MAINE REPORTS

131

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1932, TO FEBRUARY 16, 1933

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

Active Retired Justices of the Supreme Judicial Court

HON. JOHN A. MORRILL

HON. WARREN C. PHILBROOK

JUSTICES OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

HON. GEORGE H. WORSTER

HON. ARTHUR CHAPMAN

HON. HARRY MANSER

HON. GEORGE L. EMERY

HON. JAMES H. HUDSON

HON. HERBERT T. POWERS

ATTORNEY GENERAL

HON. CLEMENT F. ROBINSON to January 4, 1933

HON. CLYDE R. CHAPMAN from January 4, 1933

REPORTER OF DECISIONS

EDWARD S. ANTHOINE

TABLE OF CASES REPORTED

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

STATE OF MAINE *vs.* MAX GOLDBERG.

Kennebec. Opinion January 8, 1932.

MUNICIPAL CORPORATION. STREETS. PRESCRIPTION.

R. S. 1930, CHAP. 27, SEC. 108.

By the provisions of Chap. 27, Sec. 108, R. S., when buildings have fronted, for more than twenty years, as of right, on a way, the bounds of which can not be made certain, either by records or monuments; or have so existed, for not less than forty years, when records or monuments make it possible to determine the exterior limits, the buildings shall be deemed the boundaries. The effect of this statute is to invest in the abutting landowner a prescriptive right to continue his building in the street limits, without liability for interfering with the public easement. Structures such as outside stairways, designed to furnish necessary access from a street to buildings adjacent the stairways are a part of the "building."

In the case at bar, the evidence presented by the State to prove the location of the north line of Church Street and the encroachment by the structure of the respondent upon the public highway fell short of proof.

On report. An indictment for maintaining a nuisance on Church Street in the City of Gardiner, the alleged nuisance being a flight of wooden steps along the exterior wall of a building owned by the respondent and located at the corner of Church and Water streets.

The contention of the State was that the steps extended over the street line and constituted a public nuisance. After the evidence was taken out, the cause was by agreement reported to the Law Court upon so much of the evidence as was legally admissible. On the authority of the report, *nolle prosequi.*

The case sufficiently appears in the opinion.

H. C. Marden,

P. F. Fitzpatrick, for State.

W. C. Atkins,

G. W. Heselton, for respondent.

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

DUNN, J. This case is up on report.

Incumbering a public way by buildings is, within certain limitations and exceptions, an indictable nuisance. R. S., Chap. 26, Sec. 5. The statute is but declaratory of the common law. *Corthell* v. *Holmes*, 88 Me., 376.

When buildings have fronted, for more than twenty years, as of right, on a way, the bounds of which can not be made certain, either by records or monuments; or have so existed, for not less than forty years, when records or monuments make it possible to determine the exterior limits, the buildings shall be deemed the boundaries. R. S., Chap. 27, Sec. 108; *Vye* v. *City of Medford*, 266 Mass., 208, 165 N. E., 34.

The effect of the statute is to invest in the abutting landowner a prescriptive right to continue his building within the street limits, without liability for interfering with the public easement. Structures such as outside stairways, designed to furnish necessary access from a street to buildings adjacent the stairways, have been held to be a part of the "building." *Smith* v. *Adams*, 206 Mass., 513; *Pickrell* v. *City of Carlisle* (Ky., 1909), 121 S. W., 1029, 24 L. R. A. (N. S.), 193.

There are two counts in the present indictment, but the evidence relates only to the first. This count charges the respondent with incumbering Church Street, a public way in the city of Gardiner, by maintaining a flight of twelve wooden steps, and an upper landing, within the northerly line of that street.

The respondent owns a block at the northwest corner of Church and Water streets. The steps and landing which afford entrance to the second story of the building, are attached as a shelf to its outer southerly wall. The State contends that, of their entire width of forty-four inches, only twelve inches of the stairs and landing are without the street; in other words, in closer statement of the charge in the indictment, that thirty-two inches of the structure projects into the street. If part of the stairs and landing are within the street, the fact that other parts are not would constitute no defense. *State* v. *Beal*, 94 Me., 520.

The first question which naturally presents itself is whether the stairs and landing place are proved, beyond a reasonable doubt, to be within the limits of the way.

There is proof of the laying out of the road, as a public highway, in 1814. It is described as three rods wide southwardly of a line, "Beginning on front street (now Water) at the Southeast corner of Jacob Davis's houselot," and thence following a given magnetic course "64 rods to the Brunswick road."

The assistant city engineer of Gardiner testifies that he searched all the records in his office showing road surveys by past city engineers, one of whom is still living, and from such records "produced lines on the ground down by the Goldberg (the respondent's) building, to see its relation to the street line." He produces no record; interprets none; does not otherwise refer to any, except to say that they are "in the safe in the office."

He disregards the only monument, one of stone, on the north side of Church Street, at the corner of Mechanic (a street paralleling Water, in the rear of the respondent's building), on the ground that, although it shows "through all the records," "it was noted in the book as being pushed out into Church Street on account of buildings"; he measures from a line drawn by him to intersect five, but apparently not all, private property markers on the south side of the street, to a point three rods distant, in a northerly direction, and thus establishes to his own satisfaction the exterior line on that side of Church Street.

The State is not required to prove the location of the north line of Church Street with the absolute certainty of a mathematical

demonstration, but beyond a doubt reasonably derived from the evidence, or lack of evidence, in the case. Of this proof is short.

On the authority of the report, the entry will be:

Nolle prosequi.

MUREL WITHERLY

vs.

THE BANGOR AND AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion January 8, 1932.

NEGLIGENCE. MOTOR VEHICLES. RAILROADS.

It is not in itself negligence for a railroad company to allow a train of cars to remain across a highway. Negligent obstruction of a highway by a standing train is determined by whether, under all the circumstances, it is reasonable or otherwise.

Care and vigilance must depend on surrounding conditions, and be proportioned to known danger. A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous.

When a highway and a railroad cross at a grade, the highway traveler should look, listen, and should stop, if there is room for doubt. Besides, he should be attentive to make such acts reasonably effective. A greater degree of precaution must be exercised when darkness obscures vision.

In the case at bar, the evidence disclosed that plaintiff was aware of the location of the crossing, and he should have availed himself of the knowledge of the locality. His conduct fell short of the typically prudent man, alert for safety. Plaintiff was rightly condemned of negligence, as a matter of law.

On exception by plaintiff. An action to recover for personal injuries sustained and damage to his automobile, resulting from a collision of the plaintiff's automobile with a train of the defendant at Dyer Brook crossing, on the night of October 31, 1930. Trial was had at the April Term, 1931, of the Superior Court for the County of Aroostook. At the conclusion of the evidence, on mo-

tion of the defendant the Court directed a verdict for the defendant. Exception was seasonably taken by the plaintiff. Exception overruled. The case sufficiently appears in the opinion.

R. W. Shaw, for plaintiff.

Henry J. Hart,

Frank P. Ayer,

James C. Madigan,

Cook, Hutchinson, Pierce & Connell, for defendant.

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

DUNN, J. Action by an automobilist to recover for personal injuries, and for damage to his car, from a grade crossing collision with a freight car. A verdict was ordered for the defendant. The plaintiff saved an exception.

On October 31, 1929, about 11.30 o'clock, P.M., the night being dark but clear, plaintiff drove his automobile against an empty flat car, standing motionless across a highway, as part of a train.

The accident occurred at Dyer Brook, in proximity to the station and switching yards of the defendant.

Plaintiff alleged the defendant actionably negligent in failing to provide suitable signs, lights, and bells, and in neglecting to have a brakeman on the car, with a suitable lantern, for the protection of highway travelers approaching the crossing.

The train had just been made up, and was about to pull out, southbound.

In making the train, sixteen cars, inclusive of the flat car, were hauled from a spur track to the main railroad track, and backed and coupled to another string of thirty-nine cars.

The main track, and a siding twenty feet northerly of it, cross the highway, which runs northeast and southwest, at acute angles. The flat car, counting from the locomotive, was thirteenth in line; the twelfth and fourteenth cars were box cars.

Plaintiff, accompanied by a guest passenger, was traveling southwest; his automobile lights "only focussed at twenty-five feet." The statutes exact that automobiles shall have front lamps of sufficient candle power to render any substantial object clearly discernible on a level way at least two hundred feet directly ahead.

R. S., Chap. 29, Sec. 82. Upon the plaintiff's own testimony, he violated the provisions of this statute. There may have been relationship between insufficient lights and injury.

No other traffic was moving in the vicinity, and at this hour of the night there would normally be no sound on the unlighted country road.

The highway approaches the crossing, straight for a thousand feet; it is moderately down grade for nine-tenths of the way; level almost to the crossing, and beyond it, passes over a hill. The plaintiff traveled the road two or three times a year.

He saw, at the side of the road, three hundred and forty-seven feet from the crossing, the statutory warning sign, a white disc supported by a fixed post, bearing the letters "R.R.," and knew what they foretokened. Sixty feet farther on, or two hundred and eighty-seven feet from the crossing, at the side of the highway, was a so-called danger sign, that warns at night by reflecting the lights of vehicles. The lights on plaintiff's car caused the sign to glow.

Without request therefor having ever been made, the defendant maintains an automatic wigwag signal south of its main track. Wigwag signals are to protect against approaching trains. R. S., Chap. 64, Sec. 88.

There was evidence that the red light on the wigwag was burning brightly. The plaintiff testified that, though he looked for this light, he did not see it. This is easily explained. A box car was between his sight and the light. That the box car hid the wigwag light is immaterial, since the train itself was notice of its presence. *Yardley* v. *Rutland R. Co.* (Vt., 1931), 153 Atl., 195.

Witnesses attested that the bell on the wigwag was ringing continuously, but plaintiff said that he did not hear it. Nor, according to his testimony, did he hear engine whistles, notwithstanding the windows of his car were partly down.

On the version of the plaintiff, he slackened the speed of his automobile, at the disc, to twenty-five miles an hour; and then to twenty miles. He is testified to having admitted that, to the instant of first seeing the flat car, when his own car was across the siding, and he applied the brakes and attempted to swerve its course, he had traveled at a faster speed.

Whatever may be the fact concerning its speed, plaintiff's automobile proceeded to the main track, struck the flat car, and knocked it from the rails.

It is not in itself negligence for a railroad company to allow a train of cars to remain across a highway. *Philadelphia & R. Ry. Co.* v. *Dillon* (Del., 1921), 114 Atl., 62, 15 A. L. R., 894; *St. Louis-San Francisco Ry. Co.* v. *Guthrie* (Ala., 1927), 114 So., 215; *Gulf, M. & N. R. Co.* v. *Holifield* (Miss., 1929), 120 So., 750; *Hendley* v. *Chicago & N. W. Ry. Co.* (Wis., 1929), 225 N. W., 205. Negligent obstruction of a highway by a standing train is determined by whether, under all the circumstances, it is reasonable or otherwise. R. S., Chap. 64, Sec. 79; *State* v. *Grand Trunk Ry.*, 59 Me., 189; *Killen* v. *New York Cent. R. Co.*, 232 N. Y. S., 76.

The judge in the trial court was not more specific, in his statement directing the verdict, than that, giving plaintiff's evidence the most favorable viewpoint, it would not justify the jury in returning a verdict in his favor. Whether the judge held, as a matter of law, that there was no sufficient evidence of actionable negligence on the part of the defendant, need not be the subject of investigation. The trial court was not confined to this inquiry alone.

The substantive law of negligence requires proof, by the greater amount of credible evidence, of negligence on the part of the defendant; and, equally as important, proof that the plaintiff was not himself in fault, proximately causal to injury. *Wilds* v. *Hudson River R. R. Co.*, 24 N. Y., 430; *Romeo* v. *Boston & Maine Railroad*, 87 Me., 540, 547.

Literally, there was some evidence that, in approaching the crossing, the plaintiff had been careful. But this evidence is overwhelmed by opposing evidence, and the reasonable inferences deducible from established facts, that plaintiff did not exercise that due precaution which men of reasonable prudence, conscious of danger, usually exercise to avoid the incurrence of injury. The jury, therefore, had no evidence before it on which a verdict for the plaintiff could be based. *Moulton* v. *Sanford, etc., Ry. Co.*, 99 Me., 508; *Cyr* v. *Landry*, 114 Me., 188; *Raymond* v. *Eldred*, 127 Me., 11. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that damage was occasioned solely by the negligence of the defendant. *Johnson* v.

Hudson River R. R. Co., 20 N. Y., 65, 73; *Gahagan* v. *Boston & Lowell R. R. Co.*, 1 Allen (Mass.), 187.

Care and vigilance must depend on surrounding conditions, and be proportioned to known danger. "A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous." *Wilds* v. *Hudson River R. R. Co.*, supra. To him, the danger is vastly greater than it is to the train; he may lose his life. *Wilds* v. *Hudson River R. R. Co.*, supra. A railroad crossing is a place of special danger. *Fogg* v. *New York, etc., R. R. Co.*, 223 Mass., 444. All railroad crossings are hazardous. *Lenning* v. *Des Moines, etc., R. R.* (Iowa, 1929), 227 N. W., 828. It is always train time at any railroad crossing. *High* v. *Waterloo, etc., Ry. Co.* (Iowa, 1922), 190 N. W., 331.

When a highway and a railroad cross at grade, the highway traveler should look, listen, and should stop, if there is room for doubt. *Ham* v. *Maine Central R. R. Co.*, 121 Me., 171. Besides, he should be attentive to make such acts reasonably effective.

That the accident happened at night was no excuse. *Rhodes* v. *Pennsylvania R. Co.* (Pa., 1929), 147 Atl., 854; *Anspach* v. *Philadelphia & R. Ry. Co.* (Pa., 1909), 74 Atl., 373; *Eline* v. *Western Maryland Ry. Co.* (Pa., 1918), 104 Atl., 857. A greater degree of precaution must be exercised when darkness throws a mantle over vision.

Plaintiff was aware of the location of the railroad crossing. He should have availed himself of his knowledge of the locality. *Gray* v. *Pennsylvania R. Co.* (Del., 1926), 139 Atl., 66; *McFadden* v. *Northern Pacific Ry. Co.* (Wash., 1930), 289 Pac., 1. The admonitory signs by the roadside should have enlivened his memory. He appears to have been heedless of their call to his attention of the duty imposed upon him by law, to exercise ordinary care in crossing the track. He could not abandon circumspection, and, injury befalling him, charge his delinquency to the railroad.

It is unmistakably apparent that conduct on the part of the plaintiff, without which the accident would not have happened, fell short of that of the typically prudent man, alert for safety. Both authority and common sense bar him from recovery. *Mailhot* v. *New York, etc., R. Co.* (Mass., 1930), 173 N. E., 422; *Scripture*

v. *Maine Central R. R. Co.*, 113 Me., 218. Plaintiff was rightly condemned of negligence, as a matter of law. No legal principle compels a judge to allow a jury to render a merely idle verdict.

As supporting this conclusion, see *Philadelphia & R. Ry. Co.* v. *Dillon*, supra, and note. See, also, *McGlauflin* v. *Boston and Maine Railroad*, 230 Mass., 431; *Mailhot* v. *New York, etc., Co.*, supra; *Farmer* v. *New York, etc., R. Co.*, 217 Mass., 158; *Nadasky* v. *Public Service R. R. Co.*, 97 N. J. L., 400; *Hendley* v. *Chicago & N. W. Ry. Co.*, supra; *Yano* v. *Stott Briquet Co.* (Wis., 1924), 199 N. W., 48; *Toledo Terminal R. Co.* v. *Hughes* (Ohio, 1926), 154 N. E., 916; *Gilman* v. *Central Vermont Ry. Co.*, 93 Vt., 340; *Worden* v. *Chicago & N. W. Ry. Co.* (Wis., 1923), 193 N. W., 356; *Gallagher* v. *Montpelier & Wells River R. R.*, 100 Vt., 299.

Exception overruled.

ADDISON P. SMITH

vs.

ALICE F. DAVIS, AND LEROY B. FRENCH, TRUSTEE.

Aroostook. Opinion January 15, 1932.

BANKRUPTCY. TRUSTEE PROCESS. PLEADING AND PRACTICE.

There can be no enforceable judgment against a defendant debtor who, after suit is brought, receives a discharge in bankruptcy.

A special judgment, however, can be entered for the purpose of perfecting a right of action against one secondarily liable, or in order to charge a garnishee, or to establish the right to levy on attachable property of the bankrupt, the title to which may not have passed to the trustee in bankruptcy.

Trustee process is simply a form of attachment, the purpose of which is to place a lien on goods, effects or credits of the principal defendant in the hands of the trustee. The enforcement of such lien must of necessity await the entry of final judgment against the principal defendant.

The fact that a principal defendant has received his discharge in bankruptcy does not affect the right of a plaintiff creditor to enforce his lien when no trus-

tee in bankruptcy has claimed the principal defendant's property in the hands of the defendant trustee.

In the case at bar, the trustee's contention that no judgment could be entered against the principal defendant was without merit. The same counsel appeared for both principal and trustee, and permitted the case to be presented to the court on the theory that a pleading had been filed with a brief statement setting forth a discharge in bankruptcy. The finding of the presiding Justice, made a part of the bill of exceptions, could be construed only as an order to enter a special judgment, which was valid and enforceable.

On exception by trustee. A garnishment proceeding, in which the plaintiff brought an action of assumpsit on an account annexed against the principal defendant, and a trustee.

Hearing was had before a single Justice with the right of exceptions reserved by both parties in the matter of law. The question at issue involved the effect of the bankruptcy of the principal defendant. The presiding Justice found for the plaintiff and ordered execution against the defendant trustee for $466.09 with costs, and a perpetual stay of proceedings and execution against the principal defendant. To this finding and judgment the trustee seasonably excepted. Exception overruled. The case fully appears in the opinion.

Walter Cary,
Bernard Archibald, for plaintiff.
A. S. Crawford, Jr., for defendants.

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

THAXTER, J. This case was heard by the presiding Justice with a reservation of the right to except in matters of law. April 25, 1928, suit was brought by the plaintiff against the defendant, Alice F. Davis, and the defendant Leroy B. French was summoned as trustee. The action was entered at the September Term, 1928, of the Supreme Judicial Court and continued on the docket of that court, and after the organization of the Superior Court on its docket, until the April Term, 1931. At the November Term, 1928, the bankruptcy of the principal defendant was suggested, and at the November Term, 1930, the trustee, having up to that time filed no disclosure, was defaulted, and by agreement the case was con-

tinued to the April Term. Prior to the default against the trustee, the principal defendant had received her discharge in bankruptcy; but no trustee in bankruptcy was ever appointed, and consequently no claim was made on behalf of creditors for the money in the hands of the defendant trustee. The docket entries show that at the return term a general appearance for the principal defendant and for the trustee was entered by A. S. Crawford, Jr., which has not at any time been withdrawn as to either. No plea was at any time filed; but in accordance with the agreement of the parties, the case was heard by the Court at the April Term, 1931, when the following decision was rendered:

> "ORDERED that the plaintiff recover judgment for the sum of four hundred sixty-six dollars and nine cents ($466.09) with interest thereon from the date of the writ; that execution therefor with costs of suit issue against the goods, effects and credits of the defendant, Alice F. Davis, in the hands and possession of the Trustee, Leroy B. French, otherwise called L. B. French; and it is further
>
> "ORDERED that perpetual stay of proceedings and execution upon said judgment against the principal defendant, Alice F. Davis, be had."

At the outset it is important to bear in mind that, though there can be in an action of this kind no enforceable judgment against one who has received a discharge in bankruptcy, yet a special judgment can be entered for the purpose of perfecting a right of action against one secondarily liable, or in order to charge a garnishee, or to establish the right to levy on attachable property of the bankrupt, the title to which may not have passed to the trustee in bankruptcy. *Dunham Bros. Co.* v. *Colp*, 125 Me., 211; *Hill* v. *Harding*, 130 U. S., 699; 32 L. Ed., 1083; *Peck* v. *Jenness*, 7 How., 612, 12 L. Ed., 841; *United States Wind Engine & Pump Co.* v. *North Penn. Iron Co.*, 227 Pa., 262; *Schunack* v. *The Art Metal Novelty Co.*, 84 Conn., 331; *Butterick Publishing Co.* v. *Bowen*, 33 R. I., 40. Just what form this judgment should take depends on the facts of the particular case. If the purpose is to perfect a right against a garnishee or one secondarily liable, such as a surety, judgment may be entered against the bankrupt with a perpetual stay of execu-

tion, as was done in the case which we are here considering. If, on the other hand, there is an attachment of property good against the trustee in bankruptcy, or of property which he does not claim, judgment may be entered against the bankrupt to be levied only on the property attached as was done in the case of *Peck* v. *Jenness*, supra.

The cases in our own jurisdiction, though never having outlined the exact form of the procedure to be followed, are in accord with this practice. *Stickney & Babcock Coal Co.* v. *Goodwin*, 95 Me., 246; *Leighton* v. *Kelsey*, 57 Me., 85; *Bowman* v. *Harding*, 56 Me., 559; *Cadwallader* v. *Dulac*, 128 Me., 519. The statement in the last case to the effect that no judgment can be entered against one who has received a discharge in bankruptcy obviously does not refer to the special judgment here discussed, but merely to a general judgment enforceable against the bankrupt.

In the instant case the trustee, though apparently acceding to the correctness of the procedure outlined above, has excepted to the order of the court on the ground that it is irregular and unauthorized for two reasons.

In the first place he claims that, a default having been entered against him at the November Term, 1930, judgment as to him became final as a matter of law on the last day of that term, and that, as no demand was made by the plaintiff on him within thirty days thereafter in accordance with the provisions of R. S. 1930, Chap. 100, Sec. 73, the attachment was dissolved. In the second place he urges that if this is not so and if it was necessary that judgment should have been entered against the principal defendant prior to its entry against the trustee, yet no such judgment against the principal in the absence of a plea by him to the merits could have been entered except after record of a default or by consent. Neither contention is sound.

Trustee process is simply a form of attachment, *Davis* v. *U. S. Bobbin & Shuttle Co.*, 118 Me., 285, the purpose of which is to place a lien on the goods, effects or credits of the principal defendant in the hands of the trustee. The enforcement of such lien must of necessity await the entry of final judgment against the principal defendant. *Rockland Savings Bank* v. *Alden*, 104 Me., 416; *Franklin Bank* v. *Bachelder*, 23 Me., 60. To hold otherwise would

defeat the very purpose of the statute, by throwing into complete confusion the procedure contemplated by its terms. R. S. 1930, Chap. 100, Sec. 34.

The trustee's contention that no judgment can be entered against the principal defendant has even less merit. The same counsel appeared for both principal and trustee. The case was continued by agreement to the April Term, and was heard at that time with the apparent understanding of all parties including the Court that proper steps had been taken so that judgment could be then entered. Counsel for both defendants permitted the case to be presented to the court on the theory that a plea had been filed of the general issue with a brief statement setting forth a discharge in bankruptcy. Decision having been rendered in accordance with such understanding, it is now too late to claim otherwise and to permit the trustee to take advantage of the failure of the principal defendant to plead. *Bank of Havelock* v. *Western Union Telegraph Co.*, 141 Fed., 522; *J. S. Keator Lumber Co.* v. *Thompson*, 144 U. S., 434, 36 L. Ed., 495; *Farley* v. *Dean*, 196 Ill. App., 389; 49 C. J., 845.

The statement in the bill of exceptions that no judgment was ever rendered against the principal defendant is not controlling on this court in view of the fact that the finding of the presiding Justice is made a part of the bill and can be construed only as an order to enter a special judgment. *Tower* v. *Haslam*, 84 Me., 86.

The fact that the defendant, Davis, had received her discharge in bankruptcy does not affect the right of the plaintiff to enforce his lien, when no trustee in bankruptcy has claimed her property in the hands of the defendant trustee. *Cadwallader* v. *Dulac*, supra.

Exception overruled.

WALTER S. A. KIMBALL *vs.* HARRY W. BAUCKMAN. No. 310.

WALTER S. A. KIMBALL *vs.* HARRY W. BAUCKMAN. No. 325.

GENEVA W. KIMBALL *vs.* HARRY W. BAUCKMAN. No. 326.

Cumberland. Opinion January 26, 1932.

MOTOR VEHICLES. INVITED GUESTS. NEGLIGENCE.

The supreme rule of the road is the rule of mutual forbearance and, if a situation indicates a collision, although it arises from the fault of another, ordinary prudence requires the driver of a motor vehicle to seek to avoid a collision even though this involve the waiver of his right of way.

The law will not allow a plaintiff to recover for an injury to which his own negligence contributed as a proximate cause.

A husband cannot recover for loss of the consortium of his wife or for moneys expended in her behalf, occasioned by her injuries to which his own negligence contributes.

The law will not charge a plaintiff with lack of due care for a failure to do that which would have been futile.

It is when dangers become either reasonably manifest or known to a passenger in an automobile and he, with adequate opportunity to control or influence the situation for safety, sits by without warning or protest to the driver and permits himself to be driven carelessly to his injury that his negligence will bar his recovery for injuries received.

A passenger in an automobile is not obliged to assume control of the car when disaster is imminent, and, if warning or protest would not have averted the disaster, his silence is not the proximate cause of his injuries.

In the case at bar, the Court held that the jury was warranted in finding that the defendant by an immediate effective application of the brakes of his Ford coupe, would have stopped it in a comparatively short distance and avoided the collision. The plaintiff, Doctor Kimball, in turning to and driving on the wrong side of the road, was bound to anticipate the possibility, if not probability, of the presence of cars approaching from the opposite direction. He was charged with a degree of care commensurate with the increased risk incident to his turn into the left lane of the highway. Upon the evidence, Doctor Kimball was guilty of contributory negligence as a matter of law. The defendant had no last clear chance to avoid a collision. The failure of Doctor Kimball to establish his

own due care defeats his recovery in his action for damages to his person and automobile. It also bars his recovery in the action brought to recover for his loss of the consortium of his wife, and for moneys expended in her behalf as a result of the collision.

The verdict for Geneva W. Kimball, the Court holds, must be sustained. She was a passenger in a car under the control and management of her husband, but his contributory negligence is not imputable to her. It was not an unreasonable conclusion that she had no opportunity to avert the collision.

On exceptions and general motion for new trial by defendant. Three actions of negligence tried together growing out of a collision between an automobile driven by the defendant and an automobile driven by one of the plaintiffs, Doctor Kimball, in which his wife, Geneva W. Kimball, the other plaintiff, was a passenger. Trial was had at the June Term, 1931, of the Superior Court, for the County of Cumberland. The jury rendered a verdict in the sum of $3,000.00 for Geneva W. Kimball, a verdict for Doctor Kimball in the sum of $1,336.95 for his expenses and loss of services resulting from the wife's injuries, and a verdict for Doctor Kimball in the third action for injuries to his person and automobile in the sum of $552.13. To certain instructions given by the presiding Justice, defendant seasonably excepted, and after the verdicts filed a general motion for new trial in each case.

In the case No. 310, exception sustained, motion granted, new trial ordered.

In case No. 325, motion granted, new trial ordered.

In case No. 326, motion overruled.

The cases fully appear in the opinion.

Harry E. Nixon,

Jacob H. Berman, for plaintiffs.

Harry C. Wilbur,

Leon V. Walker, for defendant.

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

STURGIS, J. These three actions of negligence were tried together and, after verdicts for the plaintiff in each case, come to this court on general motions and exceptions.

In the forenoon of February 10, 1931, as the plaintiff, Walter S. A. Kimball, a physician living in Portland, Maine, accompanied by his wife, Geneva W. Kimball, drove his Ford town car towards Auburn along the state highway in the town of New Gloucester, he collided practically head-on with the Ford coupe which the defendant was driving in the opposite direction towards Portland. Referring to these cases by their numbers in this court, but out of order, Doctor Kimball in No. 325 alleges that this collision was due solely to the defendant's negligence and seeks to recover for his personal injuries and damages to his automobile. In No. 310 he sues for his expenditures and losses growing out of his wife's injuries, and in No. 326 the action is brought by Mrs. Kimball to recover compensation for her personal injuries.

MOTIONS:

The evidence tends to show that it was snowing hard when this collision occurred and the road was covered with several inches of snow. The plaintiffs were driving into the storm, but the defendant rode with it. Doctor Kimball's car had no tire chains. The defendant's car had chains. The road was practically straight where the cars met and was plowed out, but banked several feet high on the sides with snow. Both cars had windshield wipers and the glass in front of the drivers was clear, but in front of Mrs. Kimball the windshield was covered with snow and her view ahead was shut off.

For some miles before he reached the scene of the collision, Doctor Kimball had been following a large truck described as a van. After several unsuccessful attempts to pass the truck which held the center of the road, seeing the truck swinging to the right, he turned out to the left, speeded up his car and started to go by. He says the truck was then going about eighteen miles an hour and fixes his speed at "about twenty to twenty-three or twenty-five miles an hour." As he "got started in there a little ways . . . hadn't got hardly to the hind wheel," he saw the defendant coming straight towards him, as he says, one hundred twenty-five feet away. Asked as to his exact location in respect to the truck when he first saw the defendant's car, Doctor Kimball says, "The front end of my car must have been two-thirds up that car, up that truck." And to the question, "How far did you go forward on the roadway from the

time when you nosed out so that your front end got out from behind the truck up to the time when you say you were two-thirds of the way along the truck?", he replied, "I don't know, but I guess about twenty-five or thirty feet." The Doctor also said that the moment he saw the defendant coming he threw out his clutch and applied his brakes, advancing only twenty feet when he was struck. He admits his car was moving when the impact came and states that the truck had left him and "was going away from me when we hit." As to the defendant's slowing down before the collision, Doctor Kimball's statement is, "I couldn't tell you. I didn't notice. I was trying my best to think and get out of my own muddle. I couldn't tell you. He was fast when I saw him and then it was quickly over."

The defendant told the jury that as he approached the place where the cars collided, his windshield was cleared with a wiper and a sleet chaser, which melted the snow as it fell, and his vision was in no way obstructed. The road was straight and in the distance ahead he saw a large truck and at least two cars behind it coming towards him. He says that when the truck was at least three hundred feet from him, seeing the Kimball car come out from behind it, he slowed up his car, but the Kimball car dropped back and he resumed his speed of twenty-five miles an hour. When the distance had shortened to one hundred twenty feet, the Kimball car came out again from behind the truck and, seeing the two coming side by side towards him, he says he "instantly" threw out his clutch, applied his brakes and swerved to the right to the edge of the snow bank. His estimate of the speed of the on-coming Kimball car is thirty-five miles an hour. He does not know whether it slowed down or not except that, as he says, he was going five miles an hour when he struck and the Kimball car was traveling even faster.

Mrs. Kimball could not see through the snow-covered windshield in front of her. Her testimony neither adds to nor detracts from the essential assertions made by her husband. The driver of the truck did not see the collision. He says he was going about twenty-five miles an hour until just before it occurred and states that the defendant passed the front of his truck traveling very slowly. The driver of a car following Doctor Kimball estimates their speed just before the collision as twenty-five miles an hour but, with his view

ahead cut off by the truck, can give little accurate information as to the relative positions or operation of the cars which collided. Neither the location nor the condition of the automobiles after they came together shed clear light on what actually occurred.

NEGLIGENCE:

The defendant undoubtedly had the technical right of way. But this did not relieve him from the exercise of reasonable care. The supreme rule of the road is the rule of mutual forbearance and, if a situation indicates a collision, although it arises from the fault of another, ordinary prudence requires the driver of a motor vehicle to seek to avoid a collision though this involve the waiver of his right of way. *Fitts* v. *Marquis*, 127 Me., 75; *Ritchie* v. *Perry*, 129 Me., 440; *Tomlinson* v. *Clement Brothers*, 130 Me., 189.

From the time the defendant saw Doctor Kimball come out from behind the truck in his final attempt to pass it, a head-on collision was inevitable unless the cars were stopped or the Kimball car slowed down and dropped back into its own lane. If, as the defendant says, the cars were forty yards apart when he first saw the Kimball car turn out, his estimate of its speed, when compared with that which he fixes as his own, permitted a conclusion by the triers of fact that an immediate effective application of the brakes of his Ford coupe, equipped as it was with chains, would have stopped it in a comparatively short distance and there would have been no collision. The defendant's own testimony warrants the inference that although, so far as he knew, Doctor Kimball, after he turned out, made no attempt to drop back or to bring his car to a stop, nevertheless for a time at least the defendant drove ahead without any substantial decrease in his own speed. His defense that he applied his brakes "instantly" is not borne out by the evidence. We are of opinion that, while the issue is not free from doubt, the jury, upon a consideration of all of the evidence, were not clearly wrong in finding that the defendant was negligent.

CONTRIBUTORY NEGLIGENCE:

Doctor Kimball, when he turned out, was on the wrong side of the road where automobiles coming from the opposite direction had the right of way. His duty to anticipate the possibility, if not prob-

ability, of the presence of such approaching cars charged him with a degree of care commensurate with the increased risk incident to his turn into the left lane. Until a clear vision disclosed a stretch of unobstructed road which would permit a safe passage out by the truck ahead, it was not due care to swing to the left of the center line of traffic unless he had such control of his car as would permit a drop back into his own proper lane when the impossibility of a safe passing was apparent. If, as he says, he "hadn't got to the hind wheel" of the truck when he saw the defendant coming straight towards him and one hundred twenty-five feet away, no good reason appears for his failure to then slow down, allow the truck to leave him and himself drop back into line. But if, as he also says, he had overtaken and brought his car two-thirds up the truck when he first saw the defendant, his failure to observe the on-coming automobile earlier can only be attributed to thoughtless inattention, which is the very essence of negligence.

It is agreed that the automobiles were not less than one hundred twenty feet apart when the drivers saw each other and, viewing the evidence most favorably for the plaintiffs, they were traveling at approximately the same rate of speed. Computation indicates that Doctor Kimball's car even then went ahead not less than sixty feet and, in the light of his admission that his car was moving when the impact came, we can not doubt that he, as did the defendant, either failed to effectively release his clutch and apply his brakes or delayed so doing until the collision was inevitable.

We are of opinion, therefore, that Doctor Kimball was guilty of contributory negligence, which was concurrent with and not independent of that of the defendant and was operative until the last moment. On the record, the defendant had no last clear chance to avoid a collision. The emergency of his situation was created by his own negligence. Under the settled law of this state, his failure to establish his own due care defeats his recovery in his action for damages to his person and automobile.

As already noted, in action No. 310, Doctor Kimball seeks to recover in his own name, as husband of Geneva W. Kimball, for his loss of her consortium and the expenses he incurred as a result of her injuries. The action is case for negligence and governed, we think, by the settled rules generally applicable to that form of

action. If so, Doctor Kimball's failure to prove his own due care should bar his recovery in this suit. This seems to be the view of the few law writers who have discussed this question. Their conclusions, although not decisive, are instructive and accord with the principles underlying the law of negligence. The following are worthy of note.

The editor in his note to 8 L. R. A. (N. S.) 656 says: "Undoubtedly a husband ought not to be permitted to recover damages for the loss of his wife's services through personal injuries sustained by her to which his negligence contributed. None will dispute that." In *Penn. R. R. Co.* v. *Goodenough*, 55 N. J. L., 577, 590, Judge Dixon in a dissenting opinion observes that, against a husband's claim for damages sustained by the physical injury of his wife, such as the expense of her cure and the loss of her society, "no doubt his contributory negligence would be a defense." In *Kokesh* v. *Price*, 136 Minn., 304, a ruling in the trial court of like effect is approved.

We are of opinion that Doctor Kimball's negligence bars his recovery in this action. To hold otherwise would do violence to the law of negligence as interpreted in this state, allowing the plaintiff to recover for an injury to which his own negligence contributed as a proximate cause. This the law will not allow. The verdict in No. 310 can not be sustained.

The verdict for Geneva W. Kimball in action No. 326 must be sustained. The damages awarded are not excessive. The negligence of the defendant as found by the jury has already been discussed and confirmed. The plaintiff was merely a passenger in a car under the control and management of her husband. His contributory negligence is not imputable to her. *Mitchell* v. *The B. & A. Railroad Co.*, 123 Me., 176; *Cobb* v. *Power & Light Co.*, 117 Me., 455; *Denis* v. *Street Railway Co.*, 104 Me., 39. Nor is a finding that she herself exercised due care clearly wrong. The facts warrant the inference that Doctor Kimball turned quickly to the left side of the road and collided with the defendant's car in a matter of seconds. Mrs. Kimball was not bound as a matter of law to anticipate her husband's negligence. Sitting on the right-hand side of the car, even if the windshield in front of her had been free from snow, she could have no view of the road for any distance ahead, until she was out from behind the truck. It is not an unreasonable conclusion that

she then had no opportunity to avert the collision. The law will not charge her with lack of due care for a failure to do that which would have been futile. It is when dangers become either reasonably manifest or known to a passenger and he, with adequate opportunity to control or influence the situation for safety sits by without warning or protest to the driver and permits himself to be driven carelessly to his injury that his negligence will bar his recovery. He is not obliged to assume control of the car, and if warning or protest would not have averted the disaster, his silence is not the proximate cause of his injuries. *Peasley* v. *White*, 129 Me., 450; *Dansky* v. *Kotimaki*, 125 Me., 72, 76.

EXCEPTION:

At the close of the charge of the presiding Justice, in the action of Doctor Kimball to recover for his loss of the society and services of his wife and expenses incurred in her behalf, the defendant requested an instruction to the jury to the effect that a finding of negligence on the part of Doctor Kimball which contributed to his wife's injuries barred his recovery. The instruction should have been given. The law on this point had not been covered in the body of the charge. The refusal to instruct the jury upon it was error.

In No. 310—*Walter S. A. Kimball* v. *Harry W. Bauckman*,
Exception sustained.
Motion granted.
New trial ordered.

In No. 325—*Walter S. A. Kimball* v. *Harry W. Bauckman*,
Motion granted.
New trial ordered.

In No. 326—*Geneva W. Kimball* v. *Harry W. Bauckman*,
Motion overruled.

THAXTER, J. I regret that I am unable to concur in the opinion of the Court in so far as it holds that there is evidence of the negligence of the defendant. I should hesitate to give expression to even a brief dissent, if I felt that the decision was in any way dependent on the interpretation to be given to conflicting testimony. But the facts are not in dispute.

They show that the defendant was traveling on his right-hand side of a narrow highway which by reason of snowdrifts on each side was just wide enough to permit the passage of two cars. The testimony of all the witnesses seems to agree that the driving conditions were bad and the road slippery so that it was impossible, as Mr. Laughlin, one of the witnesses said, to stop a car quickly.

Under such conditions of travel Dr. Kimball, the plaintiff, turned his car to his left-hand side of the highway to pass a truck when the defendant's car was approaching within a distance of one hundred and twenty-five feet. The only evidence as to speed is that each car was going twenty-five miles an hour.

The plaintiff has the burden of establishing the defendant's negligence. It must be conceded that the defendant's speed of twenty-five miles an hour was reasonable, that he was keeping a lookout, that he was on the proper side of the road and did all that he could to turn his car as far to the right as possible. The only evidence of his negligence, according to the opinion of the Court, is that he did not bring his car to a stop before the collision took place. And how much time did he have to do it? Accepting the distance between the cars as testified to by both drivers as one hundred twenty-five feet, when the peril was discovered, and conceding that they were going but twenty-five miles an hour, the defendant had just one and two-thirds seconds to determine that Dr. Kimball was going to insist on driving ahead, to apply his brakes, and to bring his car to a stop within a distance of sixty-two and one-half feet. As it was he almost stopped, the driver of the truck testifying that as the defendant passed him the wheels of his Ford were barely turning. He himself says that he was going not over five miles an hour at the time of the impact.

The defendant was not bound to anticipate that the driver of an approaching vehicle would be so foolhardy as to attempt to overtake and to pass the truck at the particular time and place that Dr. Kimball attempted to do so. "Due care would seem to require that one should not pass a traveler in front at a time when the passage will bring him into danger of collision with another vehicle." *Huddy: Automobiles*, 8th Ed., 459.

The decision of the issue as to the defendant's negligence depends not on whether it was possible for him to have stopped his car, but

rather on whether his not doing so under the particular circumstances is evidence of a want of due care. There is, moreover, no testimony to indicate within what distance he could have stopped. When we are dealing in fractions of seconds, it is difficult to predicate fault on the mere failure to achieve a certain result.

When we consider that the defendant was faced by a situation of sudden peril created not by himself but by the plaintiff, Dr. Kimball, which he had no reason to anticipate, that a large truck and an automobile occupying together the whole road were rushing toward him with no avenue of escape, that there was a space of time of less than two seconds for his mind to record the fact that the plaintiff had adopted and intended to persist in a reckless course of conduct, and thereafter for him to bring his car to a stop on a slippery way, I do not see how we can say that there is any evidence that he did not act the part of a reasonably prudent man. It seems to me that he did all that could have been expected of him and more than most men similarly situated would have accomplished.

It appears to me that the proximate cause of the accident was the negligence of Dr. Kimball, and that alone, and in my opinion the motion for a new trial should be sustained in each case.

HARRIET M. GOOGINS *vs.* HOWARD GILPATRICK.

York. Opinion January 27, 1932.

MUNICIPAL CORPORATIONS. R. S. 1930, CHAP. 5, SECS. 4 AND 25.

R. S. 1930, CHAP. 8, SEC. 89.

When a vacancy occurs in the office of town treasurer and the municipal officers, in accordance with the provisions of Sec. 25, Chap. 5, R. S., appoint a person to fill the vacancy, the term of office of such appointed treasurer will be to the next annual town meeting.

In the case at bar, there was no "vacancy" when the petition to call a special town meeting was presented to the selectmen of the town of Old Orchard Beach; they therefore did not "unreasonably refuse" as expressed in Sec. 4, Chap. 5, R.

S. Reason would not justify the expenditure to summon the inhabitants to vote when their action would effect nothing. Petitioner was not, therefore, elected, and had no standing in court.

On appeal by complainant. A petition under the provisions of Sec. 89, Chap. 8, R. S., made by Harriet M. Googins, claiming to have been elected as treasurer of the town of Old Orchard Beach at a special election called by Wesley M. Mewer, a justice of the peace, upon the application of ten taxable inhabitants of Old Orchard Beach, held on the twenty-fourth day of April, 1931.

The question at issue involved an interpretation of the statutes authorizing the inhabitants of a town to fill a vacancy in the office of town treasurer.

From the decree of the sitting Justice dismissing the petition, complainant seasonably appealed. Appeal dismissed. The case fully appears in the opinion.

Wesley M. Mewer,

Harry C. Wilbur, for complainant.

Willard & Willard, for respondent.

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

BARNES, J. Petitioner brings a bill in equity, under Chap. 8, Sec. 89, R. S., in which she claims that the treasurer of the town of Old Orchard Beach who was duly elected, on March 2, 1931, resigned that office on March 28; the selectmen, on the day of the treasurer's resignation appointed defendant to serve as treasurer of the town until his successor should be elected and qualified; that the defendant duly qualified on that day; that he has since been holding the office, to date of petition; and that she, having the qualifications required by law, was duly elected as treasurer of said town, on the 24th day of April last, at a special town meeting, called by a justice of the peace of said town, after a request had been made to the selectmen to call a meeting for the election of a treasurer, and the request refused.

As we understand the record it is admitted that from the time of acceptance of his bond, up to and until the election and qualification of petitioner, defendant was the lawfully appointed and duly qualified treasurer of the town.

Petitioner's claim is that when by reason of a vacancy in the office of town treasurer the selectmen have appointed a treasurer, that treasurer's term of service ends when another person is chosen by such of the voters of the town as attend and by majority vote choose a town treasurer, at a special election, called and held after the selectmen have refused to call a special town meeting.

One point only need be determined. It is the answer to the question how shall a town treasurer be selected, when, after the regular annual town meeting a vacancy in that office occurs.

On this point the legislature has spoken, and a town may secure a treasurer, when a vacancy in that office exists, only in the way prescribed by statute.

"Towns are mere agencies of the State. They are purely creatures of the Legislature and their powers and duties are within its control." *Sawyer* v. *Gilmore*, 109 Me., 169-186.

"The Legislature represents the sovereign power of the people and is, therefore, limited in the exercise of supreme authority, only by an inhibition of the Constitution.

"The Legislature has a large discretion with reference to its control of municipalities. Municipal corporations are but instruments of government created for political purposes and subject to legislative control." *Bayville Village* v. *Boothbay Harbor*, 110 Me., 46-50.

With due solicitude for the preservation and transmission to the State of the taxes committed to a town for collection, the legislature provided for the annual election of a treasurer in each town and for the filling of a vacancy in the office of treasurer, should such occur.

The question at issue in this case, limited to filling of vacancy in the office of treasurer, arises from the fact that four sections of Chap. 5, R. S., are to be considered in arriving at a conclusion.

Section 15, relating to filling a vacancy in the office of auditor, reads: "When by reason of the non-acceptance, death, removal, insanity, or other incompetency of a person elected to the office of town auditor, there is a vacancy in said office, the selectmen may appoint a person to fill said office, who shall perform all the duties of said office until an auditor is elected by the town at its next annual meeting. The person so appointed shall be duly sworn."

Section 17, relating to filling a vacancy in the office of road commissioner: "If a person elected or appointed as road commissioner fails to qualify within seven days after appointment, the office shall be deemed vacant, and shall be filled by the selectmen by appointment; and in the event of a vacancy caused by death or otherwise, the selectmen shall appoint some competent person to fill out the unexpired term, ..."

Section 25, as to treasurer: "In case of death, resignation, removal or other permanent disability of a treasurer of a town or plantation, the municipal officers may appoint a citizen thereof to be treasurer until his successor is elected and qualified."

Section 30, general provisions for filling vacancies in town offices, is as follows: "When by reason of non-acceptance, death, removal, insanity, or other incompetency of a person chosen to a town office, except as provided in sections fifteen, seventeen, and twenty-five there is a vacancy, or want of officers, the town may choose new officers; and they shall be sworn, if an oath is required, and have the same powers as if elected at the annual meeting. The meeting for choice of such new officers may be called by the person or persons legally elected and qualified as selectman or selectmen although less than a full board."

The legislature thus provides that when a vacancy occurs in three town offices, it may be filled by appointment of the selectmen.

So far all are in accord.

In the case of an appointed treasurer the law reads that he shall "be treasurer until his successor is elected and qualified."

And because, in the cases of the other two town officers who by appointment of the selectmen are filling vacancies, the auditor "shall perform all the duties of said office until an auditor is elected by the town at its next annual meeting," and, the road commissioner shall "fill out the unexpired term," while the length of term of an appointed treasurer is as quoted above, petitioner argues that it is her right to succeed defendant, because she insists that her election terminated his period of lawful service.

From the establishment of the State, until the taking effect of Chapter 18 of the Public Laws of 1875, a treasurer must be elected at each annual town meeting and when a vacancy occurred in that office the selectmen might call a town meeting for the election of a

treasurer to serve "until his successor shall be elected and qualified."

The legislature of 1875 introduced a different method of filling such vacancy, that of appointment by the selectmen.

The legislature of 1929, in amending what was Section 30 of Chapter 4, now Chapter 5, had a purpose to achieve.

In the cases of auditor and road commissioner, as the law stood prior to the Act of 1929, it was impossible for a town to elect except at an annual town meeting, and in the case of a treasurer there may have existed an uncertainty as to the power of a town to elect before the next annual town meeting.

It seems to have been the clear intent of the legislature, in Chapter 154, 1929, to eliminate any uncertainty and provide that no vacancy in the important office of treasurer need wait upon the calling of a meeting of the inhabitants, need not stand for even a day.

It seems to have been intended that a treasurer appointed should serve until the next annual town meeting; else the amendment of 1929 is without purpose and is meaningless.

This interpretation is strengthened by the wording of Section 21 of the same Chapter, providing for election or appointment of a treasurer when vacancy is caused by failure to furnish bond, after demand therefor, election or appointment "to fill the vacancy."

We hold that there was no "vacancy" when the petition to call a special town meeting was presented to the selectmen of the town of Old Orchard Beach; that they did not "unreasonably refuse," as expressed in Section 4 of the same Chapter. Reason would not justify the expenditure required to summon the inhabitants to vote when their action would effect nothing. Petitioner was not, therefore, elected, and has no standing in court.

Appeal dismissed.

HENRY J. GAUTHIER, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE.

Androscoggin. Opinion, February 11, 1932.

PROBATE COURTS.

One who seeks to set aside a decree of the Probate Court on the ground that the jurisdictional facts recited therein are incorrectly stated must establish his position by clear, positive and convincing evidence.

In the absence of such evidence, the decree stands.

In the case at bar appellant alleged that the mother did not consent to the adoption. No proof in support of the allegation, however, appears in the record. The contrary statement in the decree must stand until and unless it is overthrown by evidence.

On exceptions by appellant. The issue involved the validity of a certain probate decree. Exceptions overruled. The case fully appears in the opinion.

Franklin Fisher, for appellant.

L. A. Jack, for appellee.

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

PATTANGALL, C. J. Appellant is an heir-at-law of one Joseph Gauthier and administrator of his estate. George Gauthier, Jr., a grandson of Joseph, claimed an interest in the property as the adopted son of his grandfather and was recognized as such in the order of distribution. Appellant petitioned Probate Court to declare null and void the decree of adoption upon which George Gauthier, Jr. relied and that the decree of distribution be accordingly amended. Petition was denied, appeal followed, hearing on the appeal in the Supreme Court of Probate resulted in dismissal, and the case is before us on exceptions to that dismissal.

The decree relied on by George Gauthier, Jr. was based on a petition signed by his grandfather, which read as follows:

"STATE OF MAINE.

To the Honorable, the Judge of the Probate Court in and for the County of Androscoggin:

Respectfully Represent Joseph Gauthier of Lewiston in said County, unmarried that he desires to adopt George Gauthier, Jr., child of George Gauthier of Lewiston and Lean Gauthier of said Lewiston which child was born in Lewiston on the twenty-second day of July A.D. 1920, that he is of sufficient ability to bring up and educate said child properly, having reference to the degree and condition of his parents. They further represent that George Gauthier, father of George Gauthier, Jr., is an inmate of the County Jail on a charge of assault with intent to murder his wife, and take his own life and that bail to the amount of $5000 is required for his enlargement, and that the mother of George Gauthier, Jr., is at present on Blake St. in said Lewiston but that she is not in a condition to take care of this boy.

WHEREFORE, Your petitioner prays that leave be granted him to adopt said child with the rights of inheritance as provided by law.

Dated this sixth day of March A.D. 1925.

Joseph Gauthier."

Decree followed:

"STATE OF MAINE.

Androscoggin, ss.

At a Probate Court held at Auburn, in and for said County, on the 10th day of March in the year of our Lord one thousand nine hundred and twenty-five.

On the foregoing petition of Joseph Gauthier for leave to adopt George Gauthier, Jr., a child not their own by birth, being satisfied of the identity and relationship of the parties,

and of the petitioners' ability to bring up and educate said child properly, having reference to the degree and condition of his parents, and of the fitness and propriety of such adoption, and the written consent required by law having been given thereto;

It Is Decreed that the prayer of said petition be granted, that from the date of this decree said child is the child of said petitioner, Joseph Gauthier.

Wm. H. Newell, Judge of Probate."

Appellant claims that the above decree is void, alleging that the mother did not consent to the adoption in writing as required by the statute.

Sec. 36, Chap. 80, R. S. 1930 provides that before a petition for adoption is granted "written consent to such adoption must be given by the child, if of the age of fourteen years, and by each of his living parents, if not hopelessly insane or intemperate; or, when a divorce has been decreed to either parent, written consent by the parent entitled to the custody of the child; or such consent by one parent, when, after such notice to the other parent as the judge deems proper and practicable, such other parent is considered by the judge unfit to have the custody of the child."

In order to bring a case within the exceptions to the general rule requiring the consent of both parents, the petition should recite the facts depended upon; and the decree should indicate the findings of the court with regard to the allegations thus set forth. They are jurisdictional facts required by statute and must be distinctly alleged in the petition as the basis of the court's authority to act in the premises; and after decree, a proof of the allegations must be shown by the records of the court. *Tabor* v. *Douglass*, 101 Me., 368. In the absence of such a recitation of facts, it may be assumed that the consent of the mother in writing is necessary.

The decree recites that "the written consent required by law" was given, which is equivalent to a declaration that the written consent of both parents had been procured.

Appellant alleges that the mother did not so consent. No proof in support of the allegation, however, appears in the record. The

record shows that the father did consent and that the mother's signature does not appear on the paper which the father signed; but there is nothing to negative the proposition that she may have filed an independent consent, and the statement in the decree must stand until and unless it is overthrown by evidence.

Appellant relies upon *Tabor* v. *Douglass*, supra, but apparently overlooked an important statement of fact upon which the opinion in that case was predicated; namely, "In this case it is alleged and proved that written consent to the adoption was given by the father of the child alone although the mother was also living at the time."

In the instant case the allegation appears but no proof of its truth. We can not overturn a decree of Probate Court on a mere statement that it contains an incorrect recital of fact. There must be clear and positive evidence in support of such a statement before this Court would be justified in so doing.

Exceptions overruled.

STATE OF MAINE *vs.* EMILE J. BEAUDOIN.

Somerset. Opinion, February 9, 1932.

CRIMINAL LAW. PLEADING AND PRACTICE. INTOXICATING LIQUORS.

It is the duty of a person entrusted with preparing a complaint or indictment charging a violation of the prohibitory law to specifically allege a former conviction for a similar offense if he has knowledge of the fact.

Such an allegation, being a material part of the complaint or indictment, must be sustained by proof beyond a reasonable doubt.

Before respondent can be found generally guilty on a complaint or indictment charging a former conviction, his guilt on the principal charge must be proved and also the fact of the former conviction.

It is not sufficient to merely introduce the record of a person bearing the same name as defendant. The identity of the person named in the record and the prisoner must be shown.

It is not error to submit the question of former conviction to the jury. On the contrary, it would be error not to do so.

In the case at bar the evidence was amply sufficient to warrant the trial Justice in submitting the case to the jury, and his instructions correctly stated the law.

On exceptions. Respondent tried on a complaint and warrant for illegal transportation of intoxicating liquor was found guilty. To the denial of his motion for a directed verdict respondent seasonably excepted, and likewise excepted to certain instruction with reference to a previous conviction given by the presiding Justice. Exceptions overruled. Judgment for the State. The case fully appears in the opinion.

Thomas A. Anderson, County Attorney for State.

James H. Thorne, for respondent.

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

PATTANGALL, C. J. On exceptions. Respondent was tried on an indictment charging him with illegal transportation of liquor, containing also an allegation of a former conviction for the same offense. The exceptions are (1) to the refusal of the presiding Justice to direct a verdict of not guilty; and (2) to the following instruction given to the jury:

> "The fact of a previous conviction is introduced in this case for two purposes. Ordinarily the fact of a previous conviction can only be introduced for the purpose of impeaching the credibility of a witness. That is upon the theory that a witness who has once been convicted of a crime is not so likely to tell the truth in the testimony which he gives, as a witness who has never been convicted of crime. The testimony of a previous conviction bears upon that question and you should take that fact into account in weighing the testimony of the respondent.
>
> "It is also introduced to substantiate the charge in the complaint that this is in fact the second commission of an offense of the same nature. You will take it into account so

far as it has any bearing upon the charge in the complaint that this is in fact a second offense."

It is to the second paragraph of this excerpt from the charge that respondent objects.

The first exception needs little consideration. There was ample evidence justifying a verdict of guilty. It was plainly the duty of the presiding Justice to submit the case to the jury.

In considering the second exception, our attention is called to Sec. 21, Chap. 127, R. S. 1930, which provides that when a person is charged with a violation of the state prohibitory law and has, to the knowledge of the officer preparing the complaint or indictment, been previously convicted of a similar offense, it shall be the duty of such officer to include in the complaint or indictment a specific allegation of the former conviction. Sec. 3 of the same chapter provides additional punishment when such previous conviction is proved.

Counsel for respondent argues that it was error to call the attention of the jury to the allegation of a prior conviction and to require a finding as to that fact. The brief states, "It is of no concern to the jury how many times the respondent has previously been convicted of a like offense."

But the respondent had entered a plea of not guilty. It was incumbent on the State to prove every material allegation in the indictment in order to justify the jury in bringing in a verdict of guilty. Respondent was not only charged with illegal transportation of liquor, he was charged with having been previously convicted of a similar offense and therefore liable to additional punishment. Two issues were raised, namely, the immediate infraction of law and the fact of a prior conviction. *State* v. *Gordon*, 35 Mont., 458, 90 Pac., 173; *People* v. *Ross*, 60 Cal. App., 163, 212 Pac., 627; *State* v. *Zink*, 102 W. Va., 619, 135 S. E., 905.

Before he could be subjected to an enhanced punishment for a second violation of law, his guilt on the principal charge must be proved, and also the fact of former conviction. *Singer* v. *United States*, 278 Fed., 415; *Thompson* v. *State*, 66 Fla., 206, 63 So., 423; *McKiney* v. *Com.*, 202 Ky., 757, 261 S. W., 276.

In *State* v. *Livermore*, 59 Mont., 362, 196 Pac., 977, it was held that there must be proof of a former conviction on a charge of second or subsequent offense and the proof must be beyond a reasonable doubt. To the same effect are *People* v. *Price*, 6 N. Y. Crim. Rep. 141, 2 N. Y. Supp., 414; *State* v. *Barnhardt*, 194 N. C., 622, 140 S. E., 435; *Byler* v. *State* (1927 Ohio App.), 157 N. E., 421; *Thurpin* v. *Com.*, 147 Va., 709, 137 S. E., 528.

It is not sufficient to merely introduce the record of the conviction of a person bearing the same name as defendant. The identity of the person named in the record and the prisoner must be shown. In some jurisdictions it is held that such a record is *prima facie* proof of identity; *State* v. *Livermore*, supra; *Belcher* v. *Com.*, 216 Ky., 126, 287 S. W., 550; but in *State* v. *Smith*, 129 Iowa, 709, 106 N. W., 107, the Court held that although the statute declared that authenticated copies of the alleged prior judgment constituted *prima facie* evidence thereof, yet the State's case did not rest there; that it was still incumbent on the State to prove the identity of the accused and the person named in the record. In *State* v. *Bizer*, 113 Kan., 731, 216 Pac., 303, a similar view is expressed.

The leading case in our own state in which these questions have arisen is *State* v. *Lashus*, 79 Me., 504. In that case a prior conviction was alleged. The plea was not guilty. The record of a conviction of a person whom the prosecution appears to have assumed to have been the accused because of the names being the same was offered and admitted. The trial judge instructed the jury that "if they were satisfied beyond a reasonable doubt, from all the evidence introduced before them, that the defendant had, during any portion of the time named in the indictment, been engaged in selling intoxicating liquors as a business, they should return a verdict of guilty." He failed to instruct them that they need give any consideration to the question of whether or not the prior conviction was sufficiently proved. The Court said, "It may be true that so far as the sufficiency and legal effect of the record are involved, a question of law only is presented. But the identity of the defendant on trial, with the person named in the record, is a question of fact."

There is no merit in the second exception. The instruction of which respondent complains was not only correct in law but it was

necessary to safeguard his rights. To have omitted it would have constituted reversible error.

Exceptions overruled.
Judgment for the State.

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

Androscoggin. Opinion, February 8, 1932.

VERDICTS. NEW TRIAL. LAW COURT.

When, for the reason that the jury verdict is contrary to evidence, the Law Court sets the verdict aside and grants another trial, the decision of the appellate tribunal becomes the law of the case to be followed by the Trial Court on the new trial, unless the facts appearing on such trial are essentially different from those which were before the Law Court when it rendered its decision.

In the case at bar only one new witness was produced by the plaintiff. His testimony did not add anything essentially different from that which was before the Law Court at the time of the previous decision. The verdict for the defendant was properly directed.

On exceptions by plaintiff. An action of tort to recover damages for personal injuries resulting from an automobile accident. Trial was originally 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 $2,240.00. A motion for new trial was sustained by the Law Court. Upon rehearing, at the conclusion of the testimony, the Court granted defendant's motion for a directed verdict. Plaintiff seasonably excepted. Exceptions overruled. The case sufficiently appears in the opinion.

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

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

FARRINGTON, J. The plaintiff in this case, at the March Term of the Androscoggin County Superior Court, 1930, recovered a verdict for $2,240.00 for damages received by reason of the alleged negligent operation of her automobile by the defendant.

The case came to this court on general motion and on exceptions, and the verdict was set aside on the ground that it was not justified by the evidence and a new trial was granted. *Byron* v. *O'Connor*, 130 Me., 90.

After all the testimony was taken out at the second trial, at the April Term of the same court, 1931, the presiding Justice, on motion by the defendant, directed a verdict for the defendant, and on exceptions to that ruling the case is again before us.

Two other exceptions reserved by the plaintiff are not argued and we may regard them as waived, leaving for determination by this court the single issue as to whether or not the verdict was properly directed.

It is unnecessary to enter into any discussion of the facts of the case. Only one new witness was produced by the plaintiff and neither his testimony nor anything in the record now before us adds, either as to weight or as proving new facts, anything essentially different from what was before us at the time of the previous decision to which reference has been made above.

"When, for the reason that the jury verdict is contrary to evidence, or against the weight of the evidence, the Law Court sets the verdict aside and grants another trial, the decision of the appellate tribunal becomes the law of the case to be followed by the Trial Court on the new trial, unless the facts appearing on such trial are essentially different from those which were before the Law Court when it rendered its decision." *Morrison* v. *Union Park Association*, 130 Me., 390; *Emery* v. *Fisher*, 129 Me., 496; *Tebbetts* v. *Maine Central Railroad Company*, 127 Me., 547; *Bryant* v. *Great Northern Paper Company*, 103 Me., 32.

The verdict for the defendant was properly directed and the entry must be,

Exceptions overruled.

THE INHABITANTS OF THE TOWN OF JONESPORT

vs.

THE INHABITANTS OF THE TOWN OF BEALS.

Washington. Opinion, February 8, 1932.

STATE GOVERNMENT. MUNICIPAL CORPORATIONS. NOTICE.

Division of its territory can be made only by the state, and the legislature is the branch of the government to make such division, but any power, not legislative in character which the legislature may exercise, it may delegate.

Government must go on, though public servants die, and the duty falls upon the men as individuals who for the time being hold the offices designated.

The legislature having failed to fix a limitation of time for determining the details of division, the Court is without authority to do so.

The giving of notice of the meeting of a board of arbitrators in a case involving division of the property of a town is required. But, in such case, actual notice will suffice.

The rule of definite notice does not extend to mere routine or detail proceedings, the performance of which ex parte *could not possibly prejudice the rights of either party.*

In the case at bar the service required of the commissioners in apportioning the moneys from the tax returns of 1925 was not of legislative character and could be delegated. That six years had nearly elapsed since the county commissioners had acted was not a fatal objection. The principal objection, however, was that the commissioners failed to include in their property list all articles of property owned by Jonesport on July 10, 1925, and did include as property certain real estate in which another had title. Because of these errors on the part of the commissioners, the verdict for the defendant was warranted.

On exceptions by plaintiff. An action of debt on an alleged award made by the county commissioners of Washington County purporting to act under the authority of Chapter 97, of the private and special laws of Maine, 1925, entitled "an act to divide the Town of Jonesport and incorporate the Town of Beals." Trial was had at the June Term, 1931, of the Superior Court for the County

of Washington. The case was heard by the presiding Justice without jury, right of exceptions being reserved. At the close of the evidence the presiding Justice ordered judgment for the defendant. To this ruling plaintiff seasonably excepted. Exceptions overruled. The case sufficiently appears in the opinion.

Oscar H. Dunbar, for plaintiffs.

Ryder & Simpson, for defendants.

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

BARNES, J. The legislature, in 1925, by appropriate act divided the town of Jonesport, establishing a part of the region then Jonesport to be another municipality, the town of Beals, and fixed the bounds of the latter.

The Act, Chapter 97 of the Private and Special Laws of 1925, would become effective 90 days after the recess of the legislature passing it, in this case on July 10, 1925.

The Act further provided, "all moneys raised for municipal purposes in the town of Jonesport for the year nineteen hundred and twenty-five of every kind and nature shall be divided proportionately between the towns of Beals and Jonesport taking into account the number of months remaining in the municipal year and in proportion with the valuation of the town of Beals and the town of Jonesport. The sums to be apportioned for the town of Jonesport and the town of Beals shall be determined and decided by the county commissioners of Washington County and their decision shall be final and binding upon both parties."

The last section of the Act is as follows: "Sec. 4. All the property, whether real or personal of the town of Jonesport shall be the property of the town in which it is now located. All property now in the town of Jonesport shall be appraised by the county commissioners of Washington County, and each town shall be charged with the appraised value thereof. The difference between the appraisal of the property taken by each town shall be paid by the town taking the larger amount, and shall be divided between the two towns in proportion to the valuation of their respective territories, as taken by the assessors in April, nineteen hundred

and twenty-four. All books, papers and records of the town of Jonesport shall be retained by said town of Jonesport and they shall be accessible to the inhabitants of each town at proper times."

The commissioners of Washington County met and assumed to act under the authority granted them by the Act on July 7-9, 1925.

What they then did is now conceded to have been void, as done prematurely.

On April 14, 1931, the full board of three men who by admission of the parties hereto were then the duly qualified county commissioners of the county of Washington, after notice given, met at Machias to perform the duties incumbent on them under the Act.

Two of the three selectmen of Jonesport, with its counsel, were present, as also the three selectmen of Beals.

Some "discussion" was then and there had, and at its termination the meeting adjourned, "to meet at Jonesport and Beals," on the next day.

On the following day none of the selectmen attended the adjourned meeting, but the commissioners proceeded with their duties, and in due time filed what they considered the proper award.

Upon this an action of debt was brought and hearing had before the Superior Court, without jury, and with right of exception reserved to either party in matters of law.

Continuing in the words of the bill of exceptions: "At the close of the evidence the presiding Justice ordered judgment for the defendants by which finding the plaintiffs were aggrieved and duly excepted thereto, and pray that their bill of exceptions may be allowed."

It appears from the findings of the commissioners that an attempt was made to adjust all claims that either town had against the other; and since it is highly desirable that such claims be settled we proceed to determine whether the judgment excepted to is error of law.

Division of its territory can be made only by the state, and the legislature is the branch of the government to make such division, but any power not legislative in character which the legislature may exercise, it may delegate. 12 C. J., 840.

The legislature properly concluded that moneys raised for municipal purposes in the town of Jonesport for the year nineteen hundred twenty-five should be divided between the towns of Jonesport and Beals, and delegated that duty to the county commissioners of Washington County. The service required of the commissioners in apportioning the moneys from tax returns of 1925, is not of legislative character, and could be delegated.

It is not questioned that the county commissioners of 1925 would have been competent to act, but they failed to do so.

Three men who are admitted to have been, in 1931, the regular and duly qualified commissioners of Washington County, in April of that year essayed to perform the duties delegated by the legislature.

It is argued that the county commissioners for the year 1931 could not serve, because the personnel of the commission is not the same as when the bill was enacted.

This objection is without force. Nothing could be done by the commissioners until ninety days after adjournment of the legislature. Within that period, death might remove any one or all the commissioners.

Government must go on, though public servants die, and the duty falls upon the men as individuals who for the time being hold the offices designated. *Machias River Co.* v. *Pope et al*, 35 Me., 19.

That six years had nearly elapsed before the county commissioners acted is not a fatal objection.

The legislature fixed no limit to the time within which the commissioners should act, and the reasoning in *Auburn* v. *Paul*, 113 Me., 207, a somewhat analogous case, leads us to hold that the service proferred was timely; the legislature having failed to fix a limitation of time, the court is without authority to do so.

It is claimed that no notice of the April meeting was given the parties.

The giving of notice of the meeting of a board of arbitrators in a case such as this is required. *Auburn* v. *Paul*, supra. But in such case, actual notice will suffice. *Second Soc. of Universalists* v. *Ins. Co.*, 221 Mass., 518; Ann. Cas. 1917 E., 491.

Under Section 4 of the Act the commissioners were charged with the duty of making appraisals and computations.

At the end of the session held in Machias, the commissioners adjourned their meeting, to continue with their deliberations next day at Jonesport and Beals. Such continuance was objected to as unlawful because depriving parties of their rights.

But, all matters requiring testimony may have been considered at Machias before adjournment. If so, and if inspection of properties and accounts remained for the commissioners, no harm was done if the adjournment was had as recorded.

Such has ever been the practice of county commissioners and arbitrators. Their inspection of schoolhouses and school lots must precede appraisal, and the presence of any or all the selectmen of the towns would provide nothing to aid them.

And it has been held that the rule of definite notice does not extend to mere routine or detail proceedings, the performance of which *ex parte* could not possibly prejudice the rights of either party. See *Small* v. *Trickey*, 41 Me., 507, where "no witnesses were examined, and no evidence was heard," when the referees met after adjournment of the session for introduction of proof.

We hold that the proper parties were acting at the time authorized, and that any informality in connection with notice and adjournment in no way prejudiced the rights of the parties.

The principal objection, as we understand the record, is that the Court erred in not sustaining the award. He must have found that the award of the commissioners was, in substance, wrong.

With this conclusion we agree. From the record we learn that the commissioners failed to include in their property lists all articles of property owned by Jonesport on July 10, 1925, and did include as property certain real estate in which another had title. Because of these errors on the part of the commissioners we conclude that verdict for defendants was warranted, and the entry will be:

Exceptions overruled.

W. H. OWEN *vs.* R. G. TUNISON.

Piscataquis. Opinion, February 8, 1932.

CONTRACTS.

There can be no contract for the sale of property, no meeting of the minds of the owner and prospective purchaser, unless there is first an offer or proposal of sale. Mere statements made with intent to open negotiations which might later lead to a sale do not constitute an offer.

In the case at bar, the letter of the defendant could not be construed to be an offer to sell the premises. Statements therein contained were merely incident to negotiations which might later lead to a sale. The defendant's acceptance of the alleged offer did not constitute a valid and binding contract.

On report. An action to recover damages for breach of an alleged contract for the sale of real estate. Trial was had at the September Term, 1930, of the Superior Court for the County of Piscataquis. After the evidence was taken out the cause was by agreement of the parties reported to the Law Court for its determination. Judgment for defendant. The case fully appears in the opinion.

McLean, Fogg and Southard, for plaintiff.

Fellows & Fellows,

C. W. & H. M. Hayes, for defendant.

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

BARNES, J. This case is reported to the Law Court, and such judgment is to be rendered as the law and the admissible evidence require.

Plaintiff charges that defendant agreed in writing to sell him the Bradley block and lot, situated in Bucksport, for a stated price in cash: that he later refused to perfect the sale and that plaintiff, always willing and ready to pay the price, has suffered loss on account of defendant's unjust refusal to sell, and claims damages.

From the record it appears that defendant, a resident of Newark, N. J., was, in the fall of 1929, the owner of the Bradley block and lot.

With the purpose of purchasing, on October 23, 1929, plaintiff wrote the following letter:

"Dear Mr. Tunison

Will you sell me your store property which is located on Main St. in Bucksport, Me., running from Montgomery's Drug Store on one corner to a Grocery Store on the other, for the sum of $6,000.00?"

Nothing more of this letter need be quoted.

On December 5, following, plaintiff received defendant's reply, apparently written in Cannes, France, on November 12, and it reads:

"In reply to your letter of Oct. 23rd which has been forwarded to me in which you inquire about the Bradley Block, Bucksport, Me.

Because of improvements which have been added and an expenditure of several thousand dollars it would not be possible for me to sell it unless I was to receive $16,000.00 cash.

The upper floors have been converted into apartments with baths and the b'l'dg put into first class condition.

Very truly yours,

(signed) R. G. Tunison"

Whereupon, and at once, plaintiff sent to defendant and the latter received, in France, the following message:

"ACCEPT YOUR OFFER FOR BRADLEY BLOCK BUCKSPORT TERMS SIXTEEN THOUSAND CASH SEND DEED TO EASTERN TRUST AND BANKING CO BANGOR MAINE PLEASE ACKNOWLEDGE."

Four days later he was notified that defendant did not wish to sell the property, and on the 14th day of January following brought suit for his damages.

Granted that damages may be due a willing buyer if the owner refuses to tender a deed of real estate, after the latter has made an

offer in writing to sell to the former and such offer has been so accepted, it remains for us to point out that defendant here is not shown to have written to plaintiff an offer to sell.

There can have been no contract for the sale of the property desired, no meeting of the minds of the owner and prospective purchaser, unless there was an offer or proposal of sale. It can not be successfully argued that defendant made any offer or proposal of sale.

In a recent case the words, "Would not consider less than half" is held "not to be taken as an outright offer to sell for one-half." *Sellers* v. *Warren*, 116 Me., 350.

When an owner of millet seed wrote "I want $2.25 per cwt. for this seed f.o.b. Lowell," in an action for damages for alleged beach of contract to sell at the figure quoted above, the Court held, "He (defendant) does not say, 'I offer to sell to you.' The language used is general, and such as may be used in an advertisement or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted, by any or all of the persons addressed." *Nebraska Seed Co.* v. *Harsh*, 98 Neb., 89, 152 N. W., 210, and cases cited in note L. R. A., 1915, F. 824.

Defendant's letter of December 5 in response to an offer of $6,000.00 for his property may have been written with the intent to open negotiations that might lead to a sale. It was not a proposal to sell.

Judgment for defendant.

LAURIER BONEFANT, PRO AMI *vs.* FRANCOIS CHAPDELAINE

EDWARD BONEFANT *vs.* FRANCOIS CHAPDELAINE

CHESTER CARTER *vs.* FRANCOIS CHAPDELAINE.

Kennebec. Opinion, February 15, 1932.

MOTOR VEHICLES. NEGLIGENCE. INVITED GUESTS.

Drivers of automobiles must come to realize that because they are on their right side of the road they are not thereby absolved from their responsibility to use due care toward others who may themselves be on the wrong side.

It is a well recognized principle of law that the negligence of one engaged in a joint enterprise is imputable to the other in a suit against a third party.

In the case at bar, a careful examination of the record disclosed that the plaintiff, Laurier Bonefant, was himself guilty of negligence. A reasonably prudent driver would not have kept on his course with unabated speed after it became apparent to him that there was a possibility that the approaching automobile would cross the road to the garage. The jury were not warranted by the evidence as disclosed by the record in finding Laurier Bonefant free from contributory negligence and their verdict can not be sustained. Edward Bonefant, the father of the plaintiff, was likewise barred by his son's contributory negligence from recovering his expenses and loss of services of the minor son. From the evidence it appeared that Chester Carter was not an invited guest, and if the trip on the motorcycle were to be regarded as a joint enterprise, Carter would still be barred by the negligence of Bonefant, as it is a well recognized principle of law that the negligence of one engaged in such an enterprise is imputable to the other in a suit against a third party.

On exceptions and general motion for new trial by defendant. Three actions on the case to recover damages for injuries sustained in a collision between a tandem seated motorcycle owned by Chester Carter on which he was riding on the rear seat, and which was being operated by Laurier Bonefant, who was riding on the front seat, and an automobile operated by the defendant. The jury rendered a verdict for Laurier Bonefant in the sum of $897.72, for Edward Bonefant, his father, in the sum of $750.10, and for Chester Carter, a verdict in the sum of $6,037.50. To certain rulings of the presid-

ing Justice, the defendant seasonably excepted, and after the jury verdicts, filed a general motion in each case. Motions sustained. New trials granted. The cases fully appear in the opinion.

Arthur F. Tiffin,

Walter M. Sanborn, for plaintiffs.

Gower & Eames, for defendant.

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

FARRINGTON, J. Three separate actions arising out of the same accident, the first brought by Laurier Bonefant, *pro ami,* to recover damages for personal injuries, the second brought by Edward Bonefant seeking recovery for expenses and loss of services of his minor son, Laurier Bonefant, and the third by Chester Carter to recover for personal injuries and property damage.

A verdict in favor of the plaintiff was returned in each one of the three actions, the sums named in said verdicts, in the order stated above, being $897.72, $750.10 and $6,037.50.

Each one of the three cases, which were tried together, is before this Court on general motion and on exception to a ruling of the Justice presiding.

Laurier Bonefant and Chester Carter on June 30, 1931, on a tandem seat motorcycle operated by Bonefant and owned by Carter, who was on the rear seat, were riding in a northerly direction on the highway in Augusta, Maine, known as Mt. Vernon Avenue, en route to North Augusta where they were going to see what arrangements could be made to exchange motorcycles for automobiles. There appears to be no question but that the motorcycle was on its right-hand side of the road up to and at the time of the accident.

Bonefant testified that he was familiar with a sharp bend in the road about four hundred feet easterly of the Brookside Garage near which the accident occurred; that he came around the bend at a speed of approximately thirty miles an hour; that directly after he got around the bend he saw a car coming towards him which proved to be the defendant's car, and that he was about the same distance from Brookside Garage as the defendant's car was, and that until the cars came together he kept it in sight. In describing the course

of this car, which was coming from the opposite direction, Bonefant testified on direct examination that "It took an angle course about in the middle of the road, and just a little beyond the house; and then swung back to his right-hand side again; and then after I got down a little ways, he cut in front of me," when Bonefant was ten or fifteen feet away from him. This was just beyond Brookside Garage on the side of the road on which the motorcycle was travelling. Asked to explain to the jury what he saw and did when he saw defendant coming onto his side of the road, Bonefant testified, "Well, he was up beyond the road there when I saw him coming that angle way, I didn't pay much attention to him because that was way up the road; then he swung over to his right again, and I thought he probably looked around or something. When we got down to the road he cut right in front of me; and he was so near to me I didn't have time to do anything so I took my hands off, and we hit. I swung off to my right as far as I could, and he hit me right in the ditch, beyond the driveway."

On re-direct examination Bonefant was asked how far away from defendant's car he was when he knew the automobile was going to cross onto his right-hand side of the road and he replied, "Well, when I really knew that the accident was going to happen, I was ten or fifteen feet away from him." The real test of whether or not he was in the exercise of due care did not depend on what he then *knew* was going to happen but rather upon what he as a reasonably prudent man might have regarded as likely to happen if the defendant continued to move in the direction of the garage, and it is important to bear in mind that Bonefant said he thought defendant was going in that direction.

On cross examination Bonefant said that he saw the defendant's car down beyond the Breton house, which was the house referred to by him in his direct examination, and that while defendant was there he saw him turn toward the center of the road and that he, Bonefant, kept coming toward him and that, as Bonefant approached, the defendant swung back on his right-hand side of the road. After some questions and after having his attention called to a statement made by him in a deposition, Bonefant testified that when the defendant started to angle across the road toward the garage the second time, he, the defendant, was about half way be-

tween the Breton house and the garage, about the same distance as Bonefant himself was from what is testified to as the blinker post, near which the accident occurred. At this point, in other words, Bonefant was about as far east of the Brookside Garage as the defendant was west of it.

When asked why he did not swing left of the defendant and go on the other side, Bonefant replied, "Because I didn't *know* he was turning in there." He said that he saw him angling across toward the garage but he did not think "he was going to turn *then* because he was too far from the garage driveway." At another point, when asked why he did not turn to the left, he said, ". . . I didn't think he was going to turn in there quick the way he was going," but he admits he thought he was going in that direction. When asked this question, "You thought it over and thought you had time to go on the right-hand side?" he answered, "Yes, sir." And asked this question, "You thought you would take a chance and go on the right-hand side?" he answered, "Yes." And again, when asked, "You did have time to think about it at the time and decide to go on the right-hand side, on your right-hand side?" he replied, "Yes, sir."

And it is important to note that this was at a time when the defendant's car and the motorcycle were about one hundred thirty feet apart.

There is undisputed testimony that the motorcycle was equipped with front and rear brakes and that the brakes were in good condition. When asked this question, "When you saw him angling across the road the last time and you were back east of the Brookside Garage, was there any reason why you couldn't have stopped your motorcycle with your brakes if you had wanted to?" Bonefant answered, "Well, I didn't expect him to do that," but he testified that he could have stopped it.

One witness, who saw the motorcycle pass several automobiles at a point six-tenths of a mile easterly from the Brookside Garage, recognized the driver and testified the speed was fifty to fifty-five miles an hour. Another witness, at a point three-fourths of a mile from the scene of the accident, recognized Bonefant driving the motorcycle, and when asked if the speed attracted his attention, replied that he "calculated they were going fast enough so they might get killed."

Regardless of what the actual rate of speed was at the points as to which the above testimony related, Bonefant testified that he did not know how fast he was going when he passed the automobiles but he also testified that he did not slow down any as he approached the bend next east of Brookside Garage and that he did not slow down any before he struck the defendant's car. The significance of this unqualified admission on the part of Bonefant can not be overlooked or ignored.

Flora Breton, a witness for the plaintiffs, requiring the services of an interpreter, was an eye witness of the accident. There is some conflict as to her testimony in regard to the speed of the motorcycle. She testified that the first she saw of the automobile it was on its side of the road, but, asked where it was when it turned into the middle of the road, she replied, "About the middle, between the garage and my house." She testified that it then went back on its side and then came out again about fifteen feet from the blinker post where the accident occurred. She heard no horn by defendant and saw him give no warning by hand or anything; she said he was moving from twenty to twenty-five miles an hour.

On cross examination Mrs. Breton said that she signed a statement that when defendant was about halfway between her house and garage she saw him start to drive "across the street to the garage," and this statement remained unchanged and unqualified.

The defendant, Francois Chapdelaine, testified that he had been gathering strawberries at the Willows, a place west of the Brookside Garage, and was on his way home when the accident happened, it being his intention to call for a battery at the garage and to drive on home from there. He said he was on his own side of the road and that he began to turn to go toward the driveway of the garage at a point a little above mail box No. 2, which was testified to by the surveyor as ninety-four feet distant from a point opposite the west blinker post near which the accident occurred. He testified that he drove in a straight line and that before he started he looked behind and looked ahead and saw nothing in either direction; that he put out his left hand, the only hand he had, steadying the wheel with his right arm. He said he heard the sound of a motor but did not know that a motorcycle was coming, and the first he saw it was when it hit him; that the motorcycle turned his

car "right around square and broke it." He said he was driving ten to fifteen miles an hour when he was hit.

Carter's testimony throws no light on the question of the legal responsibility of either the driver of the automobile or the motorcycle.

We find no difficulty in justifying the jury's verdict as far as it is based on the negligence of the defendant, but we reluctantly find ourselves unable to agree that the plaintiff, Laurier Bonefant, was free from negligence on his part. On a careful examination of the entire record we can not escape the conclusion that the reasonably prudent driver would not have kept on his course with unabated speed after it became apparent to him that there was a possibility of the automobile crossing to the garage. The record shows that the driver had time to consider this possibility but instead of stopping the motorcycle or slowing it down, to any degree, to make sure of the course of the automobile, which in our judgment, under the circumstances, was clearly the duty of a reasonably prudent man, he decided to "take a chance and go on the right-hand side."

We can see no emergency except as Bonefant created it and a self-created emergency avails nothing. It seems, unfortunately for all concerned, another case where a driver indulged in a false sense of security, unjustified by the mere fact that he was on his own side of the road. Drivers of automobiles must come to realize that, because they are on their right side of the road, they are not thereby absolved from the responsibility to use due care toward others who may themselves be on the wrong side. *Ritchie* v. *Perry*, 129 Me., 440, 447.

In the often cited case of *Fernald* v. *French*, 121 Me., 4, the defendant driver of an automobile well out on his own right-hand side of the road and not moving at an excessive rate of speed was suddenly confronted with the plaintiff's car, at nearly or quite a right angle, crossing directly in front of him. After a verdict for the plaintiff, the Law Court granted a new trial on the ground that, under the circumstances disclosed by the evidence, no negligence on the part of the defendant was shown.

Many other similar cases of real emergency might be cited, but study of the instant case discloses a different state of facts. That the Court in *Fernald* v. *French*, supra, had in mind that circum-

stances have much to do with each particular case is shown by the significant sentence on page nine of the opinion that there was nothing as far as the evidence showed to reasonably put the defendant on guard against the sudden appearance of the plaintiff's car or to warn him of its sudden turn across the street.

Carefully analyzed, the testimony of Mrs. Breton, that of the defendant, and that of Bonefant, discloses a situation in which it may well be said that Bonefant should have been reasonably put on his guard as to the possibility of the defendant's automobile crossing in front of him, a situation in which the power to avert an accident lay in the hands of the driver of the motorcycle under the simple and fundamental rule of reasonable care. Bonefant's own testimony and admissions show, to our minds conclusively, that he consciously, and with deliberate choice, took his chances as to passing in front of the defendant's car without accident, and that his conduct was not within the rule of reasonable care and that he was guilty of contributory negligence.

With full recognition of the rule as to jury verdicts, well established in this State, we feel, after a careful study of the case, that as a matter of law the jury was not warranted by the evidence as disclosed in the record in finding Laurier Bonefant free from contributory negligence, as they necessarily must have found in rendering a verdict in his favor, and in his case the motion is sustained.

The direct testimony of Laurier Bonefant, taken alone, unconnected with the results of cross examination, might have warranted the verdict of the jury as it was returned, but the situation disclosed on cross examination, taken in connection with the entire record of the case, the position of the automobile and the motorcycle after the accident, and the injury to the automobile, all together presented a situation which did not, in our judgment, warrant a verdict which was in effect that Laurier Bonefant was not guilty of negligence on his own part, and we can not escape the feeling that the jury must have been unduly influenced by sympathy and prejudice in order to have reached its conclusion.

In the case in which Edward Bonefant, the father, is plaintiff in his suit to recover for expenses and loss of services of the minor son, the motion is also sustained as the son's contributory negligence bars the father from recovery. *Vorrath* v. *Burke*, 63 N. J.

Law, 188, 42 Atl., 838; *Callies* v. *Reliance Laundry Co.*, 188 Wis., 376, 206 N. W., 198; *Tidd* v. *Skinner et al*, 225 N. Y., 422, 122 N. E., 247, 251; *Wueppeshal* v. *Connecticut Co.*, 87 Conn., 710, 89 Atl., 166. The same principle is clearly recognized in the case of *Kennard* v. *Burton*, 25 Me., 39. See also note 42 A. L. R., 717; also note 21 Ann. Cas., 143, 144.

Chester Carter was not an invited guest. That is apparent from the record. Even if he had been, his own thoughtless inattention to the whole situation might well have constituted a bar to recovery on his part.

According to his own testimony, it was clear that he was not paying the slightest attention to the motorcycle or its operation. He did not see the defendant car approaching. Just before the collision he was buttoning his coat and did not see the automobile until it was within "three to five feet." He had been over the road many times and knew the location of Brookside Garage, and on cross examination he said he was not paying any attention to driving or to the road or as to whether cars were ahead of or behind him, and that he took no precaution at all to see what was coming or where he was going. He also testified that he was not paying any attention to the speed of the motorcycle. Regardless of negligence on the part of Bonefant, his own evidence proves lack of due care on his part, and there being no question but that Laurier Bonefant must be regarded as Carter's agent, his negligence would bar Carter's recovery.

If the trip on the motorcycle were to be regarded as a joint enterprise, Carter would still be barred by the negligence of Bonefant, as it is a well recognized principle of law that the negligence of one engaged in such an enterprise is imputable to the other in a suit against a third party, but we make no finding as to whether or not there was a joint enterprise.

It becomes unnecessary to consider the exceptions or the question of damages, as the entry must be made as to each of the three cases,

Motion sustained.
New trial granted.

CHARLES E. BROWN *vs.* HOWARD L. SANBORN.

York. Opinion, February 15, 1932.

VERDICTS. EXCEPTIONS. PLEADING AND PRACTICE. MOTOR VEHICLES. NEGLIGENCE.

On exceptions to ordered verdict the entire evidence is to be considered although not specifically included in the bill of exceptions.

The fact that at the time of the accident the plaintiff's truck was to its left of the middle of the way convicts the plaintiff's agent of negligence as a matter of law, unless the prima facie *evidence of his negligence is explained away by evidence.*

The fact that a car is on the wrong side of the road at the time of a collision is strong evidence of carelessness, and when unexplained and uncontrolled such evidence is conclusive.

In the case at bar, the trial judge was justified in ordering a verdict for defendant on the ground of contributory negligence since the evidence viewed in the light most favorable to plaintiff showed that his agent, in charge of his auto truck and engaged in his business, while driving along the highway with the left wheel of the truck approximately two feet to the left of the median line of the travelled way, failed to turn to the right in order to avoid contact with an approaching car, although the latter had been in plain view for a distance of one hundred and fifty feet and a collision was impending if plaintiff's agent continued on his course.

On exceptions by plaintiff. An action of tort to recover for damage done to plaintiff's truck in a collision with defendant's truck. Trial was had at the January Term, 1931, of the Superior Court, for the County of York. To the direction by the presiding Justice of a verdict for the defendant, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Ray P. Hanscom, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

PATTANGALL, C. J. Action for damages resulting from a collision between two auto trucks. The case comes forward on an exception taken to an ordered verdict for defendant. The sole issue presented here is, therefore, whether or not the evidence viewed in the light most favorable to plaintiff's contentions could have warranted a verdict in his favor.

The entire evidence, while not specifically included in the bill of exceptions, is under the circumstances necessarily before us for consideration. *Peoples National Bank* v. *Nickerson*, 108 Me., 341.

A study of the record discloses sufficient testimony to justify a finding that defendant was guilty of negligence. The issue narrows then to the question of whether or not, on the record, the plaintiff can be said to be guilty of contributory negligence as a matter of law. That was the conclusion of the trial Judge and careful scrutiny fails to reveal error on his part.

Plaintiff's truck, driven by his son, employed by plaintiff and at the time of the collision engaged in his business, in broad daylight, on a state highway twenty feet in width, collided with defendant's truck coming from the opposite direction, at a point where each was visible to the other at a distance of at least one hundred and fifty feet. The only eye witnesses were the two truck drivers.

Eliminating from our consideration the testimony of defendant, who places the entire blame for the collision on plaintiff's agent, we have recourse to the story told by the latter.

He testified that he had driven a car for three years, that on the morning in question he was proceeding along a cement highway twelve feet in width, that on his right hand the soil next to the cement to the width of three feet was covered with tarvia and on the opposite side five feet of tarvia, making a travelled way twenty feet wide, although ordinarily cars made use of the cement covered portion in preference to the remainder of the road.

He had driven down one hill, short and not particularly steep, across a level and had reached the foot of another hill which he was about to ascend when he saw defendant's truck coming over the brow of the hill, one hundred and fifty feet away, directly and rapidly approaching him.

Up to that time, the position of his truck is described as being such that his left wheel was about two feet to the left of the middle

of the cement. In other words, he was occupying about eight feet of the cement, leaving about four feet for use by cars approaching him, although they could, of course, readily pass by making use of the portion of the way which was covered with tarvia.

The defendant, according to the testimony of plaintiff's agent, was likewise on his left side of the road, so that if both trucks continued as they were then moving, a collision was inevitable.

The law of the road required that each should seasonably turn to the right of the middle of the travelled way so as to pass without interference. R. S., Chap. 29, Sec. 1 and 2. Regardless of the statutory provision, the exercise of reasonable care dictated such a course.

Defendant turned to his right but not sufficiently to avoid the left wheel of his truck coming in contact with the left wheel of plaintiff's truck. Plaintiff's agent, instead of turning to his right, attempted to stop but failed to do so, then endeavored to turn to the right and, the effort being unsuccessful, continued to move slowly ahead in the same direction in which he had been travelling, up to the time of impact.

The fact that at the time of the accident the plaintiff's truck was to its left of the middle of the way convicts the plaintiff's agent of negligence as a matter of law, unless the *prima facie* evidence of his negligence is explained away by evidence. *Sylvester* v. *Gray*, 118 Me., 74; *Raymond* v. *Eldred*, 127 Me., 11. The fact that a party is on the wrong side of the road at the time of a collision is strong evidence of carelessness and, unexplained and uncontrolled, conclusive evidence of carelessness. *Bragdon* v. *Kellogg*, 118 Me., 42; *American Insurance Co.* v. *Witham et als*, 124 Me., 240.

The only explanation which plaintiff's agent gives for his failure to turn toward the right when he observed the oncoming truck was that, seeing defendant's truck "coming right toward me," he was "scared" and in nervous excitement slowed his own truck almost to a stop so that it moved so slowly as not to readily answer the steering wheel. This, quite obviously, is not a sufficient explanation to relieve him from the duty imposed upon him by law.

The situation created no emergency. It was the ordinary condition with which drivers of motor vehicles are frequently confronted. There was nothing to confuse, bewilder, or frighten a driv-

er of ordinary intelligence and experience. The collision could readily have been avoided by the exercise of reasonable care on the part of plaintiff's agent.

Exceptions overruled.

IRVING M. JORDAN *vs.* JOHN HILBERT.

Cumberland. Opinion, February 16, 1932.

BROKERS. COMMISSIONS. RULES OF COURT. REFEREES.

In references of cases by rule of court under Rule XLII of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final.

Under the rule, the decisions of a Referee on questions of law are also final unless the right to except thereto is specifically reserved and so entered on the docket.

Neither a finding of fact by a Referee nor his decision based thereon, if otherwise sound in law, is exceptionable if there is any evidence to support the finding of fact.

A broker, even though his agency is not exclusive, if in fact the procuring cause of the purchase of his principal's property and otherwise entitled to a commission, will not, as a general rule, be deprived thereof by the fact that the owner, at the time of the sale, did not know of his instrumentality in procuring the purchaser.

There may be circumstances under which the owner's ignorance of the fact that the purchaser was procured by the broker is controlling.

A broker should not be allowed to recover a commission when, having opportunity to inform the owner, he allows him to pay another broker a commission on the sale or accept a lower price for the property through ignorance that the purchaser is the broker's customer.

In the case at bar, the finding of fact by the Referee that the plaintiff was the procuring cause of the sale of the defendant's farm was supported by evidence of probative value and properly accepted in the Trial Court as final.

The plaintiff only claimed a commission. The farm was sold at a price in excess of that which the evidence tends to prove it was listed at with the plaintiff. The defendant knew that the property was listed with the plaintiff, as well

as others, and was put upon inquiry as to his liability for a commission, and as to who sent the purchaser to him, by the information given him by the purchaser's husband.

It appearing that, by the exercise of reasonable diligence, the defendant could have ascertained that the plaintiff was the man referred to by the purchaser's husband, he was chargeable with knowledge thereof.

On exceptions by defendant. An action of assumpsit to recover a commission for the procuring of a customer who purchased defendant's farm. The case was heard before a Referee. Exceptions on points of law were reserved by both parties. The Referee found that plaintiff was engaged as a broker to find a customer for the defendant's farm, that he did so and that he was entitled to the sum of $210.00 as commission. To this finding, defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Clifford E. McGlauflin, for plaintiff.

Goodspeed & Fitzpatrick, for defendant.

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

STURGIS, J. Action to recover a commission upon the sale of the defendant's farm. The suit was entered in the Superior Court and referred by rule of court with right of exception to decisions of law reserved. The Referee found for the plaintiff and so reported. The defendant filed written objections and brings forward his exception to the acceptance of the report.

The evidence taken out before the Referee and made a part of the bill of exceptions tends to prove that the defendant, the proprietor of the Johnson House, a hotel in Gardiner, Maine, sometime in October, 1929, requested the plaintiff, then stopping at the hotel as a guest, to find a purchaser for a farm which the defendant owned in West Gardiner. The plaintiff was given photographs of the place and, though his assertion is denied by the defendant, insists he was given a selling price of $4,000 if a sale should be made before the taxes of 1930 had to be paid. The farm had already been listed for sale with a real estate agency in Gardiner and numerous traveling men who stopped at the defendant's hotel. The plaintiff's agency was not exclusive.

The evidence also warranted the finding that about April 30, 1930, having in the meantime sent one prospective customer to the defendant who did not purchase, the plaintiff met Henry McCafferty of Gloucester, Mass., on the train running from Portland to Gorham, N. H., and, upon the latter's inquiry as to available farms which could be purchased, described the defendant's property, quoted a price of $4,000 and gave him the defendant's name and address. McCafferty, on arriving in Gorham, reported his conversation with the plaintiff to his wife, who immediately wrote the defendant and, within a week, accompanied by her husband, visited Gardiner, examined the farm, paid the defendant $4,200 and took title in her own name to the property.

It appears that, although the plaintiff did not inform the defendant of his conversation with Mr. McCafferty on the train before the sale was made, the latter, when he and his wife called on the defendant, informed him that he had learned about the farm from a man on the train who had quoted a price of $4,000, given him the defendant's address, but whose name he could not give. The defendant denied to them that he had given anyone authority to quote a price less than $5,000, but, without further inquiry as to the person who had sent them to him, entered into negotiations which resulted in a sale as already noted.

A further review of the facts in this case is unnecessary. The recital already made of the findings warranted by the evidence portrays the incidents of the transaction with substantial accuracy and is not materially modified in the record. Upon the evidence before him, the Referee found as a fact that the plaintiff produced the customer to whom the defendant sold his farm and ruled that he was entitled to recover the commission sued for.

In references of cases by rule of court under Rule XLII of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final. A like finality attaches to his decision on questions of law unless the right to except thereto is specifically reserved and so entered on the docket. Neither a finding of fact by a Referee, nor his decision based thereon, if otherwise sound in law, is exceptionable if there is any evidence to support the finding of fact. *Hovey* v. *Bell*, 112 Me., 192, 195. The finding of fact by the Referee that the plaintiff was the procuring cause of the sale here

involved was properly accepted in the Trial Court as final. It was supported by evidence of probative value.

The Referee, however, included a finding in his report that the plaintiff failed to notify the defendant until after the sale that the purchaser and her husband were his customers. The defendant objected to the report on this ground and charges error in its acceptance against this objection. This raises a question of law open upon the exception before this Court and not yet decided in this State.

According to the weight of authority, the rule seems to be that, if a broker is in fact the procuring cause of the purchase of his principal's property and would otherwise be entitled to a commission, he will not, as a general rule, be deprived thereof by the fact that the owner at the time of the sale did not know of his instrumentality in procuring the purchaser, even though his agency was not exclusive. Among the many authorities supporting this general rule are: *Handley* v. *Shaffer*, 177 Ala., 636; *Briggs* v. *Hall*, 24 Cal. App., 586; *Bryan* v. *Abert*, 3 App. D. C., 180; *Addison* v. *Blair*, 42 App. D. C., 331; *Adams* v. *Decker*, 34 Ill. App., 17; *Rounds* v. *Alee*, 116 Iowa, 345; *Slagle* v. *Russell*, 114 Md., 418; *Stuart* v. *Valsom*, 249 Mass., 149; *Lane* v. *Cunningham*, 171 Mo. App., 17; *Lewis* v. *McDonald*, 83 Neb., 694; *McLaughlin* v. *Campbell*, 78 N. J. L., 541; *Lloyd* v. *Matthews*, 51 N. Y., 124; *Sussdorff* v. *Schmidt*, 55 N. Y., 321; *Graves* v. *Woodward*, 78 Tex., 92; Mechem on Agency (2nd Edition), Sec. 2435; 4 R. C. L., 321; 9 Corpus Juris, 621.

It is quite generally recognized, however, and properly so, we think, that there may be circumstances under which the owner's ignorance of the fact that the purchaser was procured by the broker is controlling. And it is accordingly held that a broker should not be allowed to recover a commission when, having opportunity to inform the owner, he allows him to pay another broker a commission on the sale or accept a lower price for the property through ignorance that the purchaser is the broker's customer. *Handley* v. *Shaffer*, supra; *Gilbert* v. *McCullough*, 146 Iowa, 333; *Slagle* v. *Russell*, supra; *Metcalfe* v. *Gordon*, 83 N. Y. S., 808; *Jungeblut* v. *Gindra*, 118 N. Y. S., 942; *Wilson* v. *Franklin*, 282 Penna., 189; *Terry* v. *Bartlett*, 153 Wis., 208.

In the case at bar the defendant has paid no commission. The plaintiff alone claims a commission. The farm was sold at a price in excess of that which the evidence tends to prove it was listed at with the plaintiff. The defendant knew that the property was listed with numerous persons, including the plaintiff, and was warned of his liability for a commission, we think, and put upon inquiry as to who sent the purchaser to him when he was informed that her husband learned of the property from someone on the train. It would appear that, by the exercise of reasonable diligence, he could have ascertained that the plaintiff was the man referred to. If so, he is chargeable with knowledge thereof. *Shattuck* v. *Jenkins*, 130 Me., p. 480; *Trust Company* v. *Insurance Companies*, 127 Me., 528, 539.

We are of opinion that the Referee, having found that the plaintiff was the procuring cause of the sale here involved, properly ruled that the failure of the plaintiff to inform the defendant that the purchaser was his customer did not bar his recovery. Circumstances are not disclosed in the evidence which demand the application of a modification of the general rule already discussed, which we adopt as the law of this case. No error can be predicated on the acceptance of the same rule in the Trial Court.

Exception overruled.

PARKER L. SAWYER *vs.* THE ANDROSCOGGIN ELECTRIC COMPANY.

Androscoggin. Opinion, February 19, 1932.

STREET RAILROADS. NEGLIGENCE.

For one, intending to become a passenger on a car, to stand so near the rail as to be within reach of the ordinary overhang of the car is presumptive negligence.

In the case at bar, the duty of the motorman was not to bring his car to a stop before he reached the plaintiff, but rather to stop so that the door, through which the plaintiff would customarily enter, would be approximately opposite to him.

The plaintiff could at any time have withdrawn from the zone of danger. His failure to do so was negligence which continued up to the moment of his being hit. He had the last clear chance to avoid the accident.

On general motion for new trial by defendant. An action on the case to recover damages for injuries sustained by plaintiff, resulting from his being struck by a car of the defendant company at North Gray. Trial was had in the November Term, 1931, of the Superior Court, for the County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $1,750.00. General motion for new trial was thereupon filed by defendant. Motion sustained. New trial granted. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

Skelton & Mahon,

Nathaniel W. Wilson, for defendant.

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

THAXTER, J. After a verdict for the plaintiff this case is before us on the defendant's motion for a new trial. The plaintiff, while waiting to board a trolley car of the defendant, was struck by it and suffered serious injuries.

According to the allegations in the declaration, while he was standing in front of the Sawyer store in North Gray "at a reasonable, safe and prudent distance from the electric rail" to become a passenger on the defendant's car, he was hit by it when it suddenly approached and failed to stop on his signal.

The testimony is uncontradicted that there was a clear view of the track for a long distance in the direction from which the car was approaching. The plaintiff himself testified that the car was a third of a mile away when he commenced signalling it. He claims that he then kept on signalling till he finally realized that it was not going to stop, when it was too late for him to get out of the way. He was struck by the overhang of the car which extended one foot and eleven inches beyond the rail beside which he was standing. The duty of the motorman was not to bring his car to a stop before it reached the plaintiff, who at all times had it in his power to step back beyond the area that would be swept by the overhang, but

rather to stop so that the door, through which the plaintiff would customarily enter, would be approximately opposite to him. The operator of the car had no reason to suppose that a passenger would continue to stand so near the oncoming car as to be hit by it as it approached the stopping place. Neither did the plaintiff have any right to assume that it would stop before it reached him. His remaining standing close to the track until struck is as inexplicable to this Court as it doubtless was to the motorman operating the car. As was said in another case the plaintiff standing "so near as to be within the reach of an oncoming train's ordinary and standard overhang was presumptively negligent. This presumption he has clearly failed to overcome." *Haarland* v. *Maine Central Railroad Co.*, 125 Me., 52, 54.

The case is distinguishable from *Verrill* v. *Androscoggin Electric Co.*, 116 Me., 519, where the plaintiff was struck by the overhang of a car while standing on a platform of the defendant built to accommodate passengers.

Neither does the so called "last clear chance" doctrine apply here. Under such principle of law a plaintiff may recover in spite of his own negligence, if there comes a time prior to the accident when he can not and the defendant can by the exercise of due care prevent it. *Kirouac* v. *Androscoggin & Kennebec Ry. Co.*, 130 Me., 147. In the present case the plaintiff could at any time have withdrawn from the zone of danger. His failure to do so was negligence which continued up to the moment of his being hit. He had the "last clear chance" to avoid the accident. *Haarland* v. *Maine Central Railroad Co.*, supra.

The plaintiff's want of due care was a proximate cause of the injuries which he suffered, and by reason of it he is barred from recovery. It is accordingly unnecessary for us to consider the question of the defendant's negligence.

Motion sustained.
New trial granted.

STATE OF MAINE *vs.* STANDARD OIL COMPANY OF NEW YORK.

Cumberland. Opinion, February 23, 1932.

TAXATION. R. S. 1930, CHAPTER 12, SECTIONS 79 TO 86.

The tax imposed by the provision of Chapter 12, *Sections* 79 *to* 86 *inclusive, R. S.* 1930, *is a tax on the sale rather than upon the use of gasoline.*

In the case at bar, the defendant was, within the meaning of the statute, a "distributor" of gasoline, but under the provisions of Chapter 12, Sections 79 to 86, inclusive, it was not subject to a tax on the amount of gasoline used as fuel for its own motor vehicles transporting gasoline to various stations within the state.

On report on an agreed statement. The sole question at issue was the right of the State of Maine under the gasoline tax (R. S. 1930, Chap. 12, Sections 79 to 86) to tax the Standard Oil Company of New York as a distributor of gasoline reported by it as having been used in this state in the operation of its own automobiles in carrying on its business in the state.

Judgment for defendant. The case fully appears in the opinion.

Clement F. Robinson, Attorney-General, for the State.

Woodman, Skelton & Thompson, for defendant.

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

DUNN, J. The case is submitted upon an agreed statement of facts, to determine whether or not the action is maintainable.

The declaration counts on Chapter 12, Sections 79 to 86, both inclusive, of the Revised Statutes, 1930. These statutory provisions impose, and otherwise relate to, an excise tax of four cents a gallon, on dealings in internal combustion fuels (in the present instance, gasoline, respecting which interstate transportation is at an end) in Maine.

The validity of the statute, which excludes the imported com-

modity, while it continues subject to the commerce clause of the Constitution of the United States, is conceded.

The sole problem is one of interpretation.

In March, 1931, the defendant was, within the meaning of the statute, a "distributor" of gasoline. It operated numerous retail filling stations, in various parts of the state, but was chiefly engaged in the sale of gasoline to dealers, who in turn sold the product to ultimate consumers. It used, during the said month, in the regular course of its business, as fuel for its own motor vehicles, 20,590.2 gallons of gasoline.

On such use of gasoline, the defendant refused to pay a tax; hence this action by the Attorney-General. The amount in dispute is $823.61.

The case is said to be the first of its kind under the excise tax statute, and the question whether the tax falls, not only on motor fuel sold, but also on that which the distributor used in propelling his vehicles, new.

The distinction between an excise tax based on sales, and one based on use of property, is obvious. *Hart Refineries* v. *Harmon*, 278 U. S., 499, 73 Law ed., 475.

Inquiry is: Has the Legislature laid a tax upon the use, as well as upon the sale, of gasoline (constituting part of the stock of the "distributor") in domestic trade?

The fundamental rule of statutory construction is to ascertain and effectuate intention. *Tremblay* v. *Murphy*, 111 Me., 38; *Bowen* v. *Portland*, 119 Me., 282.

In construing statutes, courts expound the law; they can not extend the application of a statute, nor amend it by the insertion of words.

Section 79 of the statute, in so far as recital seems essential, defines a "distributor" as a person, etc., "who imports . . . for sale or for his or its own use . . . any internal combustion engine fuels as herein defined for use in this state . . ."

This language is not, on first reading, as clear as it might be.

The office of the section is, however, only that of defining the terms employed in other sections. Besides defining "distributor," the section defines "internal combustion engine," and "internal combustion engine fuel."

Section 80 lays "an excise tax . . . upon said internal combustion engine fuels sold within this state and for the uses defined in these sections" (with exceptions not of present moment).

The next section not only requires every distributor to file, in a state department, a duly acknowledged identifying certificate, but inhibits him from selling or distributing engine fuels in advance of the filing of such a certificate.

Section 82 defines "sale." The ordinary acceptation of the word is extended to include motor fuels "distributed by the distributors to their branch agencies."

Section 83 authorizes the distributor, who has paid, or become liable to pay the tax, to add the amount thereof to the selling price.

Under Section 84, the distributor must report to the state, "the number of gallons of internal combustion engine fuels received, sold and used . . . by him during the preceding calendar month;" and he must pay a tax "upon each gallon so reported as sold or distributed."

Other sections of the statute need not here be considered.

The sections under consideration, read together, manifest legislative intent to limit the tax to sales of combustion fuels, and to provide a system of checks and balances against sales escaping taxation.

First, every distributor must file an acknowledged certificate with a state department. His sworn statement as to who he is, where located, and what he is doing, becomes of public record.

Next, he must report to the department, on official forms, the number of gallons of combustion engine fuels received, the number of gallons sold, and the number used in the state by him during the preceding calendar month. The report shall contain "such further information pertinent thereto as said auditor shall prescribe;" for instance, the number of gallons remaining on hand.

The tax is upon fuel sales for the internal-combustion-engine uses which the statutes define.

In accordance with the stipulation, the entry must be:

Judgment for defendant

CHARLES A. HARRINGTON

vs.

GEORGE W. PARLIN AND EDGAR A. HUSSEY.

Kennebec. Opinion, February 23, 1932.

REAL ACTIONS.

In an action brought by plaintiff to recover a parcel of land which he claimed to own; Held the evidence in the case justified judgment for the plaintiff on the ground that the triangular strip claimed by the defendant belonged to the plaintiff.

On exceptions. A plea of land, to determine plaintiff's bound. The case was tried before a Referee with right of exceptions in matters of law reserved. To the Referee's finding for the plaintiff, defendant excepted. Exceptions overruled. The case is fully stated in the opinion.

Locke, Perkins & Williamson, for plaintiff.

Ralph W. Farris, for defendant.

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

BARNES, J. This case comes up on exceptions of Edgar A. Hussey.

It was brought, in a plea of land, to recover of defendants what was claimed to be the westerly portion of plaintiff's homestead, a city lot sixty-one feet wide on Noyes Place, its south-westerly bound, on Noyes Place, being also the south-easterly bound of defendant's lot, where until recently a large elm tree had stood.

The land claimed by plaintiff is a triangular plot or gore, its vertex on Noyes Place, at the bound common to both lots, and its base the northerly boundary of plaintiff's lot.

It was tried before a Referee, with right of exception to either party in matters of law.

Defendant Parlin by plea disclaimed any right, title, or interest in the premises sued for, and judgment was for him.

The other defendant filed the general issue and with it disclaimer to any portion of the land described in the writ which lies east of a line starting at the common bound and running thence, at a right angle with Noyes Place, to a point one hundred two feet distant from such starting point.

The Referee found against Hussey, hereinafter for convenience termed the defendant, for the portion of land described in the declaration and not disclaimed by him, to wit, the portion bounded on the east by a line drawn at a right angle to Noyes Place, from the center of the elm stump which marks the south-west corner of plaintiff's land, to a point one hundred two feet distant therefrom; thence westerly twenty-one and one-half feet on a line parallel with the north line of Noyes Place; thence in a generally southerly direction to point of beginning.

After hearing on written objections seasonably filed, the presiding Justice confirmed the report, and defendant excepted.

We find no questions of law involved save such as have been finally settled in this jurisdiction by a long series of decisions affirming the correctness of the Referee's finding.

One Noyes, in 1902, was the owner of what is now three house lots on Noyes Place, those of the parties to this suit and what is known as the Blaisdell lot, next east of plaintiff's land.

The Blaisdell lot was conveyed to the wife of the owner, Noyes, and by her, in 1906, to Asa H. Blaisdell, and described as bounded on the west by a line perpendicular to Noyes Place.

In 1924, Millie E. Noyes, having derived title through devise from her husband, who held by deed from his father, the Noyes first mentioned herein, conveyed what is now plaintiff's lot to Etta M. Harrington, then the wife of plaintiff, describing it as bounded on the south by Noyes Place; east by the west line of the Blaisdell lot; west by the east line of the property conveyed by the first Noyes owner to Nancy E. Noyes, in 1902. Etta M. Harrington devised this land to plaintiff by will approved and allowed in 1928.

The most westerly of the three lots, now owned by defendant Hussey, was conveyed, in 1902, by its owner, Noyes, to his wife, Nancy E. Noyes, by quitclaim deed, bounded as follows: "Com-

mencing at an elm tree (the common bound of both plaintiff's and defendant's lots) and running westerly one hundred and twenty (120) feet; thence northerly a distance of one hundred and twenty (120) feet; thence easterly one hundred and twenty (120) feet; thence southerly one hundred and twenty (120) feet to the elm tree, the point of beginning. Meaning and hereby intending to enlarge the said original lot ten (10) feet upon both the east and west sides of said lot and thirty-five (35) feet on the north side, thus making the original lot, with the addition hereby conveyed, one hundred and twenty (120) feet square."

On this lot this Noyes family made their home, and Mrs. Noyes lived upon it and managed it after her husband's decease.

By mesne conveyances, the Nancy E. Noyes lot became the property of defendant prior to the date of the writ in this action.

By her deed, plaintiff's wife became the owner of all the land between the Blaisdell lot on the east and the Nancy E. Noyes lot on the west.

The defense proceeded on the assumption that the east and west lines of the Nancy E. Noyes lot ran north, at right angles to Noyes Place, and urge in argument that such course must be found determinative of plaintiff's west line because of the words, "making the lot . . . one hundred and twenty feet square," in the deed to Nancy E. Noyes.

In the evidence submitted to the Referee we find that Nancy E. Noyes, during her occupancy, caused fences to be erected on both the westerly and easterly sides of the lot, and upon the lines of fences theretofore existing; that she and others in later years cultivated as garden land an area extending westerly over and beyond what would have been her boundary had her deed been interpreted to limit her to a right angle at the south-westerly corner of her lot. There was competent evidence that she occupied and caused one of her tenants later to occupy easterly to the Harrington line, and that she and her grantor before her, designated as her easterly line one running from a large elm, then standing where now is the common bound between plaintiff and defendant, on Noyes Place, not at a right angle, but declining to the west, its rear being marked by a fence. Inspection near the time of the hearing developed the remains of two iron fence posts on what plain-

tiff claims is the westerly line of defendant's lot, both then *in situ* and marking nearly the westerly edge of what was her garden plot. Significant, too, is the fact that in the deed whereby she conveyed her house lot, while the extent of each side is as in the conveyance to her, she omitted any expression of the number of square feet conveyed.

While the exact points on Noyes Place from which her side lines run can not be fixed with precise certainty, we are convinced that the triangular strip claimed by defendant is the property of plaintiff, and that its base line, as extending twenty-one and one-half feet is as accurately expressed as present knowledge may dictate.

Exceptions overruled.

DAVID E. WALKER *vs.* B. O. NORTON.

Waldo. Opinion, February 23, 1932.

VERDICTS. JURY FINDINGS.

Whether, in a particular case, where the testimony is conflicting, liability has been shown, is generally a question to be determined by the jury. A verdict, which a preponderance of the evidence reasonably supports, is not disturbable on motion.

But where, as in the case at bar, on the whole record, no weight of evidence, adequate to satisfy the minds of reasonable men, fairly tended to support the jury's finding, the verdict can not be allowed to stand.

On general motion for new trial by defendant. An action of assumpsit on an account annexed, for wages for personal services. Trial was had at the April Term, 1931, of the Superior Court for the County of Waldo. The jury rendered a verdict for the plaintiff in the sum of $581.13. A general motion for new trial was thereupon filed by the defendant. Motion sustained. Verdict set aside. New trial granted. The case sufficiently appears in the opinion.

Buzzell & Thornton, for plaintiff.

Locke, Perkins & Williamson, for defendant.

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

DUNN, J. The defendant presents this case on motion for a new trial. The motion recites the usual grounds.

The action was assumpsit, to recover a balance alleged as due the plaintiff from the defendant, as wages for the personal services of the former, from April 15, 1928, to December 8, 1929, the latter date inclusive, at $32.00 per week. Credits aggregated $2,214.00.

The plea was the general issue.

The amount of the verdict was $581.13, apparently all plaintiff sued for, including interest from the date of the writ.

Whether, in a particular case, where the testimony is conflicting, liability has been shown, is generally a question to be determined by the jury. A verdict, which a preponderance of the evidence reasonably supports, is not disturbable on motion.

But where, as here, on the whole record, no weight of evidence, adequate to satisfy the minds of reasonable men, fairly tended to support the jury's finding, the verdict can not be allowed to stand.

Motion sustained.
Verdict set aside.
New trial granted.

4-ONE BOX MACHINE MAKERS

vs.

WIREBOUNDS PATENTS COMPANY.

Cumberland. Opinion, February 23, 1932.

ESTOPPEL. CONTRACTS.

The doctrine of estoppel rests on an act that has misled one who, relying on it, has been put in a position where he will sustain a loss or injury.

One's agreement to do that which an existing contract binds him to do, cannot constitute a consideration for a new promise, on the part of him whom performance would benefit.

In the case at bar, the plaintiff on receiving the letter from the defendant temporarily reducing the terms of payment under the license, and after the qualifying spoken statement by the intermediary of the directors, did only what the license agreement obliged it to do; it continued diligent in introducing the machines and boxes into public use.

The partial waiver of royalty, made to the plaintiff by the defendant, was revocable at the pleasure of the latter. The spoken statement added nothing. Like the letter, it was without any consideration, actual or imported. Besides, the statement was not relied on. The plaintiff was not led thereby to change its position for the worse.

On appeal by defendant. A bill in equity seeking an injunction to restrain the defendant from cancelling an exclusive patent license granted to the plaintiff and from attempting to collect royalties in excess of a reduced rate agreed to in March, 1929, and for other remedies. The sitting Justice found for the plaintiff. Thereupon defendant appealed. Appeal sustained for the purpose of remanding the cause for entry of a decree modifying the original decree in certain respects. In all other respects, decree below affirmed.

Verrill, Hale, Booth & Ives, for plaintiff.

Woodman, Skelton & Thompson, for defendant.

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

DUNN, J. This is an appeal by the defendant from an equity decree. The cause was heard on bill, answer, replication, and proof. The bill of complaint, which was filed in the Supreme Judicial Court in Cumberland County, by one Maine corporation against another, prays the cancellation of a notice of election to terminate a license relating to patents; the enjoining of collection of royalties except at a specified rate; the reduction of royalty rates, because of partial eviction; and other and further relief.

The answer denies the material allegations of the bill; asserts that a promise on which the plaintiff relies was voluntary and without consideration; pleads the statute of frauds; and the commencement by defendant's assignee, prior to the present litigation, in a judicial court of competent jurisdiction in the State of New

York, of an action at law wherein this plaintiff, as defendant, has appeared and entered a general denial, in which action — so assertion continues — all the questions and issues attempted to be here raised, are raised.

The decree sustains the allegations in the bill, aside from those relating to partial eviction, and the prayer for relief in connection therewith. As to partial eviction, the decree recites that adjudication is unnecessary.

A stipulation by the parties, on review, removes the question of partial eviction, and the issues raised thereby; this without prejudice to either party's right to try those issues in a separate suit.

On May 16, 1916, the plaintiff became the licensee of certain patents and patent rights — of various lengths of unexpired terms, covering the manufacture and use of machines and methods for making folding wirebound boxes, and the use and vending of the manufactured product itself — which the defendant owned or controlled.

The record shows, and the briefs discuss, a prior relationship, in which the purchase from a third person, of patents held by him, was deemed desirable. To accomplish this purpose, the defendant corporation was formed. It acquired the patents, and entered into the license agreement which this suit involves. The license was inclusive of any patents of the United States or Dominion of Canada (and any license or other patent right) "now or hereafter owned or controlled by the Licensor." The license, though its language in such behalf is not express, is exclusive.

The agreement recognized the validity, for the full terms designated in the grants thereof, of all the patents, respectively, unless sooner terminated by the licensor under reserved power; authorized the granting of sub-licenses; obligated the licensee to prosecute infringers at its own expense; to pay costs and expenses and final judgments and decrees in any action or suit against the licensor for alleged infringement; exacted diligence in introducing the machines and boxes into public use; and bound the licensee to pay the licensor, annually, as royalty, sums of money computable on percentages; the minimum in any event to be $25,000, though this should involve the payment by the licensee of an amount additional to the percentages on boxes made and sold or used, under

the license; and on damages from infringements, and bonuses from sub-licensees.

The power reserved to the licensor permitted termination of the license for default of any imposed condition. A provision requires that the licensor shall serve, upon the licensee, written notice of intention to terminate the license, stating the reason.

After notice, the licensee has sixty days in which to remedy "such cause."

October 11, 1929, defendant gave plaintiff notice of intention to revoke the license, the causes enumerated numbering seven.

These were the granting of sub-licenses at variance with the form prescribed by the license agreement; the alteration of sub-licenses; failure to make annual reports; to assign newly acquired patents; to bring suit for infringements; and to pay royalties. The notice also charged that the licensee violated the license, in spirit and intent, by a transfer of assets to a corporation which it had been instrumental in organizing; and by failure to account for royalties accruing from still another corporation.

The annual reports which were in arrears have since been furnished.

The bill of complaint alleges that the other causes are false or immaterial; or have been approved by the defendant; and that none of them, even if established, would constitute ground for the termination of the license.

On objection by the plaintiff, Exhibits G and H were ruled out by the Justice hearing the cause, as privileged communications. Exceptions were saved.

In making up the report on appeal, the excluded exhibits were included, so that if held material, they might have consideration with the rest of the evidence. *Redman* v. *Hurley*, 89 Me., 428, 434; *Trask* v. *Chase*, 107 Me., 137, 150.

Counsel for the plaintiff, in their brief, waive exception to the exhibits.

The chief contention at the trial was as to how long the plaintiff was entitled to a partial reduction of royalty rates. The payment of any balance which might be found due was assured.

Invoking the doctrine of equitable estoppel, the Justice decreed the defendant barred from withdrawing the reduced rates and

restoring the old, until the time of the decision, by the United States Circuit Court of Appeals, Sixth Circuit, of a certain patent suit.

The appeal presents many questions. This court differs from the trial court only regarding the application of the doctrine of estoppel.

Litigation had been, in the phrase of a witness, more or less continuous. Some decisions had been adverse to the validity of the patents.

In 1925, the District Court of the United States, in the Northern Illinois District, dismissed a bill of complaint in an infringement suit begun by the plaintiff, for want of equity. The appeal court affirmed the decision, opinion being handed down February 6, 1928.

In 1927, in a Michigan district, the United States Court held the basic patents (those previously mentioned as acquired by the defendant) invalid. This decision was reversed on appeal, but the appeal had not been argued at the time of the decision in Illinois.

Sub-licensees became restless. Their businesses might fail for want of legally sufficient foundations. They hesitated to go on. Inactivity on their part meant less revenue for the plaintiff; and perhaps for the defendant. Some sub-licensees threatened to surrender their licenses; others refused to pay royalties; others insisted on reductions.

The situation was forbidding.

To allay fears, prevent the surrendering of sub-licenses, and protect its business, plaintiff conceded royalty abatements, revocable on thirty days' notice.

The sub-licensees finally agreed to pay, the largest making payment under protest.

Plaintiff asked defendant for a corresponding reduction.

The person acting as intermediary was a director, vice president, and general counsel for the plaintiff, and at the same time, one of the directors, and president of the defendant.

His effort to serve two masters, and be faithful to both, was unsuccessful; he eventually fell into embarrassment.

However, while acting in dual capacity, he interviewed individ-

ual directors of the defendant, including himself, with a view to obtaining royalty reductions.

Under a by-law of the defendant, its directors need not necessarily meet and act by formal vote. If a resolution in writing, which shall have been presented for action to all the members of the board, and which shall have been approved and signed by a majority, is thereafter, with the original or duplicate signatures of such directors, inserted in and made a part of the recorded minutes of the directors' meetings, it shall be deemed lawful and effectual action by such board, to the purpose and extent expressed in the resolution, with the same force and effect as though duly passed at a meeting regularly convened. The amendment or revision of a license requires the vote of not less than four-fifths of the members of the board of directors.

That is what occurred in this case.

A draft of resolution of a partial waiver of royalties (embodying a draft of letter addressed to the plaintiff, the letter bearing date of March 7, 1928) was initialed by all the directors; not by all on the same day, but as opportunity presented, on March 7, March 8, and the early forenoon of March 9, 1928.

The resolution gave authority to, and directed the president and secretary of the defendant to write and deliver to the plaintiff a letter, which reads as follows:

"Wirebounds Patents Company
Rockaway, New Jersey

March 7, 1928.

4-One Box Machine Makers,
Rockaway, New Jersey.

Gentlemen:—

This letter and the basis of payment hereinafter set forth, shall be effective only until the date upon which the undersigned shall deliver to you written notice withdrawing this letter and declaring the basis of payment hereinafter set forth as of no further force or effect, and shall be without prejudice to any and all the other provisions in the license between the undersigned and 4-One Box Machine Makers dated May 16,

1916. Upon delivery to you by the undersigned of the written notice above mentioned said license of May 16, 1916, shall immediately be and become in all its terms and conditions in full force and effect.

We hereby agree that you may pay us for business done by you under said license of May 16, 1916, from February 1, 1928, until date of delivery of written notice above mentioned declaring this letter withdrawn, on the below mentioned basis, any further payments on account of business done by you under said license during said period being hereby finally waived by the undersigned.

Upon business done in Canada, you to pay the undersigned 3/4 of 1% of the gross sales of boxes made and sold by your Canadian license.

Upon business done in the United States by your licensees who make and use boxes, you to pay the undersigned 1% of the fair market value of the boxes made and used by such United States licensees, except Kingan & Company of Indianapolis.

Upon business done in the United States by your licensees who make and sell boxes, you to pay the undersigned 3/10 of 1% of the gross sales of boxes made and sold by such United States Licensees, which Licensees shall be held to include Kingan & Company of Indianapolis.

If any licensee refuse and/or fail to pay you royalty upon business done by such licensee during the period this letter is effective, then and in such event you shall be released from paying the undersigned for such business, unless thereafter the licensee pay you the royalty for such business, in which case you shall pay the undersigned for such business upon the basis herein before set forth.

Yours truly,
Wirebounds Patents Company,
By (Daniel P. Murphy),
President.

Attest:
(Clarence L. Millard),
Secretary."

The royalty rates of the license agreement are:

(a) 1 per cent. of the gross sales of all boxes made and sold under this license, by the licensee and sub-licensees.

(b) 1 per cent. of the fair market value of all boxes made and used under the license by the licensee and sub-licensees.

(c) 30 per cent. of the net damages and profits, or either, received by the licensee from infringers.

(d) 30 per cent. of any cash, or stock bonuses, received by the licensee from any sub-licensee.

At 9:30 on the morning of March 9, the full board of directors met. No minutes of the meeting were made. In such a case, action taken may be established by parol. *Peirce* v. *Morse-Oliver Building Co.*, 94 Me., 406; *York* v. *Mathis*, 103 Me., 67; *Hyams* v. *Old Dominion Company*, 113 Me., 294, 299.

Evidence warranted the finding that there was discussion at this meeting concerning the period over which royalty reduction should extend.

The consensus of opinion was that reduction continue until decision on the appeal in the patent case in the Sixth Circuit. It was, however, unanimously voiced that the resolution show that the reduction might be withdrawn, on written notice, at the pleasuse of the board.

A copy of the resolution, as originally drafted and initialed by the directors, was then signed, and fastened into the record book of directors' meetings. The meeting adjourned.

The president of the plaintiff was in Cuba. On his return home, about ten days later, the letter was brought to his attention.

He scorned it, saying it was "as good as nothing."

Later in the day, he was told by the intermediary that the directors had agreed reduced rates should continue to the time of the decision of the patent suit.

On the strength of this (so the Justice found) the plaintiff continued active in business, increasing its efforts, enlarging its laboratories, and extending research.

It was ruled that the royalty recession contained in the letter of March 7, 1928, was not revocable at the will of the defendant, but binding up to the date of the decision of the patent suit.

The law enforces estoppel in pais — the rule of good morals — as a rule of policy. The doctrine of estoppel rests on an act that has misled one who, relying on it, has been put in a position where he will sustain a loss or injury. *Patton* v. *Catlettsburg Nat'l Bank* (Ky. 1923), 255 S.W., 690, 693; *Davis* v. *Briggs*, 117 Me., 536.

Assuming the material facts as favorably for the plaintiff as the evidence will permit, the plaintiff, on receiving the letter, and after the qualifying spoken statement, did only what the terms of the license agreement obliged it to do; it continued "diligent in introducing such machines and boxes into public use."

Contention that the licensee would not have extended its efforts, but would have curtailed business, and paid royalty at the rate of only $25,000 yearly, had it not been for the statement that no change of royalty should be made until the announcement of a decision in the infringement case, cannot be upheld.

The license agreement, as has before been noted, required the minimum payment by the licensee of $25,000 a year, even though the aggregate of percentages was less than that. The waiver which the letter of March 7, 1928, evidenced, aside from releasing liability for royalty which any sub-licensee might not pay, only purported to reduce percentage rates on account of business done.

The annual payment of royalty was, in fact, always more than $25,000. Beginning with 1918, to and inclusive of 1927, the differing amounts in different years were three times, four times — with a comfortable margin — once, almost five times, that sum. In 1928, the waiver notwithstanding, the royalty was in excess of $50,000.

One's agreement to do that which an existing contract binds him to do, cannot constitute a consideration for a new promise, on the part of him whom performance would benefit. This is recognized in *Wescott* v. *Mitchell*, 95 Me., 377. See too, *Savage* v. *North Anson, etc., Company*, 124 Me., 1.

The partial waiver of royalty made to the plaintiff by the defendant, was revocable at the pleasure of the latter. The spoken statement added nothing. Like the letter, it was without any consideration, actual or imported. Besides, the statement was not relied on. The plaintiff was not led thereby to change its position for the worse. *Tower* v. *Haslam*, 84 Me., 86, 90.

The royalty waiver was formally withdrawn on May 20, 1929.

The appeal is sustained, but for no other purpose than that of remanding the cause for the entry of a decree which shall modify the original decree as this opinion indicates. In all other respects, the decree below is affirmed.

So ordered.

STATE OF MAINE *vs.* ARTHUR L. CORRIVEAU.

York. Opinion, February 25, 1932.

CRIMINAL LAW. PHYSICIANS AND SURGEONS. LAW COURT.

An indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.

Chapter 21, *Section* 15, *R. S.* 1930, *prescribing the terms and conditions under which the prefix "Dr." may be used, provides for an exercise by the state of its police power.*

The Law Court will render no decision in a cause reported to it upon an agreed statement, which it holds to be but a partial statement of the facts essential to determination.

In the case at bar, the agreed statement stipulated, in effect, that respondent was to be found not guilty if the Law Court found it to be the law that one who engages in the business or profession of fitting, bending or adjusting spectacles and eye glasses with ophthalmic lenses for the betterment of vision is not thereby practicing medicine or surgery.

Inasmuch as the court held the stipulation to contain but a partial statement of the facts essential to determination of the guilt or innocence of the respondent, it declined to act, and the report was discharged.

On report on an agreed statement. Respondent was indicted under provisions of Chapter 21, Section 15, R. S. 1930, for using the prefix "Dr." before his name, he not being duly registered under the Medical Practice Act. The Law Court was requested to rule whether mechanical activities in the adjustment of eye glasses and spectacles for the betterment of vision placed the actor within the field of a practitioner of medicine and surgery, submitting no

evidence as to knowledge of anatomy, or skill in diagnosis. Report discharged. The case fully appears in the opinion.

Ralph W. Hawkes, County Attorney for the State.

Joseph E. Harvey, for respondent.

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

BARNES, J. On report. A criminal prosecution. The respondent, Arthur L. Corriveau received the degree, Doctor of Optometry, in 1927, from a reputable college, known as the Philadelphia Optical College.

The indictment is as follows:—

"THE GRAND JURORS FOR SAID STATE upon their oath present that

Arthur L. Corriveau of Biddeford

in the County of York, laborer, on the first day of January in the year of our Lord one thousand nine hundred and thirty-one at Biddeford in said County of York, with force and arms on said day and divers other days and dates between said day and the day of the making of this indictment did knowingly, willfully, and unlawfully prefix the letters 'Dr.' to his name, he then and there not being duly registered by the State Board of Registration of Medicine, against the peace of said State and contrary to the form of the Statutes in such case made and provided.

And your jurors aforesaid, on their oath aforesaid, do further present that the said Arthur L. Corriveau at Biddeford in said County on said first day of January, 1931, and on divers other days and dates between that day and the day of the making of this indictment, did knowingly, willfully, and unlawfully use the title 'Dr.' by maintaining a sign in the following words, 'Dr. Arthur L. Corriveau' at his place of business, he then and there not being duly registered by the State Board of Medicine, against the peace of said State, and contrary to the form of the Statute in such case made and provided."

At the October Term of the Superior Court, 1931, the case was taken from the jury and reported to this court, on an agreed statement, stipulating that "on the day and date alleged in the indictment, on the door entrance of the office of Arthur L. Corriveau, located at No. 9 Alfred Street, Biddeford, Maine, was the lettering 'Dr. Arthur L. Corriveau, Optometrist.' On the window of his said office was the lettering, 'Dr. Arthur L. Corriveau, Optometrist.'

"He is a duly registered optometrist in the State of Maine, and received his certificate to practice optometry in this State on July 13, 1922, said certificate being represented by No. 248. His practice is confined to the provisions of law of this State, as found in Sec. 48, Chap. 21, R. S. 1930.

"Arthur L. Corriveau is not registered by the Board of Registration of Medicine, as provided in Sec. 11, Chap. 21, R. S. 1930.

"He is not engaged and does not engage in the practice of medicine or surgery, or the treatment of any disease or human ailment, nor does he hold himself out to practice medicine or surgery, or the treatment of any disease or human ailment, or any branch thereof, within the State, unless the fitting, bending and adjusting of spectacles and of eye glasses with opthalmic lenses for the betterment of vision, is the practice of medicine or surgery."

It is further stipulated that, "if the indictment is insufficient in law in that no offense is lawfully stated therein, the same to be adjudged bad, and a *nol pros* to be entered. It being further stipulated that if the respondent be found to come under the excepting or proviso clause of said Section (R. S., Chap. 21, Sec. 15), or of any other statutory provision, as the case may be, which furnishes matter of excuse for the respondent in the acts complained of in said indictment, a *nol pros* is to be entered.

"If the Law Court determines that an offense is lawfully stated, but that the respondent comes under the benefits of the exception or proviso clause, or of any other statutory provision, said indictment to be quashed.

"If, however, the Law Court finds that an offense is lawfully stated, and the indictment is sufficient in law, and the respondent does not come under the excepting or proviso clause in said Sec-

tion, or of any other statutory provision, the respondent is to stand convicted, unless the Law Court shall otherwise order."

The sufficiency of the indictment is not directly challenged and we hold it good.

"Constitutional provisions for the protection of an accused person exact only such particularity of allegation as may enable the accused to understand the charge against him and to prepare his defense." *State* v. *Haapanen*, 129 Me., 28.

"While the rules of criminal pleading in this state are not unreasonably technical, this court has insisted that indictments should be drawn with care and exactness. No person can be held to answer to a criminal charge until it is fully, plainly, substantially and formally described to him.

"Every material fact which serves to constitute the offense must be expressed with reasonable fullness, directness and precision. *State* v. *Perley*, 86 Me., 431. The doctrine of the court is identical with that of reason. The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." *State* v. *Beattie*, 129 Me., 229.

Without deciding that the state's attorney can by agreement prevent adjudication on acts alleged in an indictment as criminal, other than by entry of *nol pros*, we proceed to consider the situation presented in the record before us.

In this case the state's attorney agrees with counsel for the respondent that in determining guilt or innocence under the pertinent statute, the court is limited to consideration of the single question whether a person fitting, bending and adjusting spectacles and eye glasses, and fitting spectacles and eye glasses with opthalmic lenses for the betterment of vision is engaged in the practice of medicine or surgery.

But the privilege of prefixing the letters "Dr." to one's name, when proceeding to treat a person for impairment of vision, or soliciting the business of such treatment, must be considered in a field that necessarily ranges beyond the limits of the confines set up by the agreement of counsel. The statute before us for interpretation requires more than handicraft in deciding what external appliances shall be deemed appropriate and effective to aid the organ of man's sight in the performance of its functions.

The practice of optometry is defined in R. S., Chap. 21, Sec. 48, and we are not here deciding that an optometrist, doing and holding himself out to do any one or any combination of the practices included in our statute definition may not be engaged in the practice of medicine. Upon this issue courts of last resort in other jurisdictions have pronounced opinions, and they are not in accord.

We are to interpret another statute, Section 15 of the same chapter, so far as applicable to respondent's case. Section 15 reads:—

> "Unless duly registered by said board, no person shall practice medicine or surgery, or any branch thereof, or hold himself out to practice medicine or surgery or any branch thereof for gain or hire within the state, by diagnosing, relieving in any degree, or curing, or professing or attempting to diagnose, relieve or cure human disease, ailment, defect, or complaint, whether physical or mental, or of physical or mental origin, by attendance, or by advice, or by prescribing or furnishing any drug, medicine, appliance, manipulation, method, or any therapeutic agent whatsoever or in any other manner, unless otherwise provided by statute of this state. Unless duly registered by said board, no person shall prefix the title 'Doctor' or the letters 'Dr.,' or append the letters 'M.D.,' to his name, or use the title of doctor or physician in any way, excepting that any member of the Maine Osteopathic Association may prefix the title 'Doctor' or the letters 'Dr.,' to his name, when accompanied by the word 'Osteopath.' Whoever not being duly registered by said board practices medicine or surgery, or any branch thereof, or holds himself out to practice medicine or surgery, or any branch thereof in any of the ways aforesaid, or who uses the title 'Doctor' or the letters 'Dr.' or the letters 'M.D.' in connection with his name, contrary to the provisions of this section, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars for each offense, or by imprisonment for three months, or by both fine and imprisonment; the prefixing of the title 'Doctor' or the letters 'Dr.' or

the appending of the letters 'M.D.' by any person to his name, or the use of the title of doctor or physician in any way by any person not duly registered as hereinbefore described shall be *prima facie* evidence that said person is holding himself out to practice medicine or surgery contrary to the provisions of this section; provided, that nothing herein contained shall prevent any person who has received the doctor's degree from any reputable college or university, other than the degree of 'Doctor of Medicine' from prefixing the letters 'Dr.' to his name, if he is not engaged, and does not engage, in the practice of medicine or surgery or the treatment of any disease or human ailment."

The exceptions specified in the section quoted and in the following section, the sixteenth, are not applicable to respondent's case.

By the agreed statement of facts we understand that counsel are asking whether respondent is excluded from the prohibition against prefixing the letters "Dr." to his name by virtue of the last proviso in the section stated.

The agreed statement stipulates, in effect, that he is to be found not guilty if we find it to be the law that one who engages in the business or profession of fitting, bending and adjusting spectacles and eye glasses with ophthalmic lenses for the betterment of vision is not thereby practicing medicine or surgery.

As already intimated, we find the proviso broader than the meaning of the stipulation.

The proviso, as we understand it, renders immune from punishment a person, to whom any doctor's degree other than the degree of Doctor of Medicine has been awarded by any reputable college, who prefixes the letters "Dr." to his name, if that person is not engaged, and does not engage, in the practice of medicine or surgery or in the treatment of any disease or human ailment.

Such we hold to have been the intent of the legislature in this enactment of law.

The section is an apt illustration of a state exercising its police power. It was set up to protect the individual from the danger of submitting to incompetent hands when he felt the need of medical

aid, surgical attention, the arresting or cure of disease, or relief from ailment; to preserve and promote the public health.

The words disease and ailment gain nothing from definition. Their weight is appreciated by the great majority of human kind, if not by all.

But in the first part of the section of the statute which we are considering, the legislature announces that diagnosing, relieving in any degree, or curing, or professing or attempting to diagnose, relieve or cure any human disease, ailment, defect, or complaint, whether physical or mental, or of physical or mental origin, by attendance, or by advice, or by prescribing or furnishing any drug, medicine, appliances, manipulation, method, or any therapeutic agent whatsoever, or in any other manner, is the practice of medicine or surgery.

It is inconceivable that anyone would solicit the services of one who holds himself out to prescribe and adjust lenses for the eye, except in the case of a seeker for personal adornment, unless he felt disease, defect or ailment.

The indictment holds respondent to answer for a crime.

Defense, as we understand the report, is despaired of unless the final proviso of the section defining the crime includes the respondent when engaged in the practices mentioned in the proviso.

The Law Court is asked to say whether he is guilty or innocent, and that upon what it holds to be but a partial statement of the facts essential to determination.

This we decline to do.

Report discharged.

NORA WITHAM *vs.* MIKE MARSHALL.

Oxford. Opinion, February 25, 1932.

VERDICTS.

A jury verdict unsupported by the preponderance of evidence and not justified by the facts, can not be sustained.

In the case at bar, the plaintiff's testimony was unsupported and uncorroborated. Several witnesses testified for the defendant. The record disclosed that the jury must have been swayed by some force other than the logic of the credible and sufficient evidence.

On general motion for new trial by defendant. An action of assumpsit for board of men, use of a barn, and for one ton of hay. The jury found for the plaintiff in the sum of $86.56. A general motion for new trial was thereupon filed by the defendant. Motion sustained. The case fully appears in the opinion.

George A. Hutchins, for plaintiff.

Albert Beliveau, for defendant.

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

BARNES, J. This is an action in assumpsit, for board of men from December 21, to March 20, use of a barn, and for one ton of hay, charged to defendant, a pulpwood operator, for whom the men and their horses worked in the season ending March, 1930.

The defense urged is that the owner of one or more of the teams was a sub-contractor on defendant's operation and that the charges should have been against him and not against the defendant.

The plaintiff testified that she furnished the board, in conformity with a contract with defendant, and that part of her bill had been paid by household supplies furnished by him: that the charge for use of the barn was on defendant's promise to "leave the barn as good as he found it," no contract claimed as to the hay, and no

testimony as to the amount thereof. No witness testified in plaintiff's behalf.

The jury apparently disregarded her testimony as to the hay and damage to the barn; struck a balance between charges for board of men and payments on account and found a verdict for plaintiff in the sum of eighty-six dollars and fifty-six cents.

Upon motion for a new trial, defendant argues that the verdict is against the evidence and the clear weight of evidence.

Defendant's testimony is that, on a day after Thanksgiving, he called on Mrs. Witham and attempted to engage of her board for two men, Merrill and Morrill, and accommodations for their four horses. He testified in effect that plaintiff would not entertain his proposition, because, "She said she had talked with another party, and if they didn't come she would talk with me."

The two men, Merrill and Morrill, did not board with plaintiff. "They arranged with the house down below where she lived."

Clarence Lafoy, a sub-contractor, hauling wood by the cord, on the Marshall job, and three of his employees, are the men for board of whom plaintiff declared.

Plaintiff's direct testimony, if believed, might justify a finding that defendant agreed to pay the board of Lafoy and his men; but cross examination revealed so many inconsistencies in her statements and indicated a course of conduct on her part so out of accord with the theory of her case that a court would not be justified in relying on her uncorroborated evidence.

Defendant denied that he made any contract with her for board of Lafoy and his men, denied that he ever talked with her regarding board of any men except Merrill and Morrill, denied that plaintiff ever requested him to pay her for the service rendered, for the hay and use of the barn.

Plaintiff admitted that she had never demanded pay of defendant, and further that within a month of the end of the hauling season she left with a lawyer, for collection of Lafoy, the bill which she now presents against defendant.

Lafoy testified wholly in support of defendant's contention.

Upon the whole record, without particularizing further, it is apparent that the jury were swayed by some force other than the

logic of credible and sufficient evidence, to a position not justified by the facts and the preponderance of evidence.

The plaintiff failed to establish such preponderance in her favor.

Motion sustained.

EDMUND D. NOYES *vs.* JULIUS LEVINE.

Kennebec. Opinion, March 3, 1932.

EASEMENTS. PLEADING AND PRACTICE.

In determining the existence of an easement or prescriptive right of one to use in a certain way land of another, the record of the judgment must show, by its wording, logical inference therefrom, or by reference to other records, the exact portion of land of the servient tenement that is encumbered.

An encumbrance upon a man's estate, if established by record, must be clearly defined by the record memorial.

Amendments to judgments can only be allowed for the purpose of making the record conform with the truth, not for the purpose of revising and changing the judgment.

In the case at bar, as the pleadings and judgment stood, the verdict was indefinite and did not legally determine the rights of the parties. Injustice would result unless a new trial were ordered.

On general motion for new trial by plaintiff. An action of trespass in which defendant was charged with piling and sawing wood on land owned by plaintiff, but over which defendant had a right of way. The jury rendered a verdict for the defendant. A general motion for new trial was thereupon filed by plaintiff. Motion sustained. The case fully appears in the opinion.

Harvey D. Eaton, for plaintiff.

Goodspeed & Fitzpatrick, for defendant.

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

BARNES, J. At a former hearing reported 130 Me., 151, 154 Atl., 78, exception to order of non-suit at the end of plaintiff's evidence was sustained.

The action is trespass *quare clausum.*

Plaintiff declares that on a lot on the southerly side of Chaplin Street in Waterville, owned by him, about seventy-two feet wide along said street and one hundred ten feet deep, defendant on a certain day did enter and deposit cordwood, which he there sawed and split into stove wood.

Upon a second hearing the case went to a jury on plea of the general issue and 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 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."

It appears from the record that the west line of plaintiff's lot and the east line of defendant's are coincident from the street to the south-east corner of defendant's lot, plaintiff's property extending much farther southerly and that over a strip of plaintiff's land twenty feet wide and adjacent to defendant's lot the latter has by grant an easement of way from the street as far southerly as his lot extends.

Defendant's contention that for more than twenty years he had continuously "exercised the right of piling wood, iron and other materials on plaintiff's land as described in plaintiff's writ" was proved to the satisfaction of the jury, together with the acquiescence of plaintiff so that prescriptive right has ripened in defendant.

The verdict was general, and although the acts of defendant, which are alleged to constitute trespass, are declared to have been done only on the twenty feet strip, the verdict, if recorded as the final judgment of the court, may be held to subject each and every

part of the land described in the declaration to uses of the nature complained of at the hands of defendant and his grantees.

The case is here on plaintiff's motion to set the verdict aside.

From a careful consideration of all the testimony we conclude the jury was justified, upon the evidence, in deciding that defendant has the easement claimed, but that such easement is to be strictly limited to the area over which he has by grant a right of way.

As in case of determination of the existence of a right of way, the record of the judgment must show by its wording, logical inference therefrom, or by reference to other records, the termini, route and area subjected to the easement of way, so here there should be record or reference to record to determine with definiteness the exact portion of plaintiff's land that is encumbered.

"The sacred right of property demands that such serious encumbrance (easement of way) upon a man's estate, if established by record, shall be clearly defined by the record memorial." *Crosier* v. *Brown*, 66 W. Va., 273, 66 S. E., 326, 25 L. R. A. (N. S.) 174.

Under the pleadings of record definite bounds might have been given by special verdict of the jury.

Omission of this essential finding can not be cured by amendment of the record.

"Amendments to judgments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. Black, Judgm. Sec. 156. The same author adds: 'If on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it can not be brought in by way of amendment.'" *Scamman* v. *Bonslett*, 118 Cal., 93, 50 Pac., 272.

"The power to amend (a judgment) should not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein." 15 R. C. L., 673. Errors subject to correction are usually clerical. *Bean* v. *Ayers*, 70 Me., 421-432.

As the pleadings and judgment stand, the verdict is indefinite and does not legally determine the rights of the parties. Injustice would result unless a new trial were ordered. *Nicholson* v. *Railroad Co.*, 100 Me., 342, 346; *Conant* v. *Arsenault*, 118 Me., 281.

Motion sustained.

JOHN D. WHEELER'S CASE

Somerset. Opinion, March 8, 1932.

WORKMEN'S COMPENSATION ACT.

An accident to be compensable must arise "out of" and "in the course of" the employment. To arise out of the employment, an injury must have been due to a risk of the employment: To occur in the course of the employment it must have been received while the employee was carrying on the work which he was called on to perform.

An accident can not arise out of the employment if it does not occur in the course of it, although an accident may occur in the course of it and still not arise out of it.

An injury suffered by an employee on his way to or from work, while entering or leaving the premises of his employer on a way maintained by the employer to provide ingress to or egress from the premises, or which the employee has a right to use for such purpose, is received in the course of the employment, and if arising out of the employment is compensable.

In the case at bar, the street on which the petitioner was injured was built and maintained, not as an approach to the place of work, but for the benefit of those who were living in the area devoted to the housing of employees.

Employees were not required to live on this property, and the injury of the petitioner is in the same category as if it had been suffered while he was on a public street on his way to work. It did not arise in the course of his employment as those words are used in the statute and was therefore not compensable.

A Workmen's Compensation case. Appeal by petitioner from a decree denying him compensation. The issue involved the question

as to whether or not the accident arose out of, and in the course of, his employment. The facts fully appear in the opinion.

Arthur L. Thayer, for appellant.

Nathaniel W. Wilson, for respondent.

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

THAXTER, J. This is a Workmen's Compensation case and is before this court on an appeal by the petitioner from a decree denying him compensation.

The employer, the Central Maine Power Co., at the time of the accident in question operated a certain real estate development located near the dam which it was building at Bingham. This property, known as Daggettville, together with several other parcels adjoining it, had been planned by the defendant to provide housing for the large number of men working on the dam. It comprised a number of acres, was laid out in lots, was traversed by streets, and contained more than a hundred houses in which the workmen and their families lived. The dwellings had in the main been built by the employees under an arrangement by which the employer financed the cost, and was repaid by the employee, who at the termination of the work could sell or remove the house. The employer had charge of the sanitation and of the policing of the district and was responsible for the maintenance and repair of the streets; the employee had control of his house and of the use of the lot. There was no requirement that the workmen should live within this particular place or in fact in any other, but the project was carried out because it was recognized that local facilities were inadequate to take care of the large influx of laborers who would have to live in proximity to the work.

The petitioner, whose work was to drive a tractor, roomed outside of the settlement across the main highway leading northward from Bingham, but took his meals with a Mr. Nutter who had a house on lot 48 within the area. It was the duty of the petitioner before starting work in the morning to report at the office building, which was approximately three-quarters of a mile from the Nutter house. The streets within the settlement connected with a way leading to the scene of the work. This way, like the streets, was a

private one controlled and maintained by the company. The petitioner on the morning of the accident left the place where he roomed, and proceeded to the house of Mr. Nutter for his breakfast. Having finished this, he left the house to start for his work, slipped on some ice in the street in front of lot 48, and fell. The result was a broken leg for which he seeks compensation.

The only question before this court is whether the accident arose out of and in the course of his employment. If it did, he is entitled to recover, otherwise not. The petitioner contends that he was on a way maintained by the company for the exclusive use of its employees, and was proceeding over it to his work, and that the case is governed by *Roberts' Case*, 124 Me., 129, where compensation was granted to the dependent of an employee killed while leaving his employer's premises on a private way which connected with the public street. The respondent claims that the petitioner had not reached the place where his work was to be performed, that though he was on a way controlled by the employer, it was not built and maintained to provide access to the place of the work, but for the benefit of those who might choose to live in the settlement known as Daggettville, and that accordingly the decision is to be governed by those cases which deny compensation for injuries to employees suffered on a public highway while on their way to or from work.

An accident to be compensable must arise "out of" and "in the course of" the employment. Rev. Stat. 1930, Ch. 55, Sec. 8. These phrases have been many times defined by this court. To arise out of the employment an injury must have been due to a risk of the employment, to occur in the course of the employment it must have been received while the employee was carrying on the work which he was called upon to perform. *Westman's Case*, 118 Me., 133; *Mailman's Case*, 118 Me., 172; *Gooch's Case*, 128 Me., 86; *McNicol's Case*, 215 Mass., 497.

An accident may occur in the course of the employment and still not arise out of it, *Gooch's Case*, *supra*; but an accident can not arise out of the employment, if it does not take place in the course of it. *Fournier's Case*, 120 Me., 236. If, therefore, an accident does not arise in the course of the employment, neither statutory requirement is present.

We agree with the findings of the commissioner who heard this

case that this accident did not arise in the course of the employment. It is the general rule that an injury suffered while an employee is on his way to work, and before he reaches the premises where the work is to be performed, is not received in the course of his employment. *Paulauskis' Case*, 126 Me., 32; *Ferreri's Case*, 126 Me., 381. At just what particular moment the employment may be said to commence, as contemplated by the statute, is oftentimes difficult to determine. It is, however, established that an injury suffered by an employee on his way to or from work, while entering or leaving the premises of his employer on a way maintained by the employer to provide ingress to or egress from the premises, or which the employer has a right to use for such purpose, is received in the course of the employment and if arising out of the employment, is compensable. *Roberts' Case, supra.*

We agree with the finding of the commissioner that the facts of this case do not bring it within the rule laid down in *Roberts' Case.* The test is not so much whether the employer owns or controls the place where the injury occurs, but rather whether it happens within the premises or on the approaches to the premises, where the work is to be performed. Thus it has been held that an employee could not recover compensation for injuries received while parking his car on the property of his employer, which was not a part of the premises where his employment called him. *Savage's Case*, 257 Mass., 30.

In the case before us the important consideration is not that the Central Maine Power Co. had control of the street on which the petitioner fell, but rather we must determine the purpose for which that way was maintained. It seems obvious that the ways in Daggettville were built for the convenience of those who desired to live there, and were not simply the approaches to the place of work. Under such circumstances an injury suffered there is to be treated as if received under similar circumstances on a public street.

Where the injury occurs as here, and in an area devoted by the employer to the housing of employees, in which they are privileged but not required to live, it does not arise in the course of the employment as those words are used in the statute.

Appeal dismissed.
Decree affirmed.

OTIS ELEVATOR COMPANY *vs.* FINKS CLOTHING COMPANY.

Cumberland. Opinion, March 12, 1932.

LIENS. PLEADING AND PRACTICE.

In interpretation of lien statutes courts will construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute. Even though the writ is unskillfully framed, if the meaning of the allegations may be easily understood, it is sufficient.

A lien attaches to real and personal estate, when a proper and sufficient claim is filed by the claimant in the repository appropriate to a claim against property of either class, effective from date of creation. The object to which it attaches is primarily the building, but by virtue of the statute it likewise attaches to the land on which it stands.

Retaining title to certain specific personal property as a means of securing payment on the part of the creditor or lienor does not impose upon the creditor or lienor any duty or obligation to assert such title by resuming possession of the property. It is not inconsistent with the lien claim, but merely additional security to that provided by the statute. In thus retaining title to the specific property, the creditor or lienor does not waive his statutory lien upon the lot or premises upon which the personal property is placed.

In the case at bar, the declaration was not defective for uncertainty and the lien attached to the building and the lot on which it stood. It was not waived by the provision for retention of title by the plaintiff to the machine and materials furnished, such claim being but security additional to the statute lien and not inconsistent with pursuing the lien claim.

On exceptions by plaintiff. An action to enforce a lien claim on premises of the defendant. The case was heard by a Referee with right of exception in matters of law reserved. The Referee found for the defendant. The report of the Referee was confirmed. To certain rulings of the Referee, plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Gerry L. Brooks, for plaintiff.

Harry S. Judelshon, for defendant.

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

BARNES, J. On exceptions.

Plaintiff brought its action at law to enforce a lien for labor and materials furnished in installing an elevator in defendant's building.

The case was heard by a Referee "with right to except in matters of law reserved by both parties."

The contract of sale and installation contained among its terms the following: "The machinery, implements and apparatus furnished hereunder remain personal property and we retain title thereto until final payment is made, with right to retake possession of the same at the cost of the purchaser if default is made in any of the payments, irrespective of the manner of attachment to the realty, the acceptance of notes, or the sale, mortgage or lease of the premises."

Subsequent to the installation of the machinery, defendant having received its discharge in bankruptcy, it is agreed that if execution issue against the defendant the same "is to be perpetually stayed by reason of said discharge."

Before the Referee defendant claimed, and now urges, that plaintiff has no lien because it did not claim a lien in its declaration as provided by law: that if the declaration is adjudged sufficient to establish a lien claim, such lien can be found to have attached to such interest in the building only as defendant had on the date of the attachment and not to the land on which it stands, and, lastly, that because of reservation of title to the materials which it claims to have incorporated in the building any lien was waived or lost.

These several defenses were urged upon the Referee, and he found for the defendant upon the defense last stated above.

When it was moved that the court confirm the report of the Referee, plaintiff filed written objections to its confirmation and requested the court to rule that retaining title to the machinery and other materials furnished did not defeat plaintiff's lien.

The objections and requests of plaintiff were overruled, the report of the Referee confirmed, and to the rulings and confirmation of the report the plaintiff excepted.

While it may be that the issue before us is but the narrow one as to whether or no agreement and assent that plaintiff retained in itself title to the personal property incorporated in the building until its bill for same and installment thereof is paid, we deem it well to discuss the three objections raised by defendant before the Referee.

As to claim of lien in the declaration. The right in any plaintiff to a lien for labor performed and materials furnished is purely statutory.

In pursuing his action at law he must comply with statute regulations conferring that right. These are specified in R. S., Chap. 105, and the requirement as to pleadings is expressed in Sec. 66, "The declaration must show that the suit is brought to enforce the lien."

The first count in plaintiff's declaration sets out the written contract in accordance with which plaintiff agreed to furnish labor and materials.

From the agreed statement it appears that plaintiff installed an elevator in a Portland building which, with the land on which it stood, subject to rights of mortgagees, was owned by defendant and in its possession, and that there is due plaintiff, "on account of said contract the sum of fifteen hundred and sixty dollars ($1,560.00) with interest from the 15th day of October 1930, together with costs of this action," and further, that the statutory notice was duly recorded.

The declaration continues as follows: "And the plaintiff avers that it has complied with all the terms and conditions of said contract, installed the materials and furnished the labor required to complete the contract, in the building located at 234 Middle Street, Portland, Maine," and proceeds: "That this suit is brought to enforce a lien for said sum of fifteen hundred and sixty dollars ($1,560.00)."

In the second count plaintiff avers: "That this suit is brought to enforce a lien for the above sum ($1,560.00) for labor performed and materials furnished by said plaintiff, upon the buildings owned and occupied by the said defendant, and situated on the south-easterly side of Middle Street in said Portland, and numbered 234 on said Street."

In regard to the sufficiency of the declaration as a lien claim: In an analogous case, assumpsit to enforce a lien claimed on logs, our court said: "The writ is unskillfully framed, but still the meaning of the allegations may be easily enough understood.

"It must be regarded as sufficient for a lien-claim if it comes within the requirement prescribed by the act of 1862, which dispenses with the necessity of any allegations outside of the common forms of the common law, except that the declaration must disclose that the suit is brought to enforce a lien upon the property attached." *Parks* v. *Crockett*, 61 Me., 489-497.

And in interpretation of lien statutes courts will "construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute." *Shaw* v. *Young*, 87 Me., 271.

In harmony with our former adjudged cases we hold the declaration in this case sufficient.

Although we have not a full and complete record before us we find in the record, and by obvious inference therefrom enough to convince the court, that the lien was created on real estate; that it attached to real estate, and not to the building as personalty.

A lien such as claimed here is created or springs into being when certain definite conditions arise.

It attaches, to real or personal estate, when a proper and sufficient claim is filed by the claimant in the repository appropriate to a claim against property of either class, effective from date of creation.

But the object to which it attaches is primarily the building. A laborer's or materialman's lien, under our statute shall exist on a building, by virtue of a contract with or by consent of the owner, "and on the land on which it stands."

The declaration in this case might have been differently worded. It was framed long after the lien was created, and filed within the time fixed for filing. We assume the claim was filed as against real estate, and that the attachment commanded in the writ was made on real estate, although record of neither is certified to us.

Returning again to the declaration, we note that the excerpts quoted above are all that may shed any light on the point under discussion.

The pleader recites that plaintiff installed materials and furnished labor in the building located at 234 Middle Street, and again, seeks to enforce a lien for labor performed and materials furnished upon the buildings situated on Middle Street and numbered 234.

The title, at the creation of the lien, being in one who had the same interest in both building and land, we hold the declaration not defective for uncertainty, and that the lien attaches to the building and the lot on which it stands.

Execution to run, however, against such interest only as defendant had in the property on the 29th of May, 1930, with interest on the amount claimed from October 15 of that year.

The exception was reserved to the ruling of the court below in confirming the finding of the Referee that plaintiff can not enforce its lien because of its attempted reservation of title to the materials furnished to secure payment of plaintiff's bill.

This ruling is a decision of law, and to such the right of exception was reserved.

Our decision on the correctness of this finding is not reached by reference to any statute, and so far as we are advised the precise question now in issue had not been heretofore ruled upon by this court. Here we find the logic and conclusions of other courts of great assistance.

In a case coming up to the circuit court from Tennessee, for the enforcement of a mechanic's lien under a statute similar to ours, whereby the contract title to the machinery installed was retained by the lienor until the same was fully paid for, the court held: "The retention of title till payment was made for the machinery was in no way inconsistent with the statutory lien given upon the lot of ground or tract of land. The purpose of the stipulation was to secure the payment of the purchase money to be paid for the machinery.

The retention of title was in the nature of a specific lien upon the identical machinery furnished. It was not inconsistent with the lien given by the statute upon the premises on which the machinery was placed or erected. Nor does it, as matter of law, show any intention of waiving the latter lien. Retaining title as a means of securing payment on the part of defendants did not impose upon com-

plainant any duty or obligation to assert such title by resuming possession of the machinery. Complainant could still look to defendants personally for the payment of the purchase price of the machinery, and to any and all other remedies conferred by law to enforce its payment.

Instead of being inconsistent, it was merely additional security to that provided by the statute. It certainly does not establish, as matter of law, that in thus retaining title to the machinery complainant has waived its statutory lien upon the lot of ground or premises on which the machinery was placed." (Citing *Railroad Co.* v. *Rolling Mill Co.*, 109 U. S., 719) *Case Mfg. Co.* v. *Smith*, 40 Fed., 339.

The above decision is followed in: *Henry & Coatsworth Co.* v. *Bond*, 37 Neb., 207, 55 N. W. 643; *Peninsular G. E. Co.* v. *Norris*, 100 Mich., 496, 59 N. W., 151; *Hooven O. & R. Co.* v. *John Featherstone's Sons*, 49 C. C. A., 243, 111 Fed., 81-95; *Elwood State Bank* v. *Mock*, 40 Ind. App., 685, 82 N. E., 1003; *Geppelt* v. *Mid. W. Stone Co.*, 90 Kan., 539, 135 P., 573; *M. A. Phelps Lumber Co.* v. *McDonough Mf'g. Co.* (Wash.) 202 Fed., 445, where it is stated the authorities are uniform; *Presque Isle Sash & Door Co.* v. *Reichel*, 179 Mich., 466, 146 N. W., 231; *Ind. Meat Co.* v. *Crane*, 21 Ariz., 1, 184 P., 992; *Otis Elevator Co.* v. *Stafford*, 95 N. J. L., 79, 111 A., 695; *In re Gambrill Mf'g. Co.* (Md.) 283 Fed., 349.

As between materialman and owner of the building, retention of title to machine and materials furnished was but security additional to the statute lien and not inconsistent with pursuing the lien claim.

Exceptions sustained.

STATE OF MAINE *vs.* ERNEST SALAMONE.

Cumberland. Opinion March 18, 1932.

CRIMINAL LAW. EVIDENCE.

It is the right of a party seeking to attack the credibility of a witness for the state to elicit by cross examination facts and circumstances which tend to prove the existence and extent of possible bias or hostility. The extent to which examination shall be permitted rests in the sound discretion of the trial Court and no rule governing the exercise of such discretion can be laid down more definitely than to say that only so much and no more of the facts and circumstances should be admitted as are necessary to give a fairly intelligent understanding of the cause, nature and extent of the supposed improper motive or influence.

When a witness denies any feeling of hostility or unfriendliness toward the party against whom he has testified injuriously, it is the party's right to inquire, on cross examination, as to the existence of any fact, including previous relationship, which in the light of human experience might reasonably engender hostility towards the party, or affect the witness with partisan feeling, and thus impair the trustworthiness of his testimony.

Entire exclusion of testimony which might tend to disclose bias or prejudice is not an exercise of sound discretion.

In the case at bar, the witness for the State and the respondent should have been permitted to answer the inquiries in relation to the trouble about the revolver and prejudice may well have resulted by the refusal of the presiding Justice to permit it.

The respondent was entitled to show the fact that there was an accusation that a revolver had been stolen from him and that the State's witness was included in that accusation. It would then have been for the jury to say what effect, if any, this had on the credibility of the witness.

On exceptions by respondent. Respondent was tried at the September Term, 1931, of the Superior Court for the County of Cumberland, on a complaint charging him with unlawful possession of intoxicating liquors, and was found guilty. To the exclusion of certain testimony offered in his behalf, respondent season-

ably excepted. Exceptions sustained. The case fully appears in the opinion.

Walter M. Tapley,
Albert Knudsen, for the State.
Harry E. Nixon, for respondent.

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

FARRINGTON, J. At the September term of the Cumberland County Superior Court, on the trial of the respondent, charged by complaint with the unlawful possession of intoxicating liquors, the only evidence as to the seizure of the liquor which was found in the cellar of the respondent's home on Middle Street in Portland, Maine, was given by Deputy Sheriff Jesse Lowd, and according to the bill of exceptions he was the only witness as to the facts existing at the time of the seizure.

Lowd was asked in cross examination if he knew of any trouble concerning a revolver between Salamone and Deputy Leighton and the other deputies just prior to the seizure. On being asked, "Did you ever hear of that?", Lowd replied, "I don't remember that I ever did." Then this question was asked: "To refresh your recollection, Deputy, concerning this revolver incident, do you recall an argument with Salamone, yourself, and Mr. or Deputy Leighton on Munjoy Hill prior to this seizure?" Objection to a reply was made and the presiding Justice sustained the objection, stating that "The fact, if such there be, that there was trouble is admissible; the details never." The respondent was limited to the right of asking the witness if there had been any trouble between the parties, the presiding Justice remarking, "I have excluded the detail." An exception was allowed, and the witness being finally asked if he recalled any trouble answered, "No; no trouble."

The case is before this court on the exception to the above ruling, as noted, and on an exception to another ruling which in effect prevented the respondent's attorney from asking him if he ever had any trouble with the deputy sheriffs concerning the loss of a revolver belonging to him, the respondent claiming that he was aggrieved by said rulings in that he was prevented from showing bias and prejudice on the part of the witness, Lowd.

There was one other exception which need not be considered.

We can not go outside the bill of exceptions as the printed record of the evidence was not made a part of it. If the evidence were a part, it would control allegations in the bill as to matters of fact, if there were a conflict between them. In this case we may, therefore, regard as true the allegations in the bill as to matters of fact therein stated and agreed to by the State, and there we note the statement that the cellar in which the liquor was found was used by two other tenants as well as by the respondent, who was found guilty by the jury. If the respondent had been permitted to pursue his intended line of inquiry, it is not impossible that the jury might have reached a contrary conclusion in view of facts which might have tended to show bias or hostility and in view of the fact that the cellar was used by two other tenants as well as by the respondent. The exact place where the liquor was found might be of great importance.

The bill discloses that it was the intention of the respondent to offer evidence to the effect that, during a search of a dwelling house occupied by the respondent at a time prior to his occupancy of the dwelling where the liquor was found in the instant case, a bureau in one of the rooms had been searched and a revolver was found to be missing and that there was a controversy between the respondent and witness Lowd and two other deputy sheriffs in which Lowd and the others were accused of stealing the revolver.

In our opinion the presiding Justice should have allowed the inquiries to be made. By the limitation of his rulings he deprived the respondent of the opportunity to revive the memory or refresh the recollection of the witness and thereby closed the door to any effort of the respondent to show bias or prejudice. We hold that the rulings constituted prejudicial error. It was so held under practically the same circumstances in *People* v. *Turney et al*, 124 Mich., 542, 83 N. W., 273.

In *Sanford* v. *State*, 143 Ala., 78, 39 So., 370, it was held error to refuse to permit the respondent to ask of a State witness the question, "Is it not a fact that you and Sanford are unfriendly on account of a whiskey bill you owe him?" See also *Motley, Applt.* v. *State*, 207 Ala., 640, 93 So., 508.

In *Wright* v. *State*, 133 Ark., 16, 201 S. W., 1107, it was held error to exclude the following question asked a witness for the State: "Haven't you been traipsing over this town ever since Mayor Wright has been in office and talking about him, because he got after you for selling cigarettes and running a gaming device?"

In *State* v. *Malmberg et al.*, 14 N. D., 523, 105 N. W., 614, the Court said, "It is therefore the absolute right of the party attacking the credibility of such a witness to elicit by cross examination the facts and circumstances which tend to prove the existence and extent of the supposed improper motives. The extent to which examination into these collateral facts and circumstances shall be permitted rests in the sound discretion of the trial court, and no rule governing the exercise of such discretion can be laid down more definitely than to say that only so much and no more of the facts and circumstances should be admitted as are necessary to give a fairly intelligent understanding of the cause, nature, and extent of the supposed improper influence."

To have permitted the witness, Lowd, and the respondent to answer would not have been going into the details and the questions propounded did not undertake to do so.

"When a witness denies any feeling of hostility or unfriendliness towards the party against whom he has testified injuriously, it is the party's right to inquire, on cross examination, as to the existence of any fact, including previous relationship of course, which in the light of human experience might reasonably engender hostility towards the party, or affect the witness with partisan feeling, and thus impair the trustworthiness of his testimony." *Motley* v. *State*, supra.

An examination of the cases discloses a few which seem to limit the inquiry but the overwhelming trend of the decisions as examined indicates a considerable latitude in examination for the purpose of showing bias or hostility and that the entire matter is largely one in the discretion of the Trial Court. In the instant case, however, we feel that answers to the respondent's interrogations should have been permitted, as it is disclosed to us by the bill of exceptions, and that prejudice may well have resulted by the refusal to permit them. The rulings of the Justice presiding prevented the respondent from showing to the jury not the details of fact but a fact it-

self which might have engendered in the witness bias and hostility which the jury might have regarded as of importance and weight sufficient to create a reasonable doubt of guilt.

Entire exclusion of testimony which might tend to disclose bias or prejudice is not an exercise of sound discretion.

The respondent was entitled to show the fact that there was an accusation that a revolver had been stolen from him and that Mr. Lowd was included in that accusation. It would then have been for the jury to say what effect, if any, this had on the credibility of the witness. We can not say it would have been without effect.

The entry must be,

Exceptions sustained.

IN RE ESTATE OF LENA A. CLARK.

York. Opinion March 21, 1932.

TAXATION. MUNICIPAL CORPORATIONS.

By the provisions of Section 1, *Chapter* 77, *R. S.* 1930, *bequests to or for the use of educational, charitable, religious or benevolent institutions in this state are exempt from inheritance taxes.*

A bequest to a municipality for the purpose of erecting or maintaining public buildings or works, or otherwise lessening the burdens of government, is for a charitable use.

A municipality may be regarded as a charitable institution, within the meaning of the statute, for the purpose of receiving and administering a bequest to be expended in the erection of a public building.

Such a bequest is exempt from an inheritance tax.

On report on an agreed statement of facts. Appeal from decree of Probate Court for the County of York, assessing an inheritance tax on a bequest under the will of Lena A. Clark to the Inhabitants of the Town of Berwick. Appeal sustained. Case remanded to lower

court for further proceedings. The case fully appears in the opinion.

Edward F. Gowell, for Inhabitants of the Town of Berwick.

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

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

PATTANGALL, C. J. On report. Appeal from decree of Probate Court assessing a tax on a legacy to Inhabitants of the Town of Berwick under the following clause in the will of Lena A. Clark:

> "Fifth: I hereby give, bequeath and devise to the Inhabitants of said Town of Berwick all the rest, residue and remainder of my estate, real, personal or mixed, wherever situated, and however and whenever acquired, to them and their assigns forever; the entire amount to be used in the construction of a town hall for the use of said town and any unexpended balance to be used for its maintenance forever."

Sec. 1, Chap. 77, R. S. 1930, provides that:

> "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 . . . by deed, grant, sale or gift . . . except to or for the use of any educational, charitable, religious, or benevolent institution in this state, shall be subject to an inheritance tax for the use of the state as hereinafter provided . . ."

The court below assessed a tax on the Inhabitants of the Town of Berwick, computing the amount of the residuary legacy on the basis of its value on the date of the testator's death. Appeal was seasonably taken and two issues are presented here: Namely, whether or not the legacy is taxable and, if so, whether it should be valued at the date of testator's death or at the date of distribution. If the first question is answered in the negative, an answer to the second is unnecessary.

Our court has never been called upon to answer the exact questions presented. The exemption provisions in inheritance tax laws in other states differ so materially from ours that only a few of the decisions of their courts are in point.

It is to be noted in the first instance that the tax imposed in this state is an inheritance tax and not an estate tax. It is an excise upon the right or privilege of taking property, by will or descent, under the law of the state, *State* v. *Hamlin*, 86 Me., 504; *In re Estate of Cassidy*, 122 Me., 33. It is collected by the state through the agency of the executor or administrator, but it is in reality paid by the legatee or devisee.

All of the states, with the exception of Alabama, Florida and Nevada, levy a tax on inheritances or estates or both. Georgia, Mississippi and Utah impose a tax on estates as does the Federal government. New York taxes both estates and inheritances. The remaining states tax inheritances.

Each of the inheritance laws contains exemptions of bequests for certain purposes or to or for the use of certain institutions, organizations, societies or political subdivisions, in addition to exemptions of bequests of certain amounts to heirs and other legatees, with the exception of Nebraska which exempts no bequests other than to relatives, although Maryland goes only a step farther, adding to such an exemption "property passing to the city of Baltimore or to any county or municipality in the state."

A number of the states specifically exempt bequests to their political subdivisions, sometimes limiting the exemption to those to be used for certain defined purposes. Others exempt bequests to be devoted to charitable, religious or educational use. A few, like Maine, limit the exemption to bequests to or for the use of certain classes of institutions.

It is held in some jurisdictions that the law in this respect is to be liberally construed to promote the benevolent purpose of the exemption, *Re Curtis*, 88 Vt., 445, 92 Atl., 965; *In re Spangler's Est.*, 148 Ia., 333, 127 N. W., 625; *Carter* v. *Whitcomb*, 74 N. H., 482, 69 Atl., 779; *In re Graves' Est.*, 171 N. Y., 40, 60 N. E., 787; *In re Harbeck's Est.*, 161 N. Y., 211, 55 N. E., 85; *Mergentime's*, 195 N. Y., 572, 88 N. E., 1125; *In re Kerr's Est.*, 159 Pa., 512, 82 Atl., 354; in other jurisdictions that the rule of strict

interpretation should be applied, *In re Bull's Est.*, 153 Cal., 715, 96 Pac., 366; *English* v. *Crenshaw*, 120 Tenn., 531, 127 Am. St. Rep., 1025; and in still others that such a statute should be given a reasonable and liberal interpretation with a view to effectuate the intention of the legislature, *State* v. *Bazille*, 97 Minn., 11, 106 N. W., 93; *State* v. *Vance*, 97 Minn., 532, 106 N. W., 98; *In re Gordon's Est.*, 186 N. Y., 471, 79 N. E., 722.

"We believe the true rule is that as the inheritance tax is a special tax, the intention to impose it in any case must be clearly expressed and words of exemption should be liberally construed." Blackmore and Bancroft on Inheritance Taxes, p. 196.

The Tennessee court, in a number of cases cited and discussed in *Henson* v. *Monday et al* (1930), 224 S. W., 1043, held that a legacy tax could not properly be laid against bequests to the University of Tennessee, the City of Knoxville, the Knox County Industrial School and several other counties, such legatees being agencies of the state and the state's privilege to take money under a will not being subject to a general tax law. The decision is based on the proposition that the tax is laid on the legatee and not upon the estate of the testator, being a tax on the right to receive rather than on the right to transmit. The conclusions reached in this case are reinforced by the opinion in *Knowlton* v. *Moore*, 178 U. S., 41, and *In re Macky*, 46 Colo., 79, 102 Pac., 1075. But in *Snyder* v. *Bettman*, 190 U. S., 249, an opposite view is taken although dissented from by Chief Justice Fuller, Justice White and Justice Peckham; and the weight of authority is that the mere fact that the property of a legatee is not subject to taxation does not prohibit the state from imposing an excise tax on its right to receive a bequest. *Washington County Hospital Association* v. *Estate of Mealey*, 121 Md., 274, 88 Atl., 136; *In re McCormick*, 206 N. Y., 100, 99 N. E., 177; *In re Saunders*, 141 N. Y. S., 1145.

That the bequest before us can not be regarded as exempt from inheritance tax, because the Inhabitants of the Town of Berwick is a municipal corporation and a political subdivision of the state or because its corporate property is not subject to taxation, seems clear. And it is just as clear that the appeal can not be sustained on the ground that the town hall when erected would be free from tax.

Unquestionably the bequest is for a charitable use. "A charity in the legal sense may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." *Jackson* v. *Phillips*, 14 Allen (Mass.), 556; *Crerar* v. *Williams*, 145 Ill., 625, 34 N. E., 467; *Bills* v. *Pease*, 116 Me., 98.

The words "charitable use" include all gifts for a general public use independent of benevolent, educational or religious purposes. Gifts in trust for the support of public schools or municipal improvements are gifts for charitable uses. *Trustees* v. *Megginson* (Del., 1910), 74 Atl., 565.

"A gift designed to promote the public good is regarded as a charity." Such is a bequest for the improvement of a city, *Howse* v. *Chapman*, 4 Ves., 542; to improve a city and support public buildings or bridges, *Gort* v. *Attorney-General in the House of Lords*, 6 *Dow's*, 136.

"What is a charity is principally regulated by the Statute of 43 Elizabeth, Chap. 4." *American Academy of Arts and Sciences* v. *President and Fellows of Harvard College*, before Shaw, C. J., sitting in equity, 12 Gray (Mass.), 594.

A municipality by tax raised funds may operate a charitable institution. *In re Wilson's Estate* (Wash., 1920), 191 Pac., 615.

A hospital given to a town is a public charity which the town has a right to accept and administer. *Adams et al* v. *Plunkett et al* (Mass., 1931), 175 N. E., 60.

In Estate of Graves, 242 Ill., 23, 89 N. E., 672, a bequest of money to erect in a public park a drinking fountain for horses was held to be a charity.

But our statute does not exempt all bequests for charitable uses. In an opinion by Mr. Justice Holmes, in the case of *Hooper* v. *Shaw*, 176 Mass., 190, at a time when the exemption in that state was practically identical with ours, that question is discussed. "The exception in the act of 1891 which is relied on is in the words 'other then . . . to or for charitable, educational, or religious societies or

institutions, the property of which is exempt by law from taxation.' Giving the broadest latitude to the word 'institution,' and assuming that there is an exemption if a charitable institution of the kind described is either trustee or *cestui que* trust, we can not read the words as meaning to embrace all charitable gifts. That is what the argument for the legatees comes to. It is suggested that we read the word 'institution' as equivalent to the German *stiftung*, and as satisfied when there is a fund permanently devoted to charity. We think it very clear that this would be a perversion of the words from their plain meaning and the substitution of an unidiomatic and remote conception which would not occur to ordinary minds. The contrary is implied in *Essex* v. *Brooks*, 164 Mass., 79. Very likely the institution need not be incorporated, but it is contemplated as an owner of property, not as property."

It may be of interest to note that "*stiftung*" has been variously translated as "institution," "foundation," and "pious bequest," obviously a much broader word than the English word "institution"; and it is also important to note that the trustee in *Hooper* v. *Shaw*, supra, was the New England Trust Company, an institution which in no sense could be deemed educational, religious, benevolent or charitable, and the *cestuis* were certain unidentified persons.

In an earlier Massachusetts case, *Essex* v. *Brooks*, 164 Mass., 83, the opinion being by Justice Morton, the Court said "By St. 1891, Chap. 425, Sec. 1, all property within the Commonwealth which shall pass by will or by intestate succession, or by deed, grant, sale, or gift to take effect after the death of the grantor, 'other than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son or the husband of a daughter of a decedent, or to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation, shall be subject to a tax of five per centum of its value, for the use of the Commonwealth.' By the will in question the testator gave to the town of Essex, first, 'twenty thousand dollars for the erection of a town hall and library for the use of its inhabitants'; then by a subsequent provision he gave 'the further sum of twenty thousand dollars, in trust to invest and keep in-

vested in some safe security, the income whereof shall annually be expended by the officers of said town for the purchase of books for said library for the free use of its inhabitants.' The two provisions taken together contemplate the establishment and maintenance by the town, with the sums thus bequeathed, of a free public library for the use of the inhabitants of the town, and the erection of a library building and town hall. We think that the library thus established may fairly be called an educational or charitable institution, and that the legacies being given to the town for it come within the exemption of the statute, and are not subject to the tax."

We can not regard *Hooper* v. *Shaw*, supra, as overruling *Essex* v. *Brooks*, supra. We think that the later opinion simply differentiated the case then before the court from the former case, in point of fact, and our view in that respect is strengthened by the fact that Mr. Justice Holmes concurred in the earlier opinion. They certainly are not unreconcilable. Both agree that either the trustee or the *cestui* must come within the scope of the word "institution" and that one or the other must be such an institution as can fairly be termed religious, benevolent, educational or charitable, and that the gift itself must be for such a charitable purpose within the scope of the work of the institution. In the early case, the court regarded a town hall and public library as an educational institution. Whether the town of Essex might not have been so regarded is not decided. The courts of other states, at a time when their statutes were no broader than ours, have gone that far.

The New York Court of Appeals in 1896 in the *Hamilton Case*, 42 N. E., 717, decided that a bequest to a city would not be exempted from the legacy tax under the section of the statute which declared that bequests to societies, corporations or institutions now exempted by law from taxation should not be subject to an inheritance tax. The court did not at that time have before it the question of whether such an exemption might not be made under certain circumstances in view of the fact that a municipality had educational and charitable duties to perform. When that aspect of the situation was presented to it, a different result was reached, and it was decided that a town to which a testamentary gift is made for a schoolhouse is an educational corporation within the meaning of

the inheritance tax law of New York, which exempts from such tax testamentary gifts to educational corporations. "A municipal corporation maintaining a free school system as one of its functions is clearly an educational corporation within the statutory exemption." *In re Guiteras' Est.*, 184 N. Y. S., 190; affirmed in 198 N. Y. S., 918.

"The trust created for building of a fire proof music hall in Warren, Ohio, was substantially a gift to the city for an educational purpose and the City of Warren, Ohio, was an educational corporation under the terms of the inheritance tax law of New York." *In re Packard's Est.*, 228 N. Y. S., 590.

In order that a bequest to an institution may be exempt on the grounds claimed here, it is not necessary that its duties should be limited to those embraced in the words "religious, charitable, educational or benevolent." It is unimportant that the scope of the duties of the institution include some which are not religious, charitable, educational or benevolent, provided that the donee is authorized to carry out the purpose of the gift. *In re Frasch's Will* (New York, 1927), 156 N. E., 656.

Municipal corporations may take charitable bequests unless prohibited by their charters. *In re Maynes' Estate* (Wash., 1922), 204 Pac., 596.

Under the terms of a statute in Iowa exempting from inheritance taxes bequests "to or for charitable societies or institutions," a devise of land in perpetuity to the dependent poor of a county, naming the county supervisors as trustees to receive and effect the trust, was held to be a charitable gift to the county as a charitable institution and within the exemption. The Court said, "The statutory exemption from inheritance taxes of bequests to or for charitable institutions will be liberally construed to promote the benevolent purposes of the exemption." *In re Spangler's Est.*, supra.

There being no question but that the gift of money to the Inhabitants of the Town of Berwick for the purpose of erecting a town hall is a gift for charitable use, that it is within the power of the donee to receive and administer the gift, and that the erection of a town hall is within the scope of the duties of the town, we do not hesitate to find that the Inhabitants of the Town of Berwick may

be held to constitute a charitable institution within the meaning of the exemption clause in the inheritance tax law.

In so holding we are but giving a reasonable interpretation of the obvious intent and spirit of the statute, designed as it was to encourage liberality on the part of those testators whose means permit them to indulge their generosity in the line of promoting the public good by contributing to the cause of religion, education, benevolence and charity.

Appeal sustained.
Case remanded to lower court for further proceedings.

EUGENE H. BAILEY ET AL *vs.* MAUD M. LAUGHLIN.

Lincoln. Opinion, March 22, 1932.

REFERENCE. PLEADING AND PRACTICE.

In this state a Referee has no authority to allow an amendment to the declaration except with the consent of both parties.

In the case at bar, the amendment presented to the Referee was clearly the introduction of a new cause of action. Inasmuch as the counsel did not agree as to what the amendment was to be, the Referee properly refused to allow the amendment as presented. The finding by the Referee that the triangular lot of land described in the plaintiff's writ was owned and title thereto was in the defendant, was warranted by the facts.

On exceptions by plaintiff to Referee's report. A real action to determine title to a parcel of land claimed by both plaintiff and defendant. The Referee found for the defendant. Plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Howard E. Hall,
George A. Cowan, for plaintiffs.
Weston M. Hilton, for defendant.

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

FARRINGTON, J. On exceptions to the acceptance of the report of a Referee.

Under the provisions of the statutes relating thereto, Maud M. Laughlin on May 20, 1930, brought a petition before a Justice of the Superior Court alleging that apprehension existed, as to premises in Bremen, Maine, that Eugene H. Bailey and Alice S. Bailey, described in the petition, claimed some right, title or interest adverse to the petitioner's estate so that it depreciated the market value thereof, the petition praying that the respondents show cause why they should not bring action to quiet title. In their answer the respondents claimed title to a portion of the premises described in the petition which portion was described as follows: "A triangular lot of land on the westerly end of that real estate described in plaintiff's petition, beginning at a point sixty-five feet westerly from the southeast corner bound of the parcel of land described in plaintiff's petition, and in the southerly line thereof, thence westerly eight feet to the southwest corner bound in said lot of land described in plaintiff's petition; thence northerly to the northwest corner bound of said land described in plaintiff's petition; thence southerly to the point of beginning." They disclaimed "any title or interest in the remaining portion of the premises described in said petition."

By decree dated November 14, 1930, the presiding Justice ordered the said Eugene H. Bailey and Alice S. Bailey to bring an action at law against the said Maud M. Laughlin to try title to that portion of the real estate claimed by the respondents in their answer, being the triangular piece to which reference has been made and description of which has been noted above, said action to be commenced on or before the first day of February, 1931, and to be made returnable at the term of Court next to be holden at Wiscasset in and for the County of Lincoln on the first Tuesday of May, 1931.

Following this decree and order, a real action was brought by Eugene H. Bailey and Alice S. Bailey against Maud M. Laughlin returnable, as directed, to the May term of the Lincoln County Superior Court, 1931. The one who drafted the writ without doubt had in mind to describe the triangular piece as to which the decree of November 14, 1930, *supra*, was made directing the Baileys to

try title, but note the language in which this parcel in the writ is described, viz.: "A small strip on the westerly side of the premises described in plaintiff's petition, triangular in shape, and starting from the northwest corner of land of the petitioner and running southerly by land of said petitioner to the northwest corner of land of respondent, Eugene H. Bailey; then running westerly by land of the respondents eight feet to a point in line with the north line of land of said Eugene H. Bailey's said land; thence running northeasterly to the point of beginning."

Confusion as to parties in the above quoted description is taken care of by stipulation evidently following the officer's return on the writ where we find the following:

"Bailey v. Loughlin

It is specified that the word 'plaintiff' in the declaration of the plaintiffs in the present action refers to the defendant, and that the word 'petitioner' refers to the defendant in this action; and that 'respondents' refers to the plaintiffs in this action.

(Signed) Howard E. Hall
(Signed) Geo. A. Cowan
Attys. for plaintiffs."

That part of the description in the writ as above quoted where it says "running southerly by land of said petitioner (*defendant*) to the northwest corner of land of respondent" (*plaintiff*) clearly should have been "to the southeast corner of land of respondent." Other than this the triangular piece described in the writ is clearly the same as the triangular piece to which, in the original proceedings, title was claimed by the present plaintiffs, assuming their ownership of the triangular parcel as claimed by them.

This fact must have been in the minds of counsel when, with view to having a description sufficiently clear and accurate so that no question could be afterward raised as to what it included, they agreed to the docket entry "Motion for amendment filed and allowed." This entry is the one about which the difficulty in the instant case hinges and was made a part of the case, together with other entries on later days of the term, which provided for a reference to John W. Brackett who was to report as of the May term

by agreement, with reservation of right of exceptions as to matters of law, and with right to file pleadings "after filing of amendment allowed."

In the bill of exceptions assented to by attorney for the opposing party it was stated that it was "further and orally agreed that the amendment of *petition* (clearly referring to the writ) be actually filed with the Referee, as also the pleadings."

There seems to be no room for doubt that no amendment was actually presented to the Justice presiding at the May term. From the Referee's report it appeared that on May 23, 1931, by agreement, the case came on to be heard by the Referee under the rule of reference and that a hearing was held in Bremen, Maine, parties, counsel and witnesses being present, and that the plaintiffs then for the first time presented an amendment the effect of which was to describe a different parcel from that attempted to be described in the writ in the real action brought in accordance with the decree of the presiding Justice of November 30, *supra,* the parcel described in the amendment including substantially more land than was claimed by the Baileys in their answer in the proceedings on the original petition to remove cloud from title, a portion of it being that as to which they had disclaimed. This amendment was not allowed by the Referee, and, as is disclosed by the Referee's report, the plaintiff took exceptions to such ruling and asked to have such ruling and exceptions noted and reported for further action before the Court. As further disclosed by the report received and filed at the November term, 1931, the plaintiffs objected to hearing because of the absence of the writ and it was then mutually agreed for hearing to be continued to May 27, 1931, at a place named in Damariscotta, Maine, at which time and place a full hearing was had and the Referee decided, and so reported, that the triangular lot of land as described in the plaintiff's writ was owned by and that the title thereto was in the defendant, Maud M. Laughlin, and judgment was accordingly rendered for the defendant for the "triangular lot of land so described in the writ."

The case is before this court on exceptions to the acceptance of the Referee's report as above.

While the language of the report refers to the lot as described in

the writ, it also contains in the paragraph immediately above this statement: "Your Referee finds, decides and accordingly reports that the triangular lot of land described in the plaintiffs' writ, and shown on the plan hereto attached, is owned by and the title thereto is in, the defendant, Maud M. Laughlin."

The plan referred to was made a part of the record and on that plan is clearly delineated what is called the "disputed triangle," which is beyond question the exact triangular piece as to which the sitting Justice in the Superior Court had ordered the Baileys to try title.

We are unable to see wherein the plaintiffs are in any way aggrieved by the acceptance of the report. If the amendment offered and rejected by the Referee had been actually seen by the presiding Justice at the term of reference, and this does not appear of record and both parties in argument clearly took the view that this was not the fact, it presented a new cause of action in the guise of an amendment and could not have been allowed. This amendment presented for the first time to the Referee was clearly the introduction of a new cause of action and if it could not have been allowed by the Justice presiding, it could and should not have been allowed by the Referee, who would have no authority to allow any amendment excepting with consent of both parties, or by a statutory provision which does not exist in this State.

The case is before us in a way to afford somewhat of confusion, but, believing that the finding of the Referee was with reference to the actual triangular piece of land upon which parties had been ordered to try title and that the parties went to final hearing on that basis, and that the rejected amendment was not one which could properly have been allowed in any event, we feel that the plaintiffs' rights have in no wise been prejudiced. It is perfectly evident that counsel did not agree as to what the amendment was to be, at least no further than that there should be a description sufficiently clear to warrant understanding as to the issue. We feel that the Referee properly refused to allow the amendment as presented, and that the issue was understood and that plaintiffs were not aggrieved by the refusal or by the acceptance of the report.

The entry must be, *Exceptions overruled.*

VIOLET BEAUDOIN *vs.* W. F. MAHANEY, INC.

York. Opinion, March 24, 1932.

PLEADING AND PRACTICE. MISTRIAL. MOTOR VEHICLES. NEGLIGENCE.

The discharge of a member of the panel, and the substitution of another in his place after the opening of the case, constitutes a valid ground of exceptions.

The mere fact that a jury may know that an insurance company is defending is not in itself a ground for ordering a mistrial, nor must a new trial be granted in every case where there is such knowledge.

The negligence of a prospective purchaser of an automobile, driving it for purposes of trial and unaccompanied by any representative of the owner, is not imputable to the owner of the car who has permitted him so to operate it. Control of it has been surrendered, and the relationship of principal and agent has not been established between the parties, who are rather in the respective positions of bailor and bailee.

If, however, the purchaser is accompanied by the owner or his agent, who retains the right to direct the operation of the car, negligence of the driver may be charged to the owner.

The relationship of the parties in the case at bar was a question for the jury and their finding on this point is conclusive. Likewise their determination that the driver of the car was negligent, based as it was on conflicting testimony, is binding.

The evidence relating to the injuries suffered by the plaintiff indicates that the damages awarded were grossly excessive. $2,000 the Court holds reasonable.

On general and special motion for new trial by defendant. An action on the case to recover damages for injuries sustained in an automobile collision by the plaintiff, a passenger in the automobile owned by defendant, and being driven by a prospective purchaser. Trial was had at the May term of the Superior Court for the County of York. The jury rendered a verdict for the plaintiff in the sum of $4,500. Defendant thereupon filed a special motion for new trial on the ground that the presiding Justice inadvertently made it known to the jury that the defendant carried liability insurance. A general motion for new trial was likewise filed by de-

fendant. Special motion overruled. General motion overruled if remittitur of all of the verdict in excess of $2,000 is filed within fifteen days from filing of rescript; otherwise sustained. The case fully appears in the opinion.

Lloyd P. LaFountaine,
Robert B. Seidel, for plaintiff.
Joseph R. Paquin, for defendant.

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

THAXTER, J. After a verdict for the plaintiff for $4,500 this case is before us on the defendant's general and special motions for a new trial.

The basis of the action is negligence in the operation of an automobile in which the plaintiff was a passenger. The writ alleges that the automobile was "owned, operated, controlled and managed by said defendant, through its agent, servant and employee, one John J. Casey, said automobile was then and there being driven by one Henry Berthiaume who was then and there under the control of said Casey."

The defendant corporation, which was in the automobile business, employed Casey as a salesman who, as the defendant's agent, took a Ford automobile to demonstrate it to one Henry Berthiaume. After they had driven for a time, Berthiaume suggested that he would like to show the car to the plaintiff to whom he was engaged to be married. They went to her house and she came out prepared to ride with them. With the consent of Casey, Berthiaume took the wheel and drove; and the plaintiff sat between them on the driver's seat. Berthiaume seems to have had considerable experience in driving cars, and no claim is made by the plaintiff that Casey was negligent in permitting him to drive. They were proceeding along the road between Biddeford and Kennebunk, when a collision took place with another car just as they emerged from the underpass where the tracks of the Boston and Maine Railroad cross over the highway. This was a particularly dangerous spot, as the three strip road narrowed between the abutments of the railroad bridge and there were sharp bends in the road on either side just before

reaching the bridge. It was necessary for traffic approaching from either direction to make a sharp turn to the right before passing under the railroad. The plaintiff testified that, as they proceeded toward Kennebunk and reached the curve on the Biddeford side of the bridge, Berthiaume was driving from forty to forty-five miles an hour, and that both she and Casey warned him to go slower. That he was driving so fast or that such conversation took place is denied by both Berthiaume and Casey. At any rate as they approached the bridge they saw the lights of an oncoming car, and a collision took place about fifteen feet on the Kennebunk side. The testimony of the plaintiff's witnesses, including two highway officers, supports the contention that the accident happened by reason of Berthiaume's being on his left side of the road. The evidence for the defence substantiates its claim that the collision took place because the approaching car came across the road as it rounded the turn, and struck the automobile of the defendant while it was being properly driven on its own side of the highway.

At this time our further discussion of the case will, perhaps, be clarified, if we state that the testimony relating to Berthiaume's negligence is sharply conflicting, that the determination of this issue was clearly within the province of the jury, and that we can not disturb their finding on this point.

Before considering the general motion we will dispose of the matter raised by the special one. It appears, from the testimony taken out in support of this, that the presiding Justice at the opening of the term of court at which the case was tried, gave a general charge to all of the jurymen, in which he stated that there might be cases come before them which would be defended by insurance companies, and if there were any men on the panel representing liability insurance companies, they should make that fact known. Juror Mervin T. Ford informed the Court that he was such a representative, and was told by the presiding Justice to remain in attendance and the matter would be taken care of later. After the case was opened to the jury by the plaintiff, the presiding Justice noticed that Mr. Ford was on the panel, and following a consultation at the bench, the Court excused him and another juror was substituted in his place. The contention of the defendant is that because of this

sequence of events the jury was apprised of the fact that an insurance company was defending the case, and the defendant was thereby prejudiced. Defendants' counsel claims that he had no knowledge of the preliminary remarks of the Court and contends that, because of them and that by the excusing of Mr. Ford, the jury's attention was called to the fact of insurance. Because of his ignorance of these matters he did not at that time move for a mistrial.

To a discharge of a member of the panel and the substitution of another in his place after the opening of the case, the defendant had a valid ground of exception, but this right was waived. The proceedings indicate that it was agreed that the particular juror might be excused and another substituted. The change in the panel is not, however, the basis of the defendant's motion, but that by reason of such procedure knowledge was imparted to the jury that an insurance company was defending. This Court, however, has never gone so far as to hold that the mere fact that the jury may know of insurance is in itself a reason for ordering a mistrial. If it were so, some cases could never be tried at all, because in certain instances such fact is known without intent or fault of either party. The case of *Ritchie* v. *Perry*, 129 Me. 440, relates to the improper introduction in evidence of the fact of insurance. It is not an authority for the proposition that a new trial must be granted in every case where it may appear that the jury knows that an insurance company is defending.

The special motion for a new trial must be overruled. On the general motion the only question is whether the negligence of Berthiaume, the prospective purchaser, which the jury has found, can be imputed to the defendant, the owner of the automobile. This question, in the form now presented, has not previously been before this Court.

It seems to be well settled that the negligence of a prospective purchaser of an automobile, driving it for purposes of trial and unaccompanied by any representative of the owner, is not imputable to the owner of the car who has permitted him so to operate it. Control of it has been surrendered, and the relationship of principal and agent has not been established between the parties, who

are rather in the respective positions of bailor and bailee. *Flaherty* v. *Helfont*, 123 Me., 134; *Gulf Refining Co.* v. *Ray Motor Co.*, 129 Me., 499; *Mosby* v. *Kimball*, 345 Ill., 420; *Murphy* v. *Mace*, 112 Conn., 684; *Marshall* v. *Fenton*, 107 Conn., 728; *Brooks* v. *McNutt Auto Delivery Co.*, 214 N. Y. S., 562; *Cruse-Crawford Mfg. Co.* v. *Rucker*, 220 Ala., 101.

When, however, the purchaser is accompanied by the owner or his agent, who retains the right to direct the operation of the car, negligence of the driver may be charged to the owner.

One of the earliest cases involving this state of facts is *Samson* v. *Aitchison*, 1912 A. C., 844. The owner of an automobile, demonstrating it to a lady contemplating its purchase, permitted her son to take the driver's seat, whose negligence caused an injury to the plaintiff. The Privy Council in holding the owner liable said at page 850: "The mere fact that he had asked or permitted young Collins, while he sat beside him, to drive the car is in their Lordships' view not enough to establish per se that he had abandoned control of his car. And if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury."

See to the same effect the following: *Doyon* v. *Massoline Motor Car Co.*, 98 N. J. L., 540; *Harris* v. *Boling*, 132 Okla., 17; *Opecello* v. *Meads*, 152 Md., 29; 42 C. J., 1097; Note 20, A. L. R., 194.

This Court has had an analogous question before it and has indicated the result which it would reach on the facts here presented. From the opinion in *Fuller* v. *Metcalf*, 125 Me., 77, it appears that a father permitted his daughter to use an automobile owned by his wife and himself provided the mother would go with her. While the daughter was driving, accompanied by the mother, a collision occurred. Suit was brought against the mother. In sustaining a verdict against her this Court said, page 81: "The driver of an automobile renders a constant service to those who are riding in the car. This is true notwithstanding the service is sometimes ill-performed. The driver is not the servant of the ordinary passenger

because the element of right of control is wanting. But in the passenger who is also the owner (not a bailor) acceptance of service rendered is combined with right of control and opportunity for control. Every reason for the application of the doctrine of respondeat superior is present."

See also *Kelley* v. *Thibodeau*, 120 Me., 402.

It is quite possible for the owner or his representative to surrender control of the car and still remain as a passenger therein without liability for the acts of the driver. Such a case is *Pease* v. *Montgomery*, 111 Me., 582, which is cited in *Fuller* v. *Metcalf*, supra. Under these circumstances the status of bailor and bailee exists. We think that in such a case as the present it was for the jury to determine under instructions of the Court what was the relationship between the operator of the car and the agent of the owner riding with him. If Casey had surrendered to Berthiaume the right to direct and control the management of the automobile and was a mere passenger therein, the owner was not responsible for the negligence of the driver, otherwise the defendant is liable. We can not interfere with the jury's determination of this issue.

The motion claims that the damages awarded are excessive. With this contention we agree. Dr. Lamb, who treated the plaintiff in 1930, saw her in January, 1931, four months before the trial. He testified that at that time she had some swelling of the knee joint due to an inflammation of the lining following an injury, and that it would be advisable to remove by operation the enlarged tissues which were blocking the free movement of the joint. Dr. Dolloff examined her shortly before the trial and stated that aside from complaint by her of pain in the knee, when it was moved, there was little indication of anything the matter with it. Her own testimony shows that she has walked since the accident with some inconvenience and pain and that she has intermittently done some work. For some unexplained reason Dr. Lamb was not asked to examine her at the time of the trial, and we have only the benefit of his opinion of her condition as it was when he saw her four months previously. The testimony of Dr. Dolloff and other evidence in the case indicates that in the interval she may have improved in spite of the failure to follow the treatment recommended by Dr. Lamb. Putting

the most favorable interpretation for her on the evidence, the damages awarded are grossly excessive. The Court feels that a verdict of $2,000 would be reasonable. If the plaintiff will, within fifteen days from the filing of the rescript, enter her written consent to the reduction of the verdict to $2,000, the motion for a new trial will be overruled; otherwise it will be sustained.

Special motion overruled.
General motion overruled if remittitur of all of the verdict in excess of $2,000 is filed within fifteen days from filing of rescript; otherwise sustained.

WILLARD WHITE *vs.* REMI MICHAUD AND MARY MICHAUD.

Aroostook. March 26, 1932.

MOTOR VEHICLES. NEGLIGENCE.

When it is pleaded in defense that negligence of the plaintiff is the proximate cause of his injury, the exercise of due care by plaintiff must be shown.

Negligence and contributory negligence are as a general rule questions of fact for the jury. The Court cannot say as a matter of law that there was contributory negligence on the part of the plaintiff unless it be that any other inference could not reasonably be drawn from the evidence.

The driver of a motor vehicle intending to cross the street in front of another vehicle should so watch and time the movements of the other vehicle as to reasonably insure himself of safe passage.

In the case at bar, the collision took place in a dooryard, five feet north of the northerly limit of the wrought part of the road. The jury were apparently convinced that the defendants, the only occupants of the road besides the plaintiff, were more than one hundred feet behind him when plaintiff turned, and that defendants were remiss in the operation of their car. The Court concludes their finding was a just verdict.

On general motion for new trial by defendants. An action on the case to recover damages for personal injuries sustained by plaintiff who was struck by the automobile of the defendants. Trial was had at the April term, 1931, of the Superior Court for Aroostook County. The jury rendered a verdict for the plaintiff in the sum of $5,000. A general motion for new trial was thereupon filed by defendants. Motion overruled. The case fully appears in the opinion.

A. S. Crawford, Jr., for plaintiff.

J. F. Burns,

C. F. Small,

O. L. Keyes, for defendants.

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

BARNES, J. This case came up on the general motion for a new trial, after verdict for plaintiff in the sum of $5,000.

The injuries complained of were sustained in a collision of defendants' automobile and plaintiff's motorcycle, which occurred about the width of a car within the dooryard of Mack Levesque in Fort Kent.

Plaintiff was preceding defendants down a "good gravel road," twenty-four feet wide, and his machine was hit by defendants' right forward bumper and mudguard after he had entered the dooryard, turning to his left.

There is no claim that the damages awarded are excessive, and negligence of defendants is admitted.

Contributory negligence is the defense.

The only question for the Court is whether the record displays evidence to sustain the verdict.

The accident occurred in mid-afternoon of a clear June day, on a reach of road straight for approximately a half mile in either direction, with no other occupants of the road in sight.

Though a minor, plaintiff was in his twenty-first year, a laboring man, trained in the common schools only through the sixth grade.

He lived with his parents not far westerly from the Levesque home. While defendants were calling at his home, plaintiff saw and

talked with them and proceeded easterly down the road to find his brother and return with him on his motorcycle to their work in the woods on Eagle Lake waters.

Defendants, with four passengers, in a big Buick sedan, followed him down the road at a distance of 700 to 500 feet, Remi Michaud driving, with Mary at his side.

The Levesque house stands many feet back from the road, on level ground, and between it and the road there was no ditch.

According to plaintiff's testimony, when he was 500 feet westerly of this house, he was travelling in the middle of the road at the speed of twenty-five to thirty miles an hour.

When he had run on about a hundred feet farther he looked back and saw defendants' car 500 feet in his rear.

He testified that he thrust out his left arm, ran on at the same or decreasing speed on his left-hand side of the road, heard no signal from the car behind him, turned in at the Levesque entrance, arm still in signal position, heard his sister, on the Levesque door-stoop, scream, "Look out! There's a car coming!" and, in the door-yard, five feet north of the northerly limit of the wrought part of the road was hit by the car. His machine was demolished, he was thrown thirty-eight feet eastward, suffering such fractures of one leg that it was amputated.

In all this he is corroborated by several witnesses, two of whom were sitting with his sister on the stoop that he had almost reached when he was hit.

There was testimony conflicting with his, given by defendants, three of their passengers and a woman just within her door some 400 feet westerly of the point of collision.

Defendant's testimony, if believed, would establish that plaintiff rode the last 400 feet on middle and right side of the road, came to a full stop on the right side, opposite the Levesque entrance, while defendants following sounded the car horn at 400 feet and again at fifty feet from him; that at the last signal plaintiff was crossing the middle of the road directly in front of the approaching car, and that to avoid a collision defendants turned into the dooryard, on their left, and striking the motorcycle, carried plaintiff a dozen feet on their running board, and until he rolled to the ground.

Where the motorcycle was jammed to the ground it made an indentation plainly visible next day. This mark was five feet north of the northerly margin of the road.

Next morning a traffic policeman surveyed the scene, with Remi Michaud, and from the information which the latter furnished, learned that the automobile entered the Levesque dooryard, pursued a diagonal course for fifteen feet before colliding with the motorcycle and ran on thence for seventy-five feet before being brought to a stop.

There was testimony given by more than one witness that defendant's, Remi Michaud's, breath smelled of alcohol, and one man testified that before noon on that day Remi Michaud drank "split" with him.

Mr. Michaud testified of twice applying his brakes, first near where he first sounded his horn, and again as follows: "When I saw that I was going to hit him in the middle of the road, then I turned, in other words, to clear him. The motorcycle followed the car, and as I turned, the motorcycle also turned, and then the motorcycle fell on the soft ground on the side of the road and he fell on the running board and was carried some ways, about ten or twelve feet. Then I stopped my car near the wagon — near the barn. I applied my brake and stopped the car."

Defendants' speed was given as fifty to fifty-five miles an hour.

Details as to the operation of both vehicles were fully presented to the jury. The testimony on vital points could not be reconciled. The jury found preponderance on plaintiff's side.

If they accepted Remi Michaud's statement that he did not attempt to brake his car till after the collision, they were justified in believing that he proceeded with utter disregard of the danger ahead of him.

With the testimony of defendants' speed and direction the jury may have found that the driver's control of the car was not of the degree required of a driver about to overtake and pass another traveller.

The legal rights of plaintiff are plain. No one would suggest that a traveller may not turn to enter his driveway or that of another on the left of the road as he may be riding.

The jury were to determine whether or no plaintiff exercised due care in the circumstances at the time of turning to his left.

When, as in this case, it is pleaded in defense that negligence of the plaintiff is the proximate cause of his injury, the exercise of due care by plaintiff must be shown. "It must affirmatively appear that he was himself in the use of due care. If it so appears from a full account of the circumstances attending the occurrence, whether the evidence be put in for one purpose or another, then he does affirmatively sustain the burden obligatory upon him." *Lesan* v. *Maine Cent. R. Co.*, 77 Me., 85.

"Negligence and contributory negligence are as a general rule questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty, or has observed care and caution in requisite degree, and the determination of the question involves the weighing and determining of evidence, the question must be submitted as one of fact to the jury.

The court can not say as matter of law that there was contributory negligence on the part of the plaintiff unless it be that any other inference could not reasonably be drawn from the evidence." *Rogers* v. *Forgione & Romano Co.*, 126 Me., 354.

And due care required that the driver of 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" himself of safe passage. *Fernald* v. *French*, 121 Me., 4.

If the jury were convinced that defendants, only occupants of the road besides plaintiff, were more than a hundred feet behind him when plaintiff turned, they may well have found defendants remiss in operation of the car, or regardless of consequences in continuing in a course and at a speed that took them ninety feet into the Levesque dooryard without stopping.

No emergency confronted the driver of the car, save that which he occasioned.

The duty of this Court is plain.

Interpreting the evidence, subsequent to verdict for plaintiff, in the light favorable to him, we can not conclude otherwise than that their finding is a just verdict.

Motion overruled.

PETER HILL *vs.* LYDIA LEHTINEN ALIAS LYDIA LEHTONEN.

JOHN A. HENDRICKSON

vs.

LYDIA LEHTINEN ALIAS LYDIA LEHTONEN.

MIKKO LOFMAN *vs.* LYDIA LEHTINEN ALIAS LYDIA LEHTONEN.

KNOX. Opinion, March 30, 1932.

FIRES. NEGLIGENCE. R. S. 1930, CHAPTER 35, SECTION 17.

An owner about to burn over his land for any lawful purpose must select a time and a condition of weather that to the reasonably prudent man would seem unlikely to endanger nearby properties. He must in addition exercise reasonable care in controlling the flames so that they will not do damage to others.

In the case at bar, the jury finding that the defendant selected a proper day and hour for the burning and that the number of guards and their diligence met the requirements of the statute, was justified by the facts.

On general motions for new trials by plaintiffs. Three cases tried together to recover damages for losses sustained by the plaintiffs by reason of a fire kindled on land of defendant for a lawful purpose. The jury found for the defendant in each case. General motions for new trials were thereupon filed by plaintiffs. Motions overruled. The cases fully appear in the opinion.

Gilford B. Butler,
Charles T. Smalley, for plaintiffs.
Z. M. Dwinal, for defendant.

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

BARNES, J. Three real estate owners claim damages under Section 17 of Chapter 35, R. S.

The cases were tried together. Verdict was for defendant and review here is on motions for new trial. The parties are blueberry growers, each plaintiff occupying land adjoining or near that of defendant, where, on April 19, 1931, by her servant or agent, the latter at about nine o'clock in the forenoon began the burning of her blueberry land.

This operation is necessary at intervals of two or three years. It must be done in the spring, before new verdure renders good burning impossible. What is known as a clean burn, no spots or patches being left unburned in the bearing area, is necessary in order to insure as fully as may be a profitable crop.

To secure a clean burn the ground must be fairly dry; a sufficient drift of air or breeze should be moving in one direction; and often, as on defendant's land in these cases, combustible material, as straw or hay, is lightly spread on the more barren spots of the land to be burned.

A crew to ignite and control the fires, and to prevent their spread to other lands is necessary, and in the cases at bar the crew was made up of defendant's servants and plaintiff Hendrickson, with other neighbors.

A few acres, not to exceed perhaps thirty in all, were to be burned, and, as the wind held at the time, the fires must be started on defendant's land.

Our statute, a statement of the common law, requires that one who for a lawful purpose kindles a fire on his own land, "shall do so at a suitable time and in a careful and prudent manner."

Plaintiffs claim that the time chosen for kindling the fires was not suitable, in that the wind was dangerously high, or that the crew employed to set and guard the fires was inefficient.

The burning was effected in about an hour, and at about the time it was reported checked, a barn in defendant's hayfield, up wind from each of these plaintiffs' properties where damage was later suffered, was observed to be ablaze.

Burning embers from this barn, carried by the wind, caused the conflagrations and losses complained of.

When defendant's barn burned, the wind was stronger than when

the blueberry fires were kindled, and was blowing from a slightly different quarter.

The rule of law is that an owner, about to burn blueberry land must, at his peril, select an hour that to the reasonably prudent man would seem suitable, i.e., not dangerous to nearby properties; and must exercise reasonable care in controlling the flames so that they may not do damage to others.

The testimony shows that nine men were at work during the burning; that supply of water was distant not more than 200 feet, as needed; that about half the men had water sprinklers, pails were abundant and kept filled with water.

Testimony of different witnesses varies as to the presence of wind at the setting, one witness declaring there was then no wind, the smoke going "straight up" when the fire was kindled.

It is urged that some backfire escaped unheeded by any member of the crew and was communicated along the ground to defendant's barn, but there was no record of traces of its passage through the stubble of the hayfield to the barn.

On the prime question of fact, the choice of day and hour for the burning, the jury must have found the defendant not remiss.

Their decision that the number of guards and their diligence met the requirements of the statute was wholly on the facts found by them.

Nothing in the record gives occasion for rejecting the verdicts.

Motions overruled.

L. V. THIBODEAU, AS TRUSTEE IN BANKRUPTCY OF THEODORE LANGLAIS

vs.

THEODORE LANGLAIS, JULIE LANGLAIS, FLAVIE LANGLAIS, AND FLAVIE LANGLAIS AS LEGATEE UNDER THE WILL OF JOSEPH LANGLAIS.

Aroostook. Opinion, April 8, 1932.

FRAUDULENT CONVEYANCES.

Fraud is never to be presumed. It must always be proved. Fraud is not to be lightly assumed to exist but must be proved by trustworthy evidence consistent with undisputed circumstances.

To sustain an allegation of fraud, there must be more than surmise or conjecture which can not stand as substitutes for proof.

It is not enough that the relationship of the parties and the circumstances and surroundings involved are such as might tend to arouse suspicion. The burden is upon the defendant to establish the alleged fraud by clear and convincing proof.

In the case at bar, the Court holds that the evidence, as disclosed by the record, would not warrant a finding, which of necessity must be the basis of a decree, that there was fraudulent conduct on the part of the defendants.

On appeal from the decree of a sitting Justice in a Bill in Equity alleging a corrupt plan and purpose on the part of the defendants in placing property beyond the reach of creditors.

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

R. W. Shaw, for plaintiff.

John B. Pelletier,

Harry C. McManus, for defendants.

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

FARRINGTON, J. The case is before this Court on appeal from the decree of the sitting Justice on a bill in equity dated August 16, 1930, brought by L. V. Thibodeau, Trustee in Bankruptcy, of Theodore Langlais against the said Theodore, his wife, Julie, and his mother, Flavie Langlais, individually and as legatee under the will of Joseph Langlais, deceased father of the bankrupt.

From allegations in the bill admitted in the answer the following narrative of events may be assumed as true. On October 27, 1915, Flavie Langlais and Joseph Langlais, husband and wife, conveyed by warranty deed to their son, Theodore Langlais, certain land and buildings in Hamlin Plantation, described as part of Lot No. 321 in Township G, First Range of Townships, W. E. L. S., Aroostook County, including a separately described triangular parcel, and constituting the homestead farm.

On the same day, Theodore, his wife Julie joining in the deed, mortgaged the same premises to Joseph and Flavie (the consideration being named as $1,500) to secure their support and maintenance as long as they or either of them lived, together with certain other correlated obligations. The deed, and the mortgage containing a one year redemption clause, were recorded October 28, 1915.

Joseph Langlais and Flavie Langlais, claiming a breach of its conditions, began foreclosure of this mortgage by notice dated January 23, 1924, duly published, and seasonably recorded. No question is raised as to the technical validity of the foreclosure by virtue of which the record title again vested in Joseph and Flavie on January 30, 1925.

On May 28, 1928, Joseph and Flavie by warranty deed conveyed the same premises to Julie, wife of Theodore Langlais, who was the grantee in the original conveyance of October 27, 1915. It may be noted that this deed did not cover the triangular piece mentioned in the deed to Theodore.

On the same day, Julie, her husband joining in the deed, mortgaged the same premises to the same Joseph and Flavie to secure their support and maintenance on the premises as long as they lived.

The record does not disclose the date of death of Joseph but it is clear that it occurred some months before Theodore was adjudicated bankrupt on November 27, 1929.

Under the seventh paragraph of the bill it was alleged that there was not any breach of the conditions of the mortgage of October 27, 1915, and that Theodore and his wife conspired with Joseph and Flavie "to change the title of the said real estate named in said mortgage from the said Theodore Langlais to his wife Julie Langlais in contemplation of bankruptcy and with a corrupt plan and purpose to place his said Theodore Langlais's interest in said real estate beyond the reach of his creditors, which purpose he tried to carry out by the foreclosure proceedings named and set forth in paragraph six of this bill, and did thereby unlawfully, fraudulently and corruptly put his property beyond the reach of creditors."

On this phase of the case the sitting Justice, without any direct findings of fact, decreed that the foreclosure proceedings were null and void and that title to the land covered by the foreclosure was in Theodore Langlais on November 27, 1929, the date of adjudication of bankruptcy, and that the same passed to his Trustee in Bankruptcy. As to this real estate the decree did not order any conveyance or releases by the respondents to the Trustee.

Fraud is never to be presumed. It must always be proved. *Grant* v. *Ward*, 64 Me., 239; *Frost et als* v. *Walls et al*, 93 Me., 405, 412.

"While fraud when proved vitiates any contract or settlement, it is not to be lightly assumed to exist but must be proved by trustworthy evidence consistent with undisputed circumstances." *Valley* v. *B. & M. Railroad Co.*, 103 Me., 106, 112.

To sustain an allegation of fraud there must be more than surmise or conjecture which can not of themselves stand as substitutes for proof. *Averill, Admr.* v. *Cone*, 129 Me., 9; *Adams et als* v. *Ketchum et als*, 129 Me., 212; *Titcomb* v. *Powers, Executrix*, 108 Me., 347; *McTaggart, Admx.* v. *Maine Central Railroad Company*, 100 Me., 223.

While the relationship of the parties and the circumstances and surroundings involved in the case at bar were such as, taken together, might have tended to arouse suspicion, we do not regard the

situation disclosed by the record as one which took it beyond the rule as to suspicion, surmise and conjecture.

"The burden of proof, to establish the alleged fraud, is upon the defendant (*the one claiming fraud*) and it is not sufficient to raise suspicions." *Bartlett* v. *Blake*, 37 Me., 124, 127.

In *Strout* v. *Lewis, Admx.*, 104 Me., 65, which involved a question of fraud, the Court said: "The charge is a serious one and the law imposes upon the defendant (*the one claiming fraud*) the burden of substantiating it by clear and convincing proof."

The record of the case was brief, and, after careful reading and rereading of the same, we find no evidence which, in our opinion, warranted a finding, which of necessity was the basis of the above decree, that there was fraud and conspiracy. The burden of substantiating their existence under the rule above given has not been sustained, nor do we regard the record as justifying an inference of their existence.

We find that, by virtue of the foreclosure, title to the property in question vested in Joseph Langlais and Flavie Langlais on January 30, 1925, and that the title, never having been again acquired by the bankrupt, was not in his Trustee on November 27, 1929, but that, with the exception of the triangular piece, it was on that date in Julie Langlais, subject to the support mortgage hereinbefore noted. The title of the triangular parcel, having been excepted in the deed to Julie Langlais, can be easily traced, and it never again came back to Theodore.

Having considered the situation with reference to the property covered by the aforesaid deed to Theodore, the record shows that on December 11, 1918, he purchased from one Pea R. Cyr a fifty-three acre parcel of land in said Hamlin Plantation, Township G, Range 1, W. E. L. S., being part of Lot No. 3.

On September 19, 1923, he mortgaged this parcel to Remi P. Cyr and Levitte Ayotte for $8,000, together with the homestead farm. The support mortgage to the father and mother was not mentioned in this mortgage to Cyr and Ayotte, which was conditioned on Theodore saving them harmless on account of a bond signed by them on criminal recognizances to release Theodore from arrest and also to release certain personal property from attachment.

On January 24, 1925, this mortgage was assigned to The First National Bank of Van Buren "for a valuable consideration," and by it assigned on January 7, 1926, to Joseph Langlais. As to this mortgage, it is alleged in the bill and admitted in the answer that Joseph Langlais "never put any money into said mortgage." There being no discharge of record, the sitting Justice decreed that "For the purpose of carrying out the final provisions of this decree, the mortgage given by said Theodore Langlais and his wife, as recorded in Vol. 108 Page 214, set forth in paragraph four of the plaintiff's bill, be and hereby is declared to be paid in full and the personal representatives of the said Joseph Langlais, deceased, are hereby ordered to discharge the same of record." As far as counsel were concerned, there appeared to be no question as to this part of the decree, but it would be well to remove a slight but apparent confusion as to volume and page of record.

On November 5, 1923, Theodore and Julie mortgaged to The First National Bank of Van Buren for $950, covering the same fifty-three acre parcel above mentioned and also the homestead farm, reference being made to the incumbrance in favor of Joseph Langlais, and to one other not important in this case. The bill in paragraph seventeen alleged that this mortgage had been paid by Theodore Langlais and that it should be discharged of record, and this was admitted in the answer, which also states that "said mortgage and assignment have been lost and can not be found although a diligent search has been made." The record does not show any assignment to anyone. If there had been in fact such assignment to Joseph, that part of the decree which ordered his personal representatives to discharge it, was proper and should be enforced. If in fact there was no assignment, the Bank still owned the mortgage, and, not being made a party to the bill, no decree, if made, could be effective against it. The answer at least made it clear that no rights under that mortgage were claimed by the respondents.

On January 24, 1925, Theodore, his wife joining, gave another mortgage to Remi P. Cyr and Levitte Ayotte. This time the mortgage was for $1,500 and covered the same fifty-three acre parcel and the same land, including the triangular piece, covered by the mortgage of October 27, 1915, which was foreclosed, and title to

which revested in Joseph Langlais, January 30, 1925, six days later than the date of the above mortgage, which was conditioned on the payment by Theodore and his wife of two notes held by The First National Bank of Van Buren and endorsed by the mortgagees, one for $1,000 and one for $425, and so save them harmless as to costs.

On the same day, the mortgage was assigned to the bank where the notes were held and was assigned by the bank to Joseph Langlais January 7, 1926.

As to this mortgage, the bill alleged that it had been paid "by the property and funds of the said Theodore Langlais and that said Joseph Langlais never paid the same nor any part thereof." The paragraph containing this allegation, which is quoted only in part, was denied in the answer of the respondents and was one of the issues in the case.

Referring to this mortgage, the decree was that it was "found to be paid out of the funds and property of the said Theodore Langlais and that the same be discharged of record by the personal representatives of Joseph Langlais, deceased, especially as far as it relates to the property described in paragraph three of the decree, said mortgage being recorded in Vol. 104, Page 226." Paragraph three related to the fifty-three acre parcel which was acquired by Theodore, December 11, 1918, as above noted and which was not covered by the foreclosure. On the issue raised as to this mortgage, we are unable to find any evidence supporting the claim that when it was assigned to Joseph Langlais the money was paid from funds of the bankrupt. A careful reading of the record forces us to the conclusion that, while it may have afforded ground for surmise and suspicion, it did not warrant the finding and decree as noted above. Admissions in the answer of respondents made it unnecessary to consider the record as to who paid the mortgages of September 23, 1923, and November 5, 1923. Had it not been for these admissions we might have been forced, on the record before us, to the same conclusion which we have reached as to the mortgage now under consideration.

The third paragraph of the decree, without any finding of fact, declared the deed from Joseph Langlais and Flavie Langlais to

Julie, wife of Theodore, to be "null and void" as far as it related to the fifty-three acre piece to which reference has already been made. An examination of the copy of this deed which is a part of the record before this Court reveals the fact that this parcel was not included or mentioned in it. It conveyed only the real estate foreclosed as hereinbefore indicated, with the specific exception of the triangular parcel. This part of the decree was, therefore, of no effect as there was nothing upon which it could operate. Furthermore, we find no evidence in the case which satisfies us that there was any fraud or conspiracy on the part of Theodore, Joseph, Flavie or Julie Langlais in connection with the deed and mortgage of May 28, 1928. It is true that this part of the decree covered only the fifty-three acre parcel, and made no reference to any part of the original homestead farm but we feel that the evidence, in any event, would not warrant a decree that the deed was null and void in respect to any land conveyed by it.

The sixth and last paragraph of the decree was that the title to the fifty-three acre parcel was in the Trustee and that Theodore, Julie, his wife, Flavie Langlais, the mother, and as legatee under the will of Joseph, should "make, execute and deliver to said Trustee in Bankruptcy all necessary deeds, discharges and releases to ratify and confirm the title of the said Trustee in Bankruptcy in and to said property, so that the said Trustee in Bankruptcy can convey the same to any purchaser free from any liens or claims of the said defendants or either of them."

The title to the fifty-three acre parcel was unquestionably in the Trustee in Bankruptcy on November 27, 1929, but he took it subject to the mortgage of January 24, 1925, held, as far as the record shows, at the time of his death by Joseph Langlais under the assignment above noted. When and if the Trustee in Bankruptcy shall have paid the mortgage, the personal representative of Joseph Langlais would be under the duty of executing a proper discharge.

The entry must be,

Appeal sustained.
Decree in accordance with this opinion.

FRANCES EDDY ET AL *vs.* EMILY PINDER.

Cumberland. Opinion, April 2, 1932.

DEEDS. DELIVERY.

Delivery of a deed to a third person by the grantor, to be held until the grantor's death and then to be delivered by the third person to the grantee, may under certain circumstances be sufficient to pass title. Such an arrangement differs from an escrow in the fact that a delivery in escrow is dependent upon the happening of some event and not upon the lapse of time.

Whether putting a deed into a third person's hands is a present delivery or an escrow depends upon the intent of the parties. If the delivery depends upon the performance of a condition, it is an escrow; otherwise it is a present grant though it be to wait the lapse of time or the happening of an event. If it is to be delivered at the grantor's death, it is a present deed and a quitclaim by the grantee, intermediate, would pass his estate.

Delivery to a third person, to be delivered to the grantee after grantor's death, without any reservation by the grantor of a right to recall it, is sufficient in law and effects a complete transfer of the title to the property and such delivery may be sufficient although no prior authority has been given by the grantee to receive the deed if the grantee subsequently assents.

But to constitute delivery, the grantor must part with the possession of the deed and the right to recall. It must pass beyond the control or dominion of the grantor. He can not transfer his property after his decease by deed. The statute of wills or of descent governs all property not disposed of during the lifetime of the owner. So far as the grantor is concerned, acts or words, either or both, whereby he in his lifetime parts with all right of possession and dominion over the instrument with the intent that it shall take effect as his deed and pass to the grantee, constitute delivery of a deed and nothing less will suffice.

To make the delivery good and effective, the power of dominion over the deed must be parted with. Until then the instrument passes nothing and gives no title. It is nothing more than a will defectively executed and void under the statute. So long as it is in the hands of a depository subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none, and if the grantor dies without parting with his control over the deed, it has not been delivered during his lifetime and after his decease no one can have the power to deliver it.

Whether or not delivery to a third person is absolute and irrevocable, or qualified and revocable, depends in the first instance upon the intention of the grantor, and is to be gleaned from his words and acts at the time, the attendant circumstances, and his subsequent conduct.

While the possession and production of a deed by the grantee is prima facie *evidence of its having been delivered, when it is ascertained that the possession was acquired after the grantor's death the presumption disappears.*

The possession and production of a deed by the grantee is prima facie *evidence of delivery, but the presumption is the other way where it remained in the possession of the grantor during his lifetime though it has been recorded since his death.*

The delivery is good only when the grantor parts with all dominion over the deed, reserving no right to recall it or alter its provisions. On such delivery title passes immediately to the grantee, the right of possession and enjoyment being delayed. The situation of the parties is exactly as though grantee had received her deed and grantor had received from her a life lease of the property.

The evidence must show that the owner intended to divest himself of the right to withdraw, revoke or control the instrument as completely as though he were delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention.

The fact that the grantor handed a deed to the depositary, with instructions to the latter to keep the same and give it to the grantee when he (grantor) was dead, which instructions were followed by the depositary, would not alone necessarily lead to the conclusion that it was the intention of the grantor to vest a present title in the grantee.

The record in the case at bar contains nothing in the way of words or acts which indicates even in the slightest degree an intention on the part of the grantor to make an irrevocable conveyance on the day the deed was executed. No effective delivery of the instrument having been shown, defendant took no title to the property. Plaintiffs were entitled to relief prayed for.

On report. A Bill in Equity to remove cloud from title to certain real estate. Bill sustained. The case fully appears in the opinion.

Ralph O. Brewster, for plaintiffs.

Frank M. Libby, for defendant.

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

PATTANGALL, C. J. On report. Bill in Equity brought by the heirs of Hiram E. Eddy to remove a cloud from title to certain real estate of which it is alleged he died possessed.

Mr. Eddy died intestate on March 1, 1929. After his death a deed executed by him on June 9, 1924, purporting to convey to defendant the property in question, was duly recorded. The bill alleged that the deed was procured by fraud, but no evidence was offered which even tended to substantiate that allegation. The case was tried and argued on the issue of whether or not the deed was void for want of delivery.

The record shows that the deed was prepared by an attorney at law who had represented Mr. Eddy in the settlement of his wife's estate and after having been executed was deposited with the attorney with instructions to deliver it to defendant after the grantor's death. These directions were followed.

There is no question of escrow involved here. "An escrow is a deed delivered to a stranger to be delivered by him to the grantee upon the performance of some condition or the happening of some contingency." *Hubbard* v. *Greely*, 84 Me., 348.

Delivery of a deed to a third person by the grantor, to be held until the grantor's death and then to be delivered by the third person to the grantee, may under certain circumstances be sufficient to pass title. Such an arrangement differs from an escrow in the fact that a delivery in escrow is dependent upon the happening of some event and not upon the lapse of time. *1 Devl. Deeds*, Sec. 280.

"Whether putting a deed into a third person's hands is a present delivery or an escrow depends upon the intent of the parties. If the delivery depends upon the performance of a condition, it is an escrow; otherwise it is a present grant though it be to wait the lapse of time or happening of an event. If it is to be delivered at the grantor's death, it is a present deed and a quitclaim by the grantee, intermediate, would pass his estate." *Washburn on Real Property*, Fifth Edition, Vol. 3, Pages 319, 320.

Delivery to a third person to be delivered to the grantee after grantor's death, without any reservation by the grantor of a right to recall it, is sufficient in law and effects a complete transfer of the title to the property, and such delivery may be sufficient although

no prior authority has been given by the grantee to receive the deed if the grantee subsequently assents. *Tripp* v. *McCurdy*, 121 Me., 196.

But to constitute delivery, the grantor must part with the possession of the deed and the right to recall. "It must pass beyond the control or dominion of the grantor. He can not transfer his property after his decease by deed. The statute of wills or of descent governs all property not disposed of during the lifetime of the owner. So far as the grantor is concerned, acts or words, either or both, whereby he in his lifetime parts with all right of possession and dominion over the instrument with the intent that it shall take effect as his deed and pass to the grantee, constitute delivery of a deed and nothing less will suffice." *Brown* v. *Brown*, 66 Me., 321.

"To make the delivery good and effective, the power of dominion over the deed must be parted with. Until then the instrument passes nothing and gives no title. It is nothing more than a will defectively executed and void under the statute. So long as it is in the hands of a depositary subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none, and if the grantor dies without parting with his control over the deed, it has not been delivered during his lifetime and after his decease no one can have the power to deliver it." *Shed* v. *Shed*, 3 N. H., 432.

"Whether or not delivery to a third person is absolute and irrevocable, or qualified and revocable, depends in the first instance upon the intention of the grantor, and is to be gleaned from his words and acts at the time, the attendant circumstances, and his subsequent conduct." *Tripp* v. *McCurdy*, supra.

The instant case is singularly bare of evidence from which any inference as to the intent of the grantor can be drawn. The record shows nothing more than the execution of the deed, the delivery to one who had at one time acted as attorney for the grantor in his capacity as administrator, who drew up the deed at grantor's request, and the instruction to deliver it to defendant at grantor's death.

If the depositary is assumed from these circumstances to be the agent or attorney of grantor, there was no delivery. The possession of the deed by the agent would be possession by the principal, and

the agent's authority to deliver the deed would cease at the death of the principal; but the decision of this case need not and does not rest on the narrow ground of such an assumption.

While the possession and production of a deed by the grantee is *prima facie* evidence of its having been delivered, *Eagan* v. *Horrigan*, 96 Me., 51, when it is ascertained that the possession was acquired after the grantor's death, the presumption disappears.

"The possession and production of a deed by the grantee is *prima facie* evidence of delivery, but the presumption is the other way where it remained in the possession of the grantor during his lifetime though it has been recorded since his death.

"A deed intended by the grantor to take effect only as a testamentary disposition of his property and retained by him in his own possession without delivery until his decease passes no title from him to the grantees named in it." *Patterson* v. *Snell*, 67 Me., 560. And the same is true if it was in the possession either of grantor's agent or attorney or some third person from whom he might demand its return at any time that he desired.

The delivery is good only when the grantor parts with all dominion over the deed, reserving no right to recall it or alter its provisions. On such delivery title passes immediately to the grantee, the right of possession and enjoyment being delayed. The situation of the parties is exactly as though grantee had received her deed and grantor had received from her a life lease of the property. *Kirby* v. *Hulette*, 174 Ky., 257, 192 S. W., 63.

Such a method of disposing of real property being in contravention of the law governing testamentary devises, and the fact that irrevocable delivery of the deed prevents the grantor, regardless of changed conditions, from availing himself of what might be a valuable asset in time of need, or in the event of changed relations between himself and his grantee, altering in any way the conveyance which he has made or the terms thereof, to constitute effective delivery it must clearly appear that the grantor's intention was that the deed should presently become operative and that he intended to divest himself of all control over the deed. *Linn* v. *Linn*, 261 Ill., 606, 104 N. E., 229; *Johnson et al* v. *Fleming*, 301 Ill., 139, 133 N. E., 667; *Fine* v. *Lasater*, 110 Ark., 425, 161 S. W., 1147.

"Unless therefore we are able to discover from this record that the grantor absolutely parted with all control over the deed and intended it to operate as a present conveyance subject to his life interest, we must adjudge the instrument void for want of delivery." *Arnegaard* v. *Arnegaard*, 7 N. D., 475, 75 N. W., 797, 804.

"The evidence must show that the owner intended to divest himself of the right to withdraw, revoke, or control the instrument as completely as though he were delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention." *Saltzsieder v. Saltzsieder*, 219 N. Y., 523, 114 N. E., 856.

"The fact that the grantor handed a deed to the depositary, with instructions to the latter to keep the same and give it to the grantee when he (grantor) was dead, which instructions were followed by the depositary, would not alone necessarily lead to the conclusion that it was the intention of the grantor to vest a present title in the grantee." *Williams* v. *Kidd*, 170 Cal., 631, 151 Pac., 1.

The record in the instant case contains nothing in the way of words or acts which indicates even in the slightest degree an intention on the part of the grantor to make an irrevocable conveyance of the property in question on the day the deed was executed. On the contrary, the fact that so far as the record shows, no one knew of the transaction excepting the grantor and one who had acted for him as counsel, with whom the deed was left; that the effect of an irrevocable transfer was not explained to the grantor; that nothing was said by him excepting merely to give directions as to the delivery of the deed after his death, lead to the conclusion that the grantor was attempting to do by means of a deed that which could only be accomplished through the medium of a will. No effective delivery of the instrument having been shown, defendant takes no title to the property. Plaintiffs are entitled to the relief prayed for.

Bill sustained.
Decree accordingly.

MARIE CHAPUT PRO AMI *vs.* ADELARD LUSSIER.

ANNA CHAPUT *vs.* ADELARD LUSSIER.

Androscoggin. Opinion, April 13, 1932.

PLEADING AND PRACTICE. MOTOR VEHICLES. NEGLIGENCE.

MASTER AND SERVANT.

Exceptions lie to the acceptance of a report of Referees when any issue included in the submission is left undecided.

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 was 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.

In the cases at bar, inasmuch as the Referees failed to pass upon and decide issues involving negligence on the part of the defendant's employee, the cases go back to the lower court to be there disposed of, either by recommittal to Referees or by new reference or to be tried in usual course.

On exceptions by plaintiff. Actions on the case to recover damages for personal injuries resulting from the negligent operation of the defendant's taxicab by a person invited and permitted to drive by the defendant's servant and agent. The cases were heard by Referees who found in each case for the defendant. Exceptions were seasonably reserved under Rule 21, Rules of Court.

Exceptions were likewise taken to the acceptance and approval of the report. Exceptions sustained. The cases fully appear in the opinion.

Clifford & Clifford,
Frank T. Powers,
John Marshall, for plaintiffs.
Berman & Berman, for defendant.

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

PATTANGALL, C. J. On exceptions. Actions for damages alleged to have been suffered by reason of the negligence of the servant of defendant in driving a public taxicab owned by defendant and operated in his business.

The cases were heard together by Referees who found for defendant in both. Objection was seasonably made to the acceptance of the Referees' reports and written reasons for objection were filed in accordance with Rule 21, Revised Rules of Supreme Judicial and Superior Courts, 129 Me., 511. The reports were accepted and exceptions filed and allowed.

The facts are these. At the time plaintiffs sustained the injuries of which they complain, defendant was engaged in carrying on a public taxi business. Plaintiffs were passengers for hire. One Gagne was the regular driver of the particular cab in which they were riding and was engaged to carry plaintiffs, together with their father and one Lucien, from the home of plaintiffs to a town some miles distant therefrom. Although Gagne had received explicit orders from defendant not to permit anyone else to drive the car, he surrendered the wheel to Lucien, who appears to have been an experienced driver, and took his place on the rear seat with one of the plaintiffs and her father, the other plaintiff occupying the front seat with Lucien.

After having driven a considerable distance, a collision occurred between the taxi and an approaching automobile under circumstances which the Referees found supported plaintiffs' claim of negligence on the part of the driver of the taxi.

The Referees also found that plaintiffs received injuries because of the collision and that they were not guilty of contributory negligence but, finding that Lucien "was not the agent or servant of defendant," their decision was in defendant's favor. So far as Gagne was concerned, they found that at the time of the accident he was riding on the rear seat "but did not in any way attempt to control the actual operation of the car." They neither considered nor passed upon the vital question of whether or not he was guilty of

negligence. If he was, and that negligence was the proximate cause of the accident, there could be no doubt as to defendant's liability.

Exceptions lie to the acceptance of a report of Referees when any issue included in the submission is left undecided. *Wyman* v. *Hammond*, 55 Me., 534; *Jonah* v. *Clark*, 111 Me., 142; *Kennebec Housing Co.* v. *Barton*, 122 Me., 374; *Fuller* v. *Wright*, 10 Vt., 512; *Pinsker* v. *Pinsker*, 60 N. Y. Supp., 902; *Heckers* v. *Fowler*, 69 U. S., 123.

In the instant cases, rights of exceptions to the findings of the Referees on matters of law were specifically reserved in accordance with Rule 42, Rules of Court, *supra*. This rule is a revival of one long in force in this state but at one time repealed and recently re-adopted. The rights of parties under it and the procedure to enforce them are quite fully discussed in *Inhabitants of Bucksport* v. *Buck*, 89 Me., 320. We are not particularly concerned, however, with these matters in these cases. Irrespective of Rule 42, plaintiffs here have brought themselves within the broader rule recognized in *Wyman* v. *Hammond*, supra, and cases cited therewith.

Whether or not the failure of the Referees to pass on the negligence of Gagne was occasioned by a misunderstanding of the law applicable to the cases is unimportant. In any event they did not pass on it and plaintiffs relied upon it as the basis of their actions. If there was any evidence tending to support their position, they had a right to have the issue decided.

It can not be said that there is no such evidence. We have already noted that the Referees found that Gagne, at the time of the accident, was riding on the rear seat of the car and that he made no attempt to direct or control its operation. Whether or not this connotes negligence on his part depends upon the circumstances.

This Court has recently held in *Copp* v. *Paradis*, 130 Me., 464, 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 incompetent, is a proximate cause of the damage complained of, the employer is liable although the assistant's neg-

ligence in the presence of the employee and in combination with his negligence contributed proximately to the accident."

Plaintiffs contend that there is sufficient evidence in this record to prove (1) negligence on the part of the person to whom Gagne entrusted the driving of the car, (2) that such negligence could not but have been apparent to Gagne, (3) that Gagne had opportunity by advice and direction to prevent the negligence from continuing to the point where it resulted in injury to plaintiffs, (4) that it was his duty to do so and that failing to perform that duty he was guilty of negligence, (5) that Lucien's negligence and Gagne's negligence combined was the proximate cause of the collision in which they were injured, and (6) that these premises established, a verdict in their favor must follow.

We are not concerned with the questions of fact further than to ascertain that there is sufficient evidence in their support to warrant their consideration, and on that point there can be no argument.

The Court erred in accepting the reports of the Referees. The cases must go back and be disposed of in accordance with the rule laid down in *Clark* v. *Clark*, 111 Me., 416. The Court below may, in its discretion, strike off the references, it may recommit them to the Referees who heard them before; or, with the consent of the parties, it may, after these references are stricken off, refer them anew to other Referees.

Exceptions sustained.

ISAAC C. ELSTON, JR., ET ALS *vs.* ELSTON AND COMPANY

Cumberland. Opinion, April 13, 1932.

EQUITY. CORPORATIONS. FRAUD. PLEADING AND PRACTICE.

It is within the discretionary power of the Equity Court to grant leave to intervene after final decree although such action is unusual.

Leave should only be granted at such a stage of the proceedings when the interest of the intervenor is direct and immediate, when justice may not otherwise be done, or when it is necessary to take such action to preserve some right which can not be protected by any other course of procedure.

An order dissolving a corporation may be set aside when it appears that the decree was obtained by fraud or when it is in the interest of substantial justice to do so.

To hold any different doctrine than that a Court in Equity, misled by the fraud of one party into entering a decree, final or otherwise, which worked injury to another, could when apprised of the fact, annul its decree and in so far as possible correct the wrong, would violate every principle not only of equity but of common honesty. If fraud once having gained a temporary advantage must retain it permanently, courts would so fail of their purpose as to merit contempt.

Laches can not be predicated on passage of time alone. There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. The cases on laches proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum.

In the case at bar, the Court holds that upon the evidence it is impossible to escape the conclusion that in obtaining the decree of dissolution of the corporation, a fraud was practiced on the Maine court, and that intervenor chose the only appropriate method of procedure to remedy the situation. There were no laches on the part of the intervenor. The intervenor acted promptly as soon as it learned the true facts. If it slept on its rights, it was lulled to sleep by the attitude taken by appellants. The record shows that after the service of the writ in which intervenor was plaintiff and Elston and Company defendant, the latter corporation entered an appearance and in lieu of pleading its dissolution employed counsel and participated in resisting judgment for seven years. In-

tervenor was justified in believing that Elston and Company was still in existence even though its physical assets had been sold to another defendant and it had ceased to function as a business concern.

Appeal from decree of a sitting Justice in a Bill in Equity granting the prayer of the intervening petition of Twohy Brothers Company by setting aside and declaring null and void, as of the date of its entry, the decree of the Maine court entered in 1924 dissolving Elston and Company, a Maine corporation. Appeal dismissed. Case remanded to court below for further proceedings. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives,
Skelton & Mahon, for complainant.
Donald W. Philbrick, for Elston & Company.
Cook, Hutchinson, Pierce & Connell,
Doherty, Rumble, Bunn & Butler,
Kirkland, Fleming, Green & Martin, for intervening petitioner.

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

PATTANGALL, C. J. Equity. On appeal. Cause heard below on intervening petition of Twohy Brothers Company and answer thereto.

The facts found by the sitting Justice and about which there seems to be no dispute are as follows:

> "August 18, 1924, a bill in equity was filed in accordance with the provisions of Sec. 89, Ch. 51, Rev. Stat. 1916, as amended, for the dissolution of the defendant corporation. The bill was brought by all of the stockholders of the corporation which included the president and the treasurer, but it appears by the bill that Isaac Elston, Jr., the president, had assignments from the others of all of their stock interest. The bill alleged under oath that 'there are no existing liabilities against the corporation of any kind or character whatsoever.' The prayer was that the corporation be dissolved and its assets be distributed to Isaac Elston, Jr., who held all of the

capital stock either as registered owner or by assignment. An answer signed by the clerk was filed admitting all of the allegations of the bill, and accompanying it was an affidavit from the treasurer listing the assets and setting forth the fact that there were no liabilities. September 3, 1924, after a hearing on bill and answer, a decree was filed which found as a fact that there were no liabilities and ordered the dissolution of the corporation as prayed for. Such proceedings were had without further notice to anyone. A trustee was appointed who was ordered to transfer the assets to Isaac C. Elston, Jr. The trustee performed his duties and was discharged October 22, 1924.

It now appears that on July 12, 1924, over a month before the filing of the bill for dissolution the corporation in question together with a number of other defendants was sued in the District Court of the United States for the Northern District of Illinois, Eastern Division, by the intervening petitioner herein. July 22, 1924, Isaac Elston, Jr., the principal plaintiff in the bill for dissolution, was served with the papers in such suit, in which damages were claimed in the sum of $250,000. An appearance was entered and the corporation, even after its dissolution, took part in the defense of the action and in the trial thereof which was held in the summer of 1931. August 18, 1931, a verdict for the plaintiff was returned in the sum of $275,000. The intervening petition now before this court alleges that as a bar to the judgment on such verdict there is reason to believe that the decree dissolving the defendant corporation is about to be set up, and prays that the decree of dissolution may be set aside, and declared null and void and of no effect. No question is raised as to the propriety of the decree of dissolution except in so far as its validity is affected by the erroneous allegations in the original bill with respect to the nonexistence of liabilities of the defendant."

These facts being determined, the following decree was made:

"This cause came on to be heard on January 14, 1932, on the Intervening Petition of Twohy Brothers Company and the Answer thereto of Isaac C. Elston, Jr., Joseph N. McCallum,

Harlow W. Brown and Herbert I. Markham, and was argued by counsel and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED and DECREED that the decree dissolving the defendant corporation, said Elston & Company, heretofore entered in this Court on September 3, 1924, be and the same hereby is vacated and declared null and void as of September 3, 1924, the said date of its entry."

The case comes forward on appeal from this decree by plaintiffs in the original case, who answer the intervening petition as respondents thereto.

The record shows that not only did plaintiffs in the original bill, comprising all of the officers, directors and stockholders of the defendant corporation, make oath that it had no existing liabilities but that the corporation in its answer admitted the truth of the statement but that in the course of the proceedings defendant's treasurer filed a separate sworn statement that "he was familiar with all the financial affairs and transactions of said Elston and Company and that said Elston and Company has no debts or liabilities of any kind or character whatsoever."

The case was presented to the Court by Maine attorneys of unquestioned integrity, who were wholly unaware of the falsity of these statements; and the presiding Justice accepted them at their face value.

A decree dissolving the corporation, "it having appeared to the Court that the allegations in the bill are true" and "it having appeared to the Court that the corporation has no liabilities," was filed on September 3, 1924. In the same decree a trustee was appointed who was ordered to deliver the assets of the corporation, valued in excess of $500,000 to Isaac C. Elston, Jr. The trustee having complied with the order of the Court and so reported, a decree was filed on October 22, 1924, accepting his report, discharging him as trustee, and containing this paragraph: "3. This bill is retained for further proceedings if necessary." Because of this last provision, the bill still stands on the docket of the equity court in the county in which it was entered.

The basis of the decree from which this appeal is taken is that the original decree for dissolution was procured by fraud. Appellants admit the facts stated but deny the imputation of fraud. In their brief they assert that there was no "intentional withholding of information from the Court" and that the failure to correctly inform the Court as to the real situation was "wholly inadvertent" and was due to Mr. Elston's "misunderstanding or misconception of the legal effect of the assumption by another corporation of the liabilities of Elston and Company."

If it were possible to do so, we would be only too pleased to adopt this charitable view of the misrepresentations made by plaintiffs to the Court in the original case; but it would strain our credulity to assume that experienced business men believed it to be a matter of no importance that the corporation of which they were officers had been made defendant in a case involving a quarter of a million dollars or that they seriously believed that the agreement on the part of another to assume the liabilities of the corporation released it until and unless the arrangement had been acceded to by its creditors.

Counsel engaged by Elston and Company appeared in defense of the action brought against it and others in behalf of Twohy Brothers Company and participated in the proceedings in that case for seven years without informing plaintiff that the company had been dissolved or that it relied on its co-defendants to protect it from payment of any judgment which might be recovered. Not until the case had gone against it and joint liability of defendants established, was the point raised and then not only for the purpose of preventing the intervenor from enforcing the judgment against Elston and Company but to prevent its enforcement against the co-defendants upon whom Elston and Company relied to pay the debt. In view of this course of conduct, it is impossible to escape the conclusion that a fraud was practiced on the Maine court in 1924 and that unless some means may be found to remedy the situation, the effort to make the Court an innocent participant in a fraud on the intervenor will be successful.

Appellants raised no objection to the decree permitting intervention. Counsel agree in the brief that the granting of such leave

is discretionary but assert, what is unquestionably true, that granting such leave after final decree is unusual.

To authorize intervention at such a stage, it must appear that the interest of the intervenor is direct and immediate, *Caldwell* v. *Trust Co.*, 26 Fed. (2nd), 218; that there are cogent reasons for the intervention in order that justice may be done, *Matthieson* v. *Craven*, 247 Fed., 223; and that granting the leave is necessary to preserve some right which can not otherwise be protected, *U. S.* v. *Northern Securities Co.*, 128 Fed., 810. These conditions appear to have been fully met in the instant case. In fact we can not readily conceive of a case wherein the discretionary power of the court to permit intervention after final decree could be more wisely exercised.

Appellants insist, however, that although it was within the authority of the sitting Justice to grant leave to intervene, it was not within his authority to grant the relief prayed for.

Starting with the proposition that a decree of dissolution is a final decree, it is argued that such a decree can only be vacated by appeal or bill of review. Assuming but not deciding that the premise is correct, we do not agree with the conclusion.

Appellants rely upon *Parsons* v. *Stevens*, 107 Me., 65, and on various citations from *Whitehouse on Equity Practice* as authority for this proposition. *Parsons* v. *Stevens*, supra, as we understand it, stands for no more than the familiar rule appearing in *Whitehouse on Equity Practice*, Sec. 526, that "after final decree has been signed, filed and entered, errors involving the merits of the case can not be corrected by rehearing on motion or petition, the only remedy is by appeal, bill of review or the statutory petition for review."

The rule is somewhat modified by the following statement in the same section that "the court will, on petition, amend its decree, after entry and in a material point, when the amendment is necessary to give full expression to its judgment and is matter which would have been incorporated in the decree when made if attention had been called to it but which was omitted inadvertently"; and the seemingly rigid language in the earlier paragraphs of the opinion in *Parsons* v. *Stevens*, supra, is somewhat relaxed by the fol-

lowing qualification: "In cases where a manifest injustice in a final decree is alleged and the remedy by appeal or review has been lost without fault of the injured party, it may be that an equity court has inherent power upon due petition and notice to open the decree so far as to correct the injustice alleged and proved." This exception to the general rule is directly applicable to the instant case.

There is abundant authority for the proposition that an order of dissolution of a corporation obtained by fraud or deceit may be set aside. *In re Packer City Tire and Rubber Co.* (S. D.), 162 N. W., 897; *In re Automatic Chain Co.*, 118 N. Y. Supp., 542; *In re Newbrough et al*, 254 Mich., 570, 236 N. W., 234; *Sullivan County R. R.* v. *Conn. River Lumber Co.*, 76 Conn., 464, 57 Atl., 287; *Ensign Oil Co.'s Dissolution*, 85 Pa., Super. Ct., 527; *Zimmerman* v. *Puro Coal Co.*, 286 Pa., 108, 133 Atl., 34.

Grounds for setting aside the order of dissolution are fraud on the part of petitioners or the existence of circumstances showing that a setting aside of the order of dissolution would be in the interest of substantial justice. A creditor having an interest in the maintenance of the security for the payment of his debt may apply to have an order for dissolution of the corporation set aside. It is not necessary that he should have been a party to the dissolution proceedings; and it has been held that not only a creditor but anyone whose rights will be injuriously affected if the order of dissolution is not set aside may make an application for that purpose. 14A C. J., 1133, and cases cited.

To hold any different doctrine than that a court in equity misled by the fraud of one party into entering a decree, final or otherwise which worked injury to another, could, when apprised of the fact, annul its decree and in so far as possible correct the wrong, would violate every principle not only of equity but of common honesty. If fraud once having gained a temporary advantage must retain it permanently, courts would so fail of their purpose as to merit contempt.

Appellants base an argument, more ingenious than ingenuous, on the proposition that the decree of dissolution was not based on any mistake of fact. It is urged that under the provisions of Sec. 89, R. S. 1916, as amended by Chap. 13, P. L. 1923, the statute in

force when the decree of dissolution was entered, stockholders had a right to vote a dissolution and by Bill in Equity make the vote effective regardless of whether or not the corporation had existing liabilities, and that therefore the false statement contained in the original bill concerning liabilities was unnecessary and, if we apprehend the position of counsel correctly, may be treated as surplusage. It is contended that the Court was compelled, provided the proceedings were regular in form, to decree dissolution; hence the statement complained of did not in any way affect the action of the court.

The answer to this position seems to us to be that, admitting the right to dissolve the corporation, the conditions under which the dissolution was to proceed were an integral part of the dissolution itself and were of utmost importance to all parties concerned, especially to creditors.

The decree of September 3, 1924, which was vacated by the decree appealed from, as has been noted, not only dissolved the corporation but appointed a trustee and directed him to pursue a course of conduct entirely inconsistent with the rights of creditors. It is not necessary to attack that decree piecemeal, to pick out the portion which might be justified and the part which might not be justified. It must be taken in its entirety, and as a whole it works injustice on the intervenor.

It is suggested that a wrong method has been pursued by petitioner, that an original bill should have been brought, or that a statutory bill of review might have been appropriate. As for the latter remedy, the time for review has passed. As for the former, the courts of Maine have no jurisdiction to entertain a bill brought by intervenor, an Oregon corporation, against Elston and Company so long as the decree of dissolution remained in effect. The remedy sought was the only remedy available.

The last defense set up is that of laches. Laches can not be predicated on passage of time alone. "There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." *Halstead* v. *Grinna*, 152 U. S., 412. "The cases on laches proceed on the assumption that the party to whom laches is imputed has knowledge of his

rights and an ample opportunity to establish them in the proper forum." *Galliher* v. *Cadwell,* 145 U. S., 368.

Intervenor acted promptly as soon as it learned the true facts. If it slept on its rights, it was lulled to sleep by the attitude taken by appellants. The record shows that the service of the writ, in which intervenor was plaintiff and Elston and Company defendant, the latter corporation entered an appearance and in lieu of pleading its dissolution employed counsel and participated in resisting judgment for seven years. Intervenor was justified in believing that Elston and Company was still in existence even though its physical assets had been sold to another defendant and it had ceased to function as a business concern. It was not unreasonable to assume, in the words of Justice Cardozo in *James & Company* v. *Insurance Co.*, 37 A. L. R., 723, commenting on a somewhat analogous situation, that "the shades of dead defendants do not appear and plead."

It is suggested in appellants' brief that if the position of the court below is sustained, the decree should be modified to protect the rights of innocent third parties who may have acquired through Mr. Elston assets formerly owned by the company, the title to which would fail if it should now be decreed that there was no legal conveyance of these assets to him. Counsel for Twohy Brothers Company signify their consent to such modification. We see no reason for changing the decree. Mr. Elston holds the assets conveyed to him in trust for the corporation and incidentally its stockholders and creditors. The record discloses no innocent purchasers thereof. If such should appear, their rights may be determined in appropriate proceedings. At the present time the duty of this court is fulfilled by the issuance of the mandate,

Appeal dismissed.
Case remanded to court below for further proceedings.

WALDO & PENOBSCOT TELEPHONE CO.

vs.

CENTRAL MAINE POWER CO.

Kennebec. Opinion April 14, 1932.

ELECTRICITY.

The maintenance by a power company of high tension wires, within three to four feet from telephone wires, held not to be negligence as a matter of law, in a case involving injuries to a telephone linesman.

In the case at bar, the evidence clearly indicated that the amount of electricity passing by a corona from one wire to another could not have been sufficient to cause any injury to the plaintiff.

The injuries were caused by the current forming an arc and passing from one wire to another and such arc, except under unusual conditions, not shown to exist in this case, could only form over a space not exceeding four inches.

The accident appears to have been caused by the lineman pulling his wire so taut that it was within such close proximity to the defendant's line that in raising it to put it into the insulator, it either came in contact with the high tension line or so close to it that an arc formed.

The proximate cause of the injuries suffered by the plaintiff's employee was not the placing by the defendant of its line within three feet of that of the plaintiff, but was the act of Payson in raising his wire too close to that of the defendant.

On exceptions and general motion for new trial by defendant. An action by plaintiff to recover for itself sums paid to its injured employee, and for such moneys to which the employee would be entitled, by virtue of its right to be subrogated to the position of its injured employee under the Workmen's Compensation Act. Trial was had at the October Term, 1931, of the Superior Court for the County of Kennebec. The jury rendered a verdict for the plaintiff in the sum of $4,908.34. To the denial of its motion for a directed verdict, defendant seasonably excepted, and after the jury verdict for the plaintiff filed a general motion for new trial. Motion sustained. New trial granted. The case fully appears in the opinion.

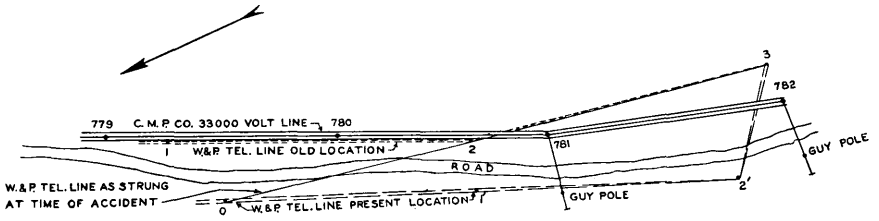
Locke, Perkins & Williamson, for plaintiff.
Perkins and Weeks,
Lewis A. Burleigh, Jr., for defendant.

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

THAXTER, J. This case, after a verdict for the plaintiff for $4,908.34, is before us on the defendant's motion for a new trial and on its exception to a ruling of the presiding Justice refusing to order a verdict for the defendant. The motion and the exception raise the same issue, and we shall accordingly consider only the motion.

The plaintiff has paid compensation to an injured employee, and in accordance with the provisions of R. S. 1930, Chap. 55, Sec. 24, seeks to recover for itself the sum so paid, and for the employee any amount beyond that which he may be entitled to receive because of injuries suffered by reason of the defendant's negligence.

The plaintiff telephone company carries on its business in Waldo County. At the time of the accident which gave rise to this litigation it had in the town of Brooks a line which had been built in 1907. Along the same highway on which this was located the defendant in 1916 had constructed a power line, which at the time of the accident carried 33,000 volts of electricity. The high tension power wires were from three to four feet above the wires of the defendant.



On the accompanying plan poles 1, 2 and 3 represent the original location of the telephone line; 779, 780, 781 and 782 the power line. Poles 0, 2 and 3 indicate the position of the telephone line as it was being reconstructed at the time of the accident. As-

suming pole 2 to be in a vertical position, the top bracket on it to which the telephone wires were attached would be from three to four feet under the power line. At this point the telephone wires crossed at an angle under those of the defendant, and here at a distance of approximately three feet the lines of the two companies were nearest each other. So long as the telephone wires remained attached to pole 2 their altitude at the point of the crossing was determined by the brackets on poles 2 and 3, unaffected in any respect by the height of the brackets on either pole 1 or pole 0.

On July 22, 1930, the plaintiff had in its employ James B. Payson, who was working here as a lineman with another man as helper. Poles 2 and 3 had been damaged and were leaning, pole 2 at an angle of about 30 degrees. These were reset and placed back in a vertical position; and the location of pole 1 was then changed by placing it at the point 0. Poles 0, 2 and 3 were then in a straight line. The significant part of this operation appears to be that though the brackets on pole 0 were a foot lower than when it was located a point 1, yet if the wires were pulled taut between poles 0 and 3, they would be about eight feet above pole 2 and about four feet above the wires of the defendant power company.

When the work of resetting the poles had been completed, preparations were made to restring the wires which were lying on the ground. One was apparently fastened to the insulator on pole 3, and then thrown over the bracket on pole 0. A block was fastened to a tree beyond the pole, and, with the aid of a tackle on the ground, the wire resting across the bracket was pulled ahead and thus raised from the ground between poles 0 and 3. It was Payson's purpose to lift the wire as high as the insulator on pole 2; and when he thought that it had reached this point, he fastened his tackle and climbed pole 0 to make his first permanent attachment of it there. While he was attempting to raise it the few inches from the bottom of the bracket to the insulator, the wire became charged with electricity and he received a shock which resulted in the injuries for which this suit is brought. That the electricity came from the wires of the defendant is conceded by both sides. The telephone wire was attached to a house a few hundred feet southerly of pole 3; and the charge of electricity was sufficient to char the side of this house

where the wire entered it and to burn off the telephone wire near pole 2. Mrs. Delbert Ames who lived in the house testified that she heard a crash and saw a large flame near this same pole.

The negligence charged in the plaintiff's declaration is that the defendant placed and maintained its wires too near the telephone line, and that as a consequence the electricity of the defendant jumped across the intervening space and then travelled over the wire of the telephone company to the body of Payson. There is in evidence an order of the Public Utilities Commission, effective May 1, 1928, applicable to the "reconstruction, replacement and maintenance of any of the existing facilities," which provides that there shall be a minimum clearance of six feet between such lines as we are concerned with here.

The defendant maintains that there was no breach of this rule, which was not intended to force the reconstruction of all existing lines not having the minimum clearance. If, however, there was a violation of it, the defendant says that such violation was not the proximate cause of the injuries to Payson, who was himself negligent in raising his telephone wire so that it either came in contact with the power line or within a few inches of it so that an arc formed from one to the other.

The plaintiff's case is based on the assumption that Payson in doing his work did not raise his wire any nearer to the power line than it had always been. The defendant tries to refute this claim by pointing out that the telephone poles were in a leaning position and that the plaintiff in straightening them did bring its wire in closer proximity to the power line. It seems obvious, however, that the poles were not set in the first instance in other than a vertical position, and the evidence substantiates the plaintiff's contention that, after the telephone poles were straightened, the brackets on them were in the same relative position to the power line as they had been originally. The real issue is, therefore, whether the location of the defendant's wires within a distance of from three to four feet of those of the plaintiff was negligence which contributed as a proximate cause to the injury to Payson.

On this point much expert testimony has been given, and as we read the evidence there is no material conflict in fundamentals be-

tween the witnesses for the plaintiff and those for the defense. The plaintiff's thesis seems to be to establish the fact that electricity can jump from one wire to another a distance of from three to four feet through the air. It is not, however, without significance that these lines had remained in these positions for a period of fourteen years under varying atmospheric conditions, through summer heat and winter cold, and no such phenomenon had ever before been recorded as took place while the plaintiff's employee was working there on the afternoon of July 22, 1930, when admittedly the weather conditions were normal in every respect. The plaintiff relies particularly on the testimony of Professor Woodruff of the Massachusetts Institute of Technology, an authority on electric power transmission. He states that electricity may pass through the air from one conductor to another either in the form of a corona or in an arc. The air is a nonconductor but is often broken down in close proximity to wires heavily charged with electricity, and as a result small amounts of current known as a corona escape over this modified air. This discharge may manifest itself to the eye as a glow or to the ear by a hissing sound, and may transfer itself to other wires if they are sufficiently near. A fair interpretation of Professor Woodruff's testimony is that except for unusual conditions not present in this case the amount of current, which would pass by a corona from one wire to another at a distance of three feet, would be so small that harm could not come to one who might be in contact with the wire so charged. It is impossible, therefore, to believe that the injuries suffered by Payson were due merely to the leakage of the small amount of current that manifests itself in the corona. Professor Woodruff, moreover, is emphatic in stating that the burning off of the wires and the scorching of the house to which they were attached could not have been caused by corona. Such powerful force was due to a short circuit caused either by the telephone wire coming in contact with the power line or by its being moved so close to it that an arc formed from one to the other. An arc is different from a corona in that, instead of small amounts of electrical energy dissipating themselves through the air, a large body or the main stream of the current is diverted from one conductor to the other. It seems, however, to be conceded by all of the

experts that an arc will not form if the two conductors are more than four inches apart. On this point Professor Woodruff testified as follows:

> "Q. Can you tell us somewhere near in inches what you would expect between wires such as these on a fair day in July, mid-day?
>
> A. I think the actual arc between the wires would not jump more than a very few inches, possibly three or four inches as a maximum."

The plaintiff's counsel practically concedes that an arc must have formed, and as we understand it has two explanations. The first is that Payson actually received in the first instance a shock from a corona discharge, and, by his convulsive movements in trying to disengage himself from the charged wire, waved it and jerked it so that it flew up and came in contact with the power line. This is a theory, a mere conjecture, and there is no evidence in the record to substantiate it. The second contention is that the arc actually formed while the wires were from three to four feet apart. This is claimed in spite of the testimony of his own witness that three or four inches is the maximum distance within which a current of electricity will jump through the air. It is true that he cites to Professor Woodruff a case alleged to have occurred twenty-five years ago, in which electricity is supposed to have formed an arc over a space of five feet. His witness calls attention to several factors that might explain such an occurrence, lightning for example, or the sudden opening of a circuit which might cause an abnormal voltage, and admits the possibility of such an incident. In seeking, however, to account for what happened to Mr. Payson here, we are concerned with probabilities rather than possibilities. From such circumstances as we know to have existed we are to draw reasonable inferences rather than fanciful ones; and we should not give undue weight to an occurrence which, if it took place as alleged, was so unusual as to have been a matter of comment among electrical engineers for a quarter of a century. In our opinion it is impossible to believe that an arc formed between these wires when they were three feet apart. The conditions were normal and why

such an event should only have taken place after fourteen years is inexplicable.

We have here a case of circumstantial evidence, consisting of certain physical facts, a charge of electricity in a supposedly dead wire, a flash, a roar, a scorching of the house to which the wire was attached, the melting of the wire itself, and burns on the body of the man in contact with it. From what we know today of the properties of electricity, these occurrences point to but one conclusion that the wire, which had served as a conductor for that current, had come in contact with another heavily charged wire or had come so close to it that an arc had formed permitting the current to pass from the one to the other. What is there to rebut such a necessary inference? We have merely the testimony of the lineman himself, who states that he raised the wire only as high as the bracket on pole 2, which admittedly was at least three feet under the power line. But he was clearly mistaken and the probative force of his evidence on this point is destroyed by his subsequent testimony on cross-examination. He was being questioned about the height of the telephone wire at pole 2, when the following colloquy took place.

"Q. You were not paying much attention to how near or how far it was from the high tension line?

A. I took it for granted that the high tension line was all right; and it is hard to tell how far wires are apart in the air.

Q. You were not giving any particular attention to how near you were bringing those wires?

A. I could not tell. I did not suppose it was bringing them near enough to do any harm."

Here then is a perfectly frank admission that he did not know how far apart the wires were. The truth of the matter is that the accident was due entirely to his own carelessness. In stringing the wires on the original line between poles 1, 2 and 3, it was essential, because of the angle made by the line at pole 2, that the wires be held in the bracket at that pole before tension was put on them. When pole 1 was shifted to the position 0, the three points then being in a line, this procedure was no longer necessary, for the wire could be pulled from 3 to 0 and subsequently fastened to pole 2.

This course was, however, a dangerous one if special care were not taken to see that the line was not pulled so taut that the wire would rise above pole 2 and strike the high tension line. Payson without knowing the space between the two lines appears to have assumed that the distance was safe, when in fact they must have been nearly in contact. Without making any further observation he climbed pole 0, and, in attempting to raise his wire the few inches necessary to place it in the insulator, either brought it into contact with the power line or within such close proximity to it that an arc formed and his line became charged with electricity.

The conclusion is irresistible that not only has the plaintiff failed to show negligence on the part of the defendant contributing to the accident but that the injuries suffered by Mr. Payson were due to his own want of due care.

Under the circumstances the entry must be,

Motion sustained.
New trial granted.

DONAT SIMONEAU *vs.* INHABITANTS OF LIVERMORE FALLS.

Androscoggin. Opinion April 15, 1932.

MUNICIPAL CORPORATIONS. EMINENT DOMAIN. EVIDENCE. DAMAGES.

The difference between the real value of property, immediately before and after alteration of a way, measures the exact equivalent for damage, and constitutes just compensation for net injuries to the property holder.

In determining diminution in value of property as a consequence of raising a street, the jury may properly consider what expense a prudent man would reasonably incur in putting the property, in reference to the new grade, in as good position as it was before.

Acceptance by a town of a way as laid out by municipal officers, can not be deemed acceptance of a previously dedicated way.

Proof that the road commissioner, or other person authorized, had elevated the physically established way of the street, injuriously in a legal sense, to the complainant, would make a prima facie *case for him.*

No exception lies to the admission of evidence unless prejudice results.

In the case at bar, the raising of the old surface left the lot of the complainant, for its frontage of fifty feet, lower than the new surface of the street. Complainant's lawn, if graded to the new surface, would be at the base of the clapboards on his house. The house, to correspond with the new grade of the street, would have to be raised approximately two feet.

The finding of the jury, that the complainant was entitled to damages, was fairly and reasonably supported by proof, and the amount awarded is not excessive.

On exceptions and general motion for new trial by defendant. A petition under the provisions of Chap. 27, Sec. 86, R. S., for damages occasioned by raising the grade of a street. The jury rendered a verdict for the complainant in the sum of $447.92. To the admission of certain testimony and to certain instructions given and refused, defendant seasonably excepted, and after the jury had rendered the verdict for the plaintiff, filed a general motion for new trial. Exceptions overruled. Motion overruled. The case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

G. R. Grua,

Berman & Berman, for defendant.

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

DUNN, J. When a road commissioner, or other person authorized, raises the surface of a public way or street to the injury of adjoining land, the owner of the land may recover special damages from the town. R. S., Chap. 27, Sec. 86. The procedure which the statute prescribes is that of written application to the municipal officers; thereupon they shall view the way, and assess the damages. R. S., supra. Any person aggrieved by the assessment may complain to the Superior Court. R. S., supra.

The application of this complainant, the owner of property adjoining Prospect Street in the town of Livermore Falls, that the municipal officers of that town assess the damage done his property by the raising of the surface of said street, was denied. The

reason assigned for the denial was that the improvement of the street, through such construction, increased the market value of the property, to the exclusion of damages.

In his complaint to the Superior Court, the complainant asserts that the street in front of and adjoining his lot of land and dwelling house was raised on June 15, 1930, to his injury.

The town, in its answer, denies that damage was done, and further says that the street, the dedication of which had been previously accepted, was not raised in manner and form as the complainant alleges, but physically graded in 1930, for the first time.

On trial by jury, the complainant recovered a verdict of $447.92.

The town presents the case on exceptions, and on motion for a new trial.

The defendant noted ten exceptions: five go to the admissibility of testimony; three to the charge; and two to the refusal to give requested instructions.

Discussion of these exceptions follows:

1. A civil engineer called by the complainant was permitted, over objection that the term was for the jury to interpret, to answer the question: "What is known as the grade of a street?" The question was patently permissible, in judicial discretion, as explaining the verbal expression which the witness himself had used shortly before in his testimony.

2. It was permissible for another witness for the complainant to testify, as bearing upon the question of special and peculiar benefits to the landowner, resulting from the raising of the street, what it would cost to put the premises in a proper condition with relation to the higher surface. *Chase* v. *Portland*, 86 Me., 367. If the real value of property, immediately before and after alteration of a way, could be ascertained, the difference between these two sums would be the exact equivalent for damage, and constitute just compensation for net injury. *Chase* v. *Portland*, supra. In determining diminution in value of property, as a consequence of raising a street, the jury (being limited in final inquiry to fixing the decrease in value caused by such elevation) may properly consider what expense a prudent man would reasonably incur in put-

ting the property, in reference to the new grade, in as good position as it was before. This no longer presents a question in this jurisdiction. *Chase* v. *Portland*, supra.

3. A plan was shown the jury, and admitted into the evidence—not as a "chalk" or "sketch", to illustrate testimony, or the case itself—but as a representation of the old and new grades of the street. Objection by counsel for the town, that the plan was "misleading and calculated to present an entirely false premise," was overruled. Technically, the plan was inadmissible; but its introduction in evidence was not harmful. The surveyor who made the plan, and whose testimony identified it, stated on cross-examination by counsel for the town, that the plan was inaccurate; moreover, that he, the draftsman, could not make it accurate, because of his lack of knowledge of the actual location of the old grade line. No exception lies to the admission of evidence unless prejudice results. *Bath* v. *Reed*, 78 Me., 276.

4-5. The fourth and fifth exceptions raise, in connection with the testimony of different witnesses, the same question that the second exception raises. Of these, there is no occasion for further remark.

6. It was left to the jury to find, from the evidence, whether, following acceptance by the town in 1919 of the way, it was then actually wrought, and thereafter maintained, by the town; or whether, as the town contended, what was done in 1930 was original construction.

The point of the exception apparently is that this question should have been ruled as one of law. The question was not entirely a legal one. Acceptance by the town, of the way as laid out by the municipal officers, located and established it. R. S., Chap. 27, Sec. 18. Ways "legally established shall be opened and kept in repair." R. S., Chap., 27, Sec. 65; *State* v. *Fuller*, 105 Me., 571, 575. Whether the town opened a legal way was a question to be decided by the jury, guided by the instructions of the judge.

7. The jury was directed in reference to the law of the case that, if it was necessary for the complainant to raise his house to the new grade, "the expense of so doing might be regarded as an aid and partial criterion of the loss that he had sustained." On reading

the charge as a whole, it is plain that the instruction was free from prejudicial error. *Chase* v. *Portland*, supra.

8. Nor is harmful error perceived in exception eight. It was intended to, and did, restrict the jury regarding damages (if they came to the consideration of that question) to the diminution in market value of complainant's premises, from reasonable probability that, as a result of raising the street, an increased quantity of surface water would flow onto his land, which adjoined it, and do injury.

9. Exception nine goes to the refusal to give a requested instruction. The exception is predicated on the proposition that the way was dedicated in 1919, by a predecessor in title of the complainant, and that consequently, in the construction of the way in 1930, no liability for damages attached.

A fatal difficulty with this exception is the premise of a dedication of the way. There was evidence that the way was laid out by the municipal officers, acting as public officers. They found that benefits equalled or exceeded damages; therefore the owners over whose lands the way was located were awarded no damages. The town accepted the way as laid out. Acceptance by a town, of a way so laid out, can not be deemed acceptance of a previously dedicated way, *Chapin* v. *Railroad Company*, 97 Me., 151, 157.

10. The tenth exception concerns the refusal to give this instruction: "The practical establishment of a grade must be by the authorized act of the town in either construction of a road, or the establishment of an improved surface on said road, or by record adoption of an existing grade." Whether the way had been raised, with resulting injury, was a question for the jury to decide. Proof that the road commissioner, or other person authorized, had elevated the physically established grade of the street, injuriously, in a legal sense, to the complainant, would make a *prima facie* case for him. *Sherburne* v. *Sanford*, 113 Me., 66.

The grounds of the motion are that the verdict is against the evidence; and the weight of the evidence; that it is contrary to law; and that the damages are excessive.

As located and established by vote of the town in 1919, Prospect Street, as it is now called, was 644½ feet long, and 33 feet wide.

There was evidence that the opening of the way was in the same year as that of its location and establishment.

In opening the way, a road machine was used to grade and smooth, and thus build an ordinary country street, where, from private use, there already were wagon tracks and wheel ruts. The expense of building the street, and in such practical manner, making the surface of the constructed street the grade, was charged against the general appropriation which the town had voted for ways.

Construction of the street did not affect, to any substantial degree, the grade of the bordering lands to the eastward.

Eleven houses, of which that now owned by the complainant was one, were subsequently erected on that side of the street. The complainant's house, which he purchased in 1927, was built in 1924.

In different years after 1919, road commissioners repaired the street, but did not materially alter its grade.

In 1930, the town having voted a specific appropriation, a hill in the street near the complainant's house was cut down, a fill was made, and the street raised. The change of surface was not merely to replace earth that had been scraped off, or washed off by the elements, or worn down by travel. On the contrary, raising the old surface left the lot of land of the complainant, for its frontage of fifty feet, lower than the new surface of the street. At the south corner, the lot was seventeen inches lower; at the north corner, twenty-three and one-half inches; at the front steps to the house, twenty inches. Complainant's lawn, if graded to the new surface, would be at the base of the clapboards on his house. The house, to correspond to the new grade of the street, must be raised approximately two feet.

These facts were not conceded, nor uncontroverted, but the finding by the jury, inferable from their general verdict, had ample support in evidence.

It is to be conclusively presumed that the probability that surface water from the street would be turned onto the adjacent lands was taken into consideration, in connection with the original determination respecting land damages. Elliott on Roads and Streets

(3d ed.), Vol. 1, Sec. 556; *Stone* v. *Augusta*, 46 Me., 127; *Peaks* v. *County Commissioners*, 112 Me., 318.

Evidence is, however, that the surface of the raised street depreciates the value of complainant's land, by the increased likelihood that, due to the raising of the street, surface water will flow onto such land in greater quantity than before, and do damage. *Sherburne* v. *Sanford*, supra.

The finding of the jury, that the complainant was entitled to damages, was fairly and reasonably supported by proof, and the amount awarded is not excessive.

Upon the whole case, the record contains no error prejudicial to the substantial rights of the defendant.

Exceptions overruled.
Motion overruled.

EARL HARMON *vs.* ANNIE IRENE HARMON.

York. Opinion April 16, 1932.

DIVORCE. PLEADING AND PRACTICE.

Under our laws a libel for divorce is regarded as a proceeding in a civil case. Such a suit is a civil suit.

The right of a libellant is similar to the right of a plaintiff in a regular civil action when voluntary nonsuit is sought.

The granting or withholding of a nonsuit is within the discretion of the Court.

Exceptions do not lie to the refusal of a nonsuit.

To dismiss the libel, without prejudice, or to enter up judgment on the merits of the case after the evidence is heard is within the judicial discretion, and hence, not subject to exceptions. The decision of the Court on the facts presented to him, without jury, must be sustained where the record presents any evidence to sustain his findings.

The Law Court does not, under a bill of exceptions, determine controverted matters of fact.

On exceptions. After hearing all testimony offered in a libel for divorce, the court denied a motion that libel be dismissed, without prejudice, and entered the decree, "Divorce denied." To which ruling the libellant excepted. Exceptions overruled. The case sufficiently appears in the opinion.

Hiram Willard, for libellant.

Roy Sturgis, for libellee.

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

BARNES, J. This action is on libel for divorce. It was heard by the judge, without the intervention of a jury, with considerable apparent conflict of evidence.

After the evidence was all in, counsel for the libellant moved that the libel be dismissed, without prejudice to the right of his client to enter and pursue another libel at a subsequent term. The motion was denied and exceptions taken.

The court then pronounced judgment that the divorce be denied, and to this decree exceptions were taken.

If the court be sustained in the former ruling there can be no contention on his right to give judgment on the evidence presented.

Under our laws a libel for a divorce is regarded as a proceeding in a civil case. Such a suit is a civil suit. *Sullivan* v. *Sullivan*, 92 Me., 84.

The correctness of the ruling that granting or refusing the motion that the libel be "dismissed without prejudice" is tested, therefore, by the rules adopted and followed for the decision of like motions generally in civil proceedings in court.

The right of the libellant here is very similar to the right of a plaintiff in regular civil actions when voluntary nonsuit is sought.

In a case in the Superior Court for Kennebec County, where each party had introduced his evidence and rested, plaintiff declared himself voluntarily nonsuit.

Defendants objected, and the court ruled, as matter of law, that the plaintiff could not become nonsuit against defendant's objection.

On exceptions, this court held the ruling erroneous, and decreed that the granting of nonsuit was within the discretion of the court. *Washburn* v. *Allen*, 77 Me., 344-352. And here it is the rule that exceptions do not lie to the refusal to order a nonsuit. *Cutler* v. *Currier*, 54 Me., 90; *Boody* v. *Goddard*, 57 Me., 602; *Carleton* v. *Lewis*, 67 Me., 76; *Auburn* v. *Water Power Co.*, 90 Me., 71-79; *Snowman* v. *Mason*, 99 Me., 490.

The same limitation applies in the case at bar.

To dismiss the libel, without prejudice, or to enter up judgment on the merits of the case after the evidence is heard is within the judicial discretion, and hence, not subject to exceptions.

The decision of the Court on the facts presented to him, without jury, must be sustained where record presents any evidence to sustain his findings.

This court does not, under a bill of exceptions, determine controverted matters of fact. *Curtis* v. *Downes*, 56 Me., 24.

Exceptions overruled.

MENTE & CO., INC. *vs.* GEORGE E. ROBINSON AND HENRY S. MITTON (CARIBOU BAG COMPANY)

Aroostook. Opinion, April 22, 1932.

SALES. TIME.

In a sales contract, in figuring the time within which the shipment should have been made, the day of the receipt of the shipping instructions is to be excluded.

In the case at bar, instructions were received by plaintiff's agent on August 20. A part of the bags were shipped on September 10 and a part on September 13. Excluding the four non-working days between the date of the order and date of shipment, and the date of the receipt of the instructions, the shipment was made within the required twenty days from date of order. The plaintiff had therefore performed its part of the contract, and the defendant by its refusal to accept the bags was guilty of a breach of it.

On report on an agreed statement. An action to recover damages for alleged breach of contract of sale. Case remanded to trial Court for assessment of plaintiff's damages. The case fully appears in the opinion.

R. W. Shaw, for plaintiff.

C. F. Small, for defendants.

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

THAXTER, J. This case is before us on report. The plaintiff is a manufacturer of bags and has a factory located at Savannah, Georgia. George Pennington of Houlton was its duly authorized agent. The defendant partnership is located at Caribou, Maine, and sells bags largely to potato growers in Aroostook County. On January 16, 1930, a contract was entered into between the parties under the terms of which the plaintiff agreed to sell and the defendant to buy 80,000 bags "to be shipped from August 1, 1930, to December 1, 1930, as ordered by the buyer." The following provision of the contract is the one about which this controversy arises.

> "Buyer must furnish written instructions unless definite shipping dates have been written into this order. Seller need not make any shipment until twenty working days after receipt of such instructions nor until thirty working days after receipt of additional printing instructions and all printing instructions must be in writing, unless definitely written into this order."

On August 19 the defendant mailed at Caribou a letter addressed to George Pennington at Houlton which requested the shipment of 23,000 bags under the contract. This letter left Caribou on the afternoon train which was scheduled to arrive at Houlton at 5.41 P.M. of the same day. Pennington, due to his absence from town, did not receive the letter till August 21 and immediately telegraphed the order to Savannah. A part of the bags were shipped from Savannah September 10 and the balance September 13 and all arrived at Caribou with the usual despatch. The defendant,

claiming that the bags were not shipped in time in accordance with the terms of the contract, refused to accept them. Under the stipulation of the parties, this Court is to determine the question of liability, and the case is to be remanded to the Trial Court to assess any damages which may be due.

The view which we take of the case renders it unnecessary to decide whether the twenty day period allowed the manufacturer for the shipment of the goods commenced to run from the day when the order was received by the agent in Houlton or by the principal at Savannah, for in either event the shipment seems to have been made on time. The agreed statement is silent as to the time when the letter of August 19 was delivered at Pennington's office. In the absence of any information to the contrary we can only assume that this was on August 20. In figuring the time within which the shipment should have been made the day of the receipt of the shipping instructions is to be excluded. Benjamin: Sales, 4 ed., Sec. 684; 26 R. C. L., 745; *Homes* v. *Smith*, 16 Me., 181; *Oatman* v. *Walker*, 33 Me., 67. It is admitted that there were four non-working days between the date of the receipt of the order and the day of shipment. If we exclude these days and August 20 when the instructions were received, it is apparent that the last lot of bags, shipped on September 13, was sent within the twenty day period prescribed by the contract.

The defendant refers to a telegram sent by the plaintiff on September 8, stating that the bags had been shipped on that day, and claims that it relied on such statement. There is nothing in the agreed statement, however, to indicate that the defendant suffered any damage because of such misinformation, and the mistake of the defendant in this respect has no material bearing on the case.

The plaintiff performed its part of the contract, and the defendant by its refusal to accept the bags was guilty of a breach of it.

Case remanded to Trial Court for assessment of plaintiff's damages.

SAMUEL W. BATES, EXECUTOR, APPELLANT

vs.

DECREE OF JUDGE OF PROBATE.

Hancock. Opinion, April 25, 1932.

CONFLICT OF LAWS. TAXATION.

It is a general rule of law that the lex rei sitae *controls the title and disposition of real estate.*

As far as real estate or immovable personal property is concerned, the laws of the state where it is situated furnish the rules which govern its descent, alienation and transfer, the construction, validity and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same.

Whether a person has an equitable interest in land is determined by the law of the state of the situs.

Whether the interest of the beneficiary of a trust of land is to be treated as real estate or whether, because of a direction to sell the land, it is to be treated as personalty, is determined by the law of the state of the situs.

In Massachusetts the law is settled that in the case of a trust, where the trustee holds only real estate, shares such as are involved in the case at bar are interests in real estate and are to be regarded as real estate.

The Law Court, being bound by the Massachusetts law in determining the question, therefore holds that the shares under consideration represent an interest in real estate and for that reason they are not subject to an inheritance tax in Maine.

On report. The question at issue involved the validity of an inheritance tax assessed in the Hancock County Probate Court against the estate of Anna H. Bates. Appeal was taken to the Supreme Court of Probate for Hancock County, and from that court reported to the Law Court. Case to be remanded to the Supreme Court of Probate for further action. The case fully appears in the opinion.

Robert H. Gardiner
Hale & Hamlin
Harris H. Gilman, for plaintiff.
Clement F. Robinson, Attorney General, for defendant.

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

FARRINGTON, J. On report. One Anna H. Bates died testate on July 9, 1929, resident of Bar Harbor, Maine. Forming a part of her estate were 2,314 shares of Wildes Buildings Trust appraised at $231,400.

On March 10, 1931, the Hancock County Probate Court decreed against the entire estate an inheritance tax of $13,145.70, of which $8,517.70 was paid, leaving unpaid the tax on the above shares amounting to $4,628.00. From this decree an appeal was taken to the Supreme Court of Probate of Hancock County and from thence the case comes to this Court on report.

The single question to be decided is whether or not the interest of the deceased, Anna H. Bates, in Wildes Buildings Trust is property within the State of Maine, and, as such, subject to an inheritance tax under the laws of this State, or, as expressed in the stipulations, "whether that part of the inheritance tax levied on the transfer of these shares is valid."

The executor as appellant claims that the interest represented by these shares is an interest in real estate situated within Massachusetts and is not property within the jurisdiction of the State of Maine and therefore not here taxable.

The appellee contends that the interest is personal property and that its transfer is taxable in this State.

By stipulation of parties it is agreed that the following facts in regard to the Wildes Buildings Trust shall be taken as true:

In 1915 the heirs of one Solomon Wildes, who died in 1867, owned undivided interests in certain real estate inherited from him and situated in Boston, Massachusetts, and in that year, after partition proceedings had resulted in a division of the property, Anna H. Bates aforesaid, a granddaughter of Solomon Bates, together

with another granddaughter and a daughter, became the sole owners of a block on Washington and Friend Streets in Boston.

In order to avoid subjecting the property to any future partition, the three owners on February 1, 1916, entered into a written agreement and declaration of trust to be known as the "Wildes Buildings Trust," and on the same date they conveyed their entire interests in the block to the trustee named in said agreement and declaration by the terms of which shares were issued to them in proportion to their ownership in the real estate as conveyed.

The trust property at that time and at the death of said Anna H. Bates consisted solely of this real estate. The sole trustee from the beginning to the date of the report was and now is Charles W. Whittier, who has at all times had full and complete charge of the property as such trustee. All books of account and records were kept by him in Boston and all transfers of interest were there recorded. The trustee had no property and no activities outside of Massachusetts.

The declaration of trust and the deed of transfer to the trustee, duly recorded in the Registry of Deeds for the county where the land was situated, together formed integral parts of one and the same transaction and must be so considered. That both instruments were executed in Massachusetts can scarcely be questioned and it is conceded by the appellee that the case of an interest held by a Maine decedent under a contract created in Massachusetts operating on Massachusetts real estate presents a conflict of jurisdiction. It is also admitted by appellee that the validity of what may be called a chose in action may depend in large part upon the law of the State of its creation. In reply brief the appellee says, "The estate's final point is that Massachusetts law governs the problem. If the problem were simply a technical question of the kind of ownership which the shareholder has, this suggestion might settle the question." But the contention is made that if the shares under consideration represent interests in real estate they will entirely escape the payment of an inheritance tax by reason of chapter 292 of the Acts of Massachusetts, 1929, in which provision was made exempting from inheritance tax all interests in Massachusetts real estate owned by nonresident decedents represented by

transferable certificate of participation or shares of an association, partnership or trust. This contention seems unimportant in view of the one question confronting us. That such shares have certain outward indicia of corporation shares is obvious, but we must go beyond the outward and apparent form to the law which controls, and in our opinion the determination of the question whether the "shares" involved in the instant case are choses in action or interests in real estate is dependent on and to be governed by the law of Massachusetts, the situs of the real property which was conveyed by the deed of February 1, 1916, and which was the basis of the trust agreement and declaration of that date.

It is a general rule of law, too well settled to require citation of authority, that the *lex rei sitae* controls the title and disposition of real estate.

As far as real estate or immovable property is concerned, the laws of the State where it is situated furnish the rules which govern its descent, alienation and transfer, the construction, validity and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same. *Thomson et al* v. *Kyle*, 39 Fla., 582, 23 So. 12, 16; *Lyndon Lumber Co.* v. *Sawyer* (Wis.), 116 N. W., 255.

"It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances." *McGoon* v. *Scales*, 9 Wall., 23; *De Vaughn* v. *Hutchinson*, 165 U. S., 566, 570.

"The validity and construction, as well as the force and effect, of all instruments affecting the title to land, depend upon the law of the State where the land is situated. This rule includes wills, as well as deeds, contracts, or agreements; . . ." *Harrison et al* v. *Weatherby et al*, 180 Ill., at page 435, 54 N. E., at page 239. See also *Peet* v. *Peet et al*, 229 Ill., 341, 82 N. E., at page 378.

"To say that the intention of the maker of an instrument is to be determined by one law or set of rules, and that its construction is to be by another and different law or set of rules, is contra-

dictory and absurd." *Harrison et al* v. *Weatherly et al,* supra; *Peet* v. *Peet et al,* supra.

"Whether a person has an equitable interest in land is determined by the law of the State of the situs." Re-statement Conflict of Laws, American Law Institute, Section 260.

"Whether the interest of the beneficiary of a trust of land is to be treated as real estate or whether because of a direction to sell the land it is to be treated as personalty is determined by the law of the State of situs." Re-statement Conflict of Laws, Section 265, *supra.*

In *Williams et als* v. *Inhabitants of Milton,* 215 Mass., 1, the Court reviews a number of Massachusetts cases relating to so-called trust arrangements and agreements and seems to make the test as to whether there is a trust or partnership depend upon whether the trustee or the certificate holder is in control. If the trustee holding the property has the right to manage it free from interference and instructions from the certificate or shareholders, it is a trust; but if such holders are the principals whose instructions in the management are to be obeyed by the trustee as an agent, it is a partnership. See *Narragansett Fire Ins. Co.* v. *Burnham et al* (R. I.), 154 Atl., 909 (1931).

Under the original trust agreement in the instant case, it was provided that "the trustee shall have full control over and exclusive management of the trust property," enumerating incidental powers in particular which show the intent of the parties to the trust instrument to make that control and management full and exclusive in fact. There was a provision that the trustees should have the power, with the assent of the majority in interest of the shareholders, either by a vote at a meeting or by an instrument in writing, to sell or mortgage the whole or any part of the trust property and to purchase other real estate in Boston and to issue additional shares of the trust in payment for property purchased or for other purposes of the trust.

By an amendment adopted June 20, 1922, it was provided as follows: "The shareholders shall have no control over the acts of the trustee hereunder, anything in this Agreement to the contrary notwithstanding and any provision in this Agreement whereby the

shareholders are given any control, *except as above stated*, is hereby annulled. The trustee may at any time by an instrument in writing assented to by three-fourths in interest of the shareholders and recorded in said Registry of Deeds alter or amend this Agreement, or appoint a new or additional trustee or trustees under this instrument and if the office of trustee is vacant said vacancy may be filled by an instrument in writing signed by three-fourths in interest of the shareholders and recorded as aforesaid."

Section 12 of the original agreement left intact, except as far as affected by the provisions of the June 20, 1922, amendment, *supra*, provided for shareholders voting at meetings which could be called in a specified way; that they might authorize action not provided for on the part of the trustee; that they might direct the trustee to terminate the trust and sell the trust property and distribute the proceeds among the shareholders or to convey the trust property to new or other trustees under a new declaration of trust, or to a corporation, as they might direct, and that the trustee should obey such directions; that they had authority to appoint a trustee or trustees to succeed to the title of the former trustee and to become a party or parties to the instrument. Some of the Massachusetts cases in which similar provisions were found, but in combination with other facts which showed a considerable degree of control of management on the part of the shareholders, have held that a partnership was created rather than a trust, but after a careful examination of the entire trust agreement in this case as amended and in the light of the case of *Williams et als* v. *Inhabitants of Milton*, supra, we are unable to see any real conflict with the right of the trustee to manage the property free from interference and instruction from the shareholders. While it is true that the language of Section 12 gives to the shareholders certain rights which might be necessary for their protection or benefit, we are unable to see how those provisions take the case out of the rule laid down by the Massachusetts case above cited. The management of the property is clearly within the control of the trustee at all times and by the trust agreement intended so to be and we see no reason under our interpretation of the above cited case to hold otherwise than that the Wildes Buildings Trust is a trust and not a partnership. By

the natural interpretation of the terms of the agreement, the trustee was clearly master of and in control of the situation so far as the actual management of the property was concerned. That he did have such control is practically admitted in argument and by stipulation.

The Massachusetts rule as to partnership real estate is that in so far as it is necessary to pay the debts of the firm, partnership real estate is personalty, but that for all other purposes it is real property. *Dana* v. *Treasurer & Receiver General et al*, infra.

In the case of *Priestley* v. *Treasurer & Receiver General*, infra, one Charles H. Priestley, domiciled in England, died in France, owning shares in the Warren Chambers Trust. The Court held that the trust agreement in the trust created a partnership as distinguished from a pure trust. The Court in that case said, "Under the Massachusetts rule, while partnership real estate is personalty so far as necessary to pay the debts of the firm, it is real property for all other purposes. The decedent, as one of the partners, had a beneficial or equitable interest in the real estate of the Warren Chambers Trust; and however that interest may be defined, it was 'real estate within the Commonwealth, or any interest therein,' and as such was subject to a succession tax. . . ."

This decision was prior to 1929 exemption statute to which reference has been made in this opinion. Under the Massachusetts law, therefore, it would seem that the same result would be reached, whether the trust agreement created a partnership or a trust.

The case of *In re Stephenson's Estate*, 171 Wis., 452, 177 N. W., 579, cited as authority for holding as personalty such shares as are under consideration, was one in which the trust property consisted of both real estate and personal property. It is not clear whether under the trust arrangement the doctrine of equitable conversion was applicable or not. If it had been applicable, the shares, under the Massachusetts decisions, would have been held as personalty, just as regarded by the Court in the Wisconsin case, *supra*, which refers to the cases of *Dana* v. *Treasurer & Receiver General*, and *Priestley* v. *Treasurer & Receiver General*, infra, as sustaining its conclusion. It is true that the same result was reached but the reasoning of the Wisconsin case seems to be that the shares

must be regarded as intangibles "because the creators of the trust have made them intangible or personal property in unmistakable terms."

Under our conclusion that the Massachusetts law governs the decision of the question before us, we do not regard the language of the declaration of trust here involved as controlling and we can not accept either the conclusion of the Wisconsin case or its reasoning as applicable to this case.

By the terms of the Wildes Buildings Trust agreement, the trust was to continue until twenty years after the death of the last survivor of certain named persons and at its termination the trustee was to sell the trust property and divide the net proceeds of the sale and all other property of the trust then in his possession among the then shareholders in proportion to their respective interests. The appellee apparently places no reliance on the doctrine of equitable conversion as a reason why these shares must be regarded as personal property. The contention that they must be so regarded seems to be based largely on the fact that the shares themselves on their face resemble corporation shares, that the language of the trust agreement seems to make them personalty, and that, if Maine can not tax them, they will go untaxed.

The question of whether real property, by the terms of the will, is equitably converted into personalty depends upon the law of the place where the property is located, and not upon the law of the testator's domicile, 5 R. C. L., Sec. 113, page 1204; *Clarke* v. *Clarke*, 70 Conn., 195, 39 Atl., 155, affirmed and approved in *Clarke* v. *Clarke*, 178 U. S., 186; *Holcomb* v. *Wright*, 5 App. D. C., 76, at page 86; *Butler* v. *Green*, 65 Hun, 99, at page 107, 19 N. Y. Supp., 890, 894; *Ford v. Ford et al*, 80 Mich., 42, 44 N. W., 1057; *In re Loyd's Estate*, 175 Cal., 699, 167 Pac., 157; *In re Berchtold*, Chancery Div., The Law Times Reports, Vol. 128, page 591; principle recognized in *Hawley* v. *James*, 7 Paige, 213, 219 (N. Y.); *Guaranty Trust, etc., Co.* v. *Maxwell* (N. J.), 30 Atl., 339, 341; Re-statement Conflict of Laws, American Law Institute, Sec. 228A.

In cases where the situation results from a conveyance of land to a trustee by deed, we see no reason why the above rule relating to wills should not be applied.

In *Dana* v. *Treasurer & Receiver General*, 227 Mass., 562, the property of the trust consisted of both real and personal property and the question of equitable conversion was discussed and held applicable and the shares, belonging to a resident decedent, were held to be personal property, and under the law were subject to inheritance tax.

The same principle was applied in *Priestley* v. *Treasurer & Receiver General*, 230 Mass., 452, where there was both real and personal property, and the shares, belonging to a nonresident decedent, were regarded as personalty and under the law not subject to inheritance tax.

In *Baker et al* v. *Commissioner of Corporations and Taxation*, 253 Mass., 130, the trust under consideration consisted entirely of real estate. In that case it was held that the doctrine of equitable conversion did not apply, the Court saying, "The question remains as to the nature of the interest of the testatrix as a certificate holder in a trust consisting wholly of real estate. It is plain that under our decisions it constitutes an equitable interest in land. . . . The interest of a *cestui que* trust in a real estate trust is rightly described as equitable. The statute imposes the excise upon 'any interest' in real estate. Those words are broad enough to include the kind of interest shown on this record to have been owned by the testatrix at the time of her death." In this case the testatrix died a resident of Rhode Island holding shares in what was agreed by parties to be a trust established by deed and the shares were held subject to succession tax as interests in real estate in Massachusetts. The case was decided prior to the 1929 law exempting such interests from payment of inheritance tax but it must still be regarded as the law in determining whether such shares are personalty or whether they represent and are rights in real estate. With the fact that Massachusetts does not exact a tax from a nonresident decedent owner of such shares we are not concerned.

That real estate or tangible personal property situated in Massachusetts and owned by a decedent resident of the State of Maine is not subject to an inheritance tax by the latter State is obvious, and, as it is so conceded by the appellee, that point need not be discussed.

Our conclusion being that we are bound by the Massachusetts law in determining the question before us, we hold that the Wildes Buildings Trust is a trust and not a partnership and that the shares under consideration represent an interest in real estate and that for that reason they are not subject to an inheritance tax in Maine.

Case to be remanded to the Supreme Court of Probate for further action in accordance with this opinion.

H. C. BUZZELL ET AL *vs.* CITY OF BELFAST.

Waldo. Opinion, April 27, 1932.

MUNICIPAL CORPORATIONS. POWER OF MUNICIPAL OFFICERS.

Persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers.

Where town or city officers are wanting in authority to employ, no liability is incurred by the town or city on a quantum meruit *or otherwise.*

In the case at bar, the employment on which the plaintiffs rely, not having been by order of the city council, as required by the ordinance, judgment must go for the defendant.

On report. An action by a firm of attorneys to recover, either on account annexed or *quantum meruit*, for professional services rendered the city of Belfast. After the testimony was taken out, the cause was, by agreement of the parties, presented to the Law Court on so much of the evidence as was legally admissible. Judgment for the defendant. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiffs.

Locke, Perkins & Williamson,

Clyde R. Chapman, for defendant.

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

DUNN, J. This case involves whether the plaintiffs, a firm of attorneys at law, can recover, either on account annexed or *quantum meruit*, for professional services rendered the city of Belfast, in a contested will case. The will contained a pecuniary bequest for the addition of a reading room to the public library in that city, and further bequests of furniture and furnishings. Probate of the will was decreed. *Sleeper*, Appellant, 129 Me., 194.

The defendant concedes that the services were rendered, and that the charges are reasonable.

The defense is that the contract of employment, if any was made, was with the mayor and aldermen, and not by order of the city council.

There is no evidence that the contract was by any such order.

The charter of Belfast vests the administration of the fiscal, prudential, and municipal affairs of the city, with the government thereof, in one principal magistrate, styled the mayor; and one council, denominated the board of aldermen; and another council, called the common council. P. & S. L., 1850, Chap. 363.

An ordinance of the city, emanating from that incidental power which warranted its passage, to enable the corporation to effect the purposes of its creation, and to execute faithfully the trust committed to it, provides that the city council shall annually elect some citizen of the city, who is an attorney and counselor of the Supreme Judicial Court, to be solicitor and law agent. Belfast Ordinances, Chap. 7. The duty of this official is to act for the city in all proceedings wherein any of its estates, rights, or privileges are called in question. Ordinances, *supra*.

The city, as such, had authority to take the bequests which the will made to it. R. S., Chap. 4, Sec. 31.

Even though the ordinance defines that the solicitor and law agent shall attend to the business of the city, other counsel may be engaged. In such connection the ordinance reads: "Whenever it may become necessary to employ additional counsel it shall be done by order of the city council. . . ." Ordinances, *supra*.

It is of vital importance that the engagement of any additional counsel shall be by order of the city council.

"Persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers." *Goodrich* v. *Waterville*, 88 Me., 39, 41; *Michaud* v. *St. Francis*, 127 Me., 255, 257. Where town or city officers are wanting in authority to employ, no liability is incurred by the town or city on a *quantum meruit* or otherwise.

Argument by counsel for the plaintiffs, that the city charter vests the "executive powers of said city generally" in the mayor and aldermen, with all the powers of selectmen, has had consideration. The mayor and aldermen are entrusted by the clause invoked, with a general care over all the interests of the city. *Blackington* v. *Rockland*, 66 Me., 332. But this in no wise affects the case in hand.

The employment, on which the plaintiffs rely, not having been by order of the city council, as required by the ordinance, judgment must go for the defendant.

Judgment for defendant.

ANDREW M. CHAPLIN

APPELLANT FROM DECREE OF JUDGE OF PROBATE.

Androscoggin. Opinion, April 27, 1932.

PROBATE COURTS. PLEADING AND PRACTICE. REFERENCE.

A probate appeal may not properly be the subject of a reference. Probate appeals are of statutory origin, and must be conducted strictly according to the statute.

Consent cannot confer jurisdiction where the law has not given it.

In the case at bar, although the reference was by consent of the parties, and though the action of the referee in sitting and deciding the appeal was on their waiver of any question of illegality, exception, that in the first instance, there could not validly be an agreement to refer, nor afterward, to invest the referee with authority, may not be put aside. It goes to jurisdiction. This defect may be raised at any time.

On exception by appellant. An appeal from the decree of the Judge of Probate in Androscoggin was referred to a referee, right of exceptions being reserved. To the overruling of objections to the acceptance of the report of the referee, appellee seasonably excepted. Exception sustained. The case sufficiently appears in the opinion.

Ralph W. Crockett, for appellant.

Oakes & Farnum, for appellees.

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

DUNN, J. This appeal to the Supreme Court of Probate, from the decree of the Judge of Probate in Androscoggin county, was referred by consent of the parties (the right of exception reserved) by a rule of court.

When the case was before the referee, counsel stipulated a waiver of any question of illegality in the reference.

Objections in writing to the acceptance of the report of the referee were seasonably made. Rules of Courts, 129 Me., 511. The objections were overruled, and the report accepted. Exceptions were filed and allowed.

Primary inquiry is whether the appeal was properly referable.

Although the reference was on consent, and though the action of the referee in sitting and deciding the appeal was on stipulation, exception that, in the first instance, there could not validly be an agreement to refer, nor afterward, to invest the referee with authority, may not be put aside. It goes to jurisdiction. This defect may be raised at any time. *Garcie* v. *Sheldon*, 3 Barb. (N. Y.), 232. Consent cannot confer jurisdiction where the law has not given it. *Dudley* v. *Mayhew*, 3 N. Y., 9; *Stoy* v. *Yost*, 12 Serg. & R. (Pa.), 385.

The power of the court regarding references is restricted by statute to cases pending in the Supreme Judicial or Superior court. R. S., Chap. 96, Sec. 94. The right of reference of probate appeals is certainly not expressly given to the Supreme Court of Probate, and that court cannot supply what the Legislature has totally omitted. Probate appeals are of statutory origin, and must be conducted strictly according to the statute.

Nor was the waiver of irregularity in the reference the inception of a proceeding *de novo*. To be sure, parties personally, or by attorney, may submit controversies to referees. But the statute limits such submissions to disputes or disagreements which may be the subject of personal action. R. S., Chap. 122, Sec. 1.

Exception sustained.

FRED W. ELWELL *vs.* CHAUNCEY B. BORLAND.

FRED W. ELWELL *vs.* MARY LORD SEXTON.

Knox. Opinion, April 28, 1932.

DEEDS. BOUNDARIES. REAL ACTIONS. EVIDENCE.

A particular, specific and definite grant by metes and bounds can not be enlarged or diminished by a later general description.

Nor is parol evidence, even if admitted without objection, competent to vary the terms of the instrument.

In a real action to recover possession of land, the burden is upon the demandant to show that he had legal title to the demanded premises at the date of his writ. Failing in this, he can not have judgment, even though the defendants show no title in themselves.

In the case at bar, the demandants only claim to title to the land in dispute was by a general descriptive clause in his deed, following a specific description. It was therefore the duty of the presiding Justice to direct verdicts for the defendants.

On exceptions by plaintiff. Real actions by the plaintiff to recover possession of a triangular lot of land on the south side of Megunticook Lake in Camden, Maine. After the evidence was presented, upon motion by defendants, the Court directed verdicts for the defendants. To these rulings plaintiff seasonably excepted. Exceptions overruled. The cases fully appear in the opinion.

Edward K. Gould, for plaintiff.

Alan L. Bird, for defendant Borland.

Z. M. Dwinal, for defendant Sexton.

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

STURGIS, J. At the trial of these real actions to recover possession of a parcel of land situated in Camden, Maine, the presiding Justice, on motion, directed the jury to return verdicts for the defendants. The case comes up on exceptions.

As early as December 27, 1883, one Franklin L. Start and his wife, Annie S. Start, in her own right, had acquired and owned in common what was then known as the George Start farm, which lay just south of Megunticook Lake, formerly called Canaan Pond. In 1884 and the years following, they sold numerous lots along or near the shore to various persons and associations, reserving rights of way and street locations as necessary and convenient for the lot owners. They kept the rest of the farm until Franklin L. Start died and the widow, by purchase of his interest from the administratrix, became sole owner. The land with the buildings thereon, which the Starts retained, came to be known in later years as the Frank Start farm.

One of the shore lots was sold September 29, 1887, to George H. Cleveland and George H. Hill and two years later, on October 23, 1889, Cleveland bought the next lot to the east. The defendants, as successors in title to the original grantees, contend that these two lots were contiguous, the east boundary of the one being identical with the west boundary of the other. The demandant insists that a triangular piece of land somewhat more than eleven hundred feet long and approximately one hundred and thirty feet wide near the shore lay between these lots, in no way a part of them but retained

by the Starts as a means of access to the shore of the pond. He here seeks to oust the defendants, who occupy and claim to own the triangle subject to existing rights of way.

For title, the demandant relies on a deed given April 1, 1914, by Annie S. Start, which contains the following description:

> "A certain lot or parcel of land together with all buildings on same near Lake City, in Camden, Maine, bounded on the north by lands of J. V. Bacot, T. A. Hunt and G. H. Cleveland; on the east by land of the Barrett heirs; on the south by lands of Ordway and Morse, and on the west by land of D. F. Hopkins, excepting a lot on the south west corner of above described land which has been sold to W. F. Start; meaning to convey all I now own of what is known as the Frank Start farm."

The demandant admits, as do all parties of record, that the property particularly described in this deed does not include any of the disputed triangle but, subject to the lot expressly excepted, is that part of the original George Start farm which lies back of it and was retained by Franklin L. and Annie S. Start. His contention is that the triangle was also retained by the Starts as a part of the farm and passed to him under the general descriptive clause in his deed.

Assuming without deciding, which is unnecessary in these cases, that Annie S. Start owned the land in dispute, we are not of opinion that she conveyed it to the demandant. A particular specific and definite grant by metes and bounds can not be enlarged or diminished by a later general description such as is found here. *Sinford* v. *Watts*, 123 Me., 230, 234; *Perry* v. *Buswell*, 113 Me., 399; *Smith* v. *Sweat*, 90 Me., 528, 533; *Brown* v. *Heard*, 85 Me., 294; *Brunswick Sav. Inst.* v. *Crossman*, 76 Me., 577. Nor is parol evidence, even if admitted without objection, competent to vary the terms of the instrument. *Goddard* v. *Cutts et al*, 11 Me., 440.

The burden was upon the demandant to show that he had legal title to the demanded premises at the date of his writ. Failing in this, he can not have judgment, even though the defendants show

no title in themselves. *Spencer* v. *Bouchard*, 123 Me., 15; *Wyman* v. *Porter*, 108 Me., 110; *Powers* v. *Hambleton*, 106 Me., 217.

It was the duty of the presiding Justice to direct verdicts for the defendants. His ruling must be sustained and the entry in each case is,

Exceptions overruled.

EUGENIA M. WELLS

vs.

ARTHUR L. GOULD AND HARVEY HOWARD.

Androscoggin. Opinion, April 28, 1932.

PHYSICIANS AND SURGEONS. MALPRACTICE.

It is the duty of a person injured through the negligence of another to use reasonable diligence in securing medical or surgical aid and, if he exercises due care in the selection of a physician or surgeon, their negligence, mistakes or lack of skill, which aggravate or increase his injury, are regarded by the law as a part of the original injury, for which the original wrongdoer is responsible.

In a suit by the injured person against the original wrongdoer, his cause of action is single and indivisible and includes all damages which naturally result from the original injury or any part of it.

If he obtains judgment, acceptance of satisfaction of it extinguishes his cause of action against other tort-feasors liable for the same injury and bars action against them.

This rule applies though the wrongdoers are severally rather than jointly liable for the injury.

In the case at bar, assuming that the nurse who applied electricity to the plaintiff was negligent as here alleged and the defendants are liable therefor, having recovered judgment against Irene Marston and accepted satisfaction of it, this plaintiff can not maintain this action. A verdict for the defendants was properly ordered in the Trial Court.

On exception by plaintiff. An action brought to recover damages from two physicians for alleged malpractice. At the close of the evidence the presiding Justice directed the jury to bring in a verdict for the defendants. To this ruling the plaintiff seasonably excepted. Exception overruled. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

Fred H. Lancaster,

Locke, Perkins & Williamson,

Sanford Fogg, Jr., for defendants.

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

STURGIS, J. In this action on the case against two physicians for malpractice, a verdict was directed for the defendants and the case comes forward on exceptions.

The material facts in the case made by the bill of exceptions are that on August 31, 1930, the plaintiff was injured in a collision between an automobile she was driving and a car operated by one Irene Marston, against whom she later brought suit for negligence and recovered judgment. Satisfaction of that judgment was entered upon the records of the Trial Court. Immediately after this collision, the defendants in this action, who are physicians practicing their profession in copartnership, were employed by the plaintiff, or her husband in her behalf, to care for her injuries. In the course of their treatments one of them advised the use of electricity, and, at his direction, a nurse in their employ attached an electrical appliance to the plaintiff's chest. It is here claimed that, through the negligent operation of the appliance by the nurse, the plaintiff was burned and is entitled to recover damages therefor from the physicians.

The defendants pleaded the judgment entered for the plaintiff in her original action and its satisfaction, and in support of this defense, introduced certified copies of the plaintiff's declaration in that suit and an entry of "Judgment for plaintiff $600. Judgment satisfied." No attempt is made to impeach or explain this evidence.

It is the duty of a person injured through the negligence of an-

other to use reasonable diligence in securing medical or surgical aid and, if he exercises due care in the selection of a physician or surgeon, their negligence, mistakes or lack of skill, which aggravate or increase his injury, are regarded by the law as a part of the original injury, for which the original wrongdoer is responsible. *Andrews* v. *Davis*, 128 Me., 464; *Hooper* v. *Bacon*, 101 Me., 533; *Stover* v. *Bluehill*, 51 Me., 439.

As a corollary of this general rule, we find it held that a settlement with and release of all rights to recover against the original tort-feasor by the injured person operates as a bar to another action for malpractice against the physician or surgeon who treated and aggravated the injury. *Andrews* v. *Davis*, supra; *Purchase* v. *Seelye*, 231 Mass., 434; *Guth* v. *Vaughan*, 231 Ill. App., 143; *Martin* v. *Cunningham*, 93 Wash., 517; *Hooyman* v. *Reeve*, 168 Wis., 420; *Retelle* v. *Sullivan*, 191 Wis., 576.

The result is the same, we think, when the injured person brings suit on his claim against the original wrongdoer and receives satisfaction of his judgment. His cause of action there is single and indivisible and includes all damages which naturally result from the original injury or any part of it. Freeman on Judgments, Sec. 241; *Hubbard* v. *M. H. & E. Co.*, 105 Me., 384; *Trask* v. *H. & N. H. Railroad Co.*, 2 Allen (Mass.), 331. His acceptance of satisfaction of the judgment recovered has the same effect as a release. It extinguishes his cause of action against other tort feasors liable for the same injury and bars action against them. *Mitchell* v. *Libbey*, 33 Me., 74; *Luce* v. *Dexter*, 135 Mass., 23; *Grimes* v. *Williams*, 113 Mich., 450; *Livingston* v. *Bishop*, 1 Johns. (N. Y.), 290; *Fitzgerald* v. *Campbell*, 131 Va., 486; Cooley on Torts, 138; Notes, 27 A. L. R., 805, 92 A. S. R., 885. This is true though the wrongdoers are severally, rather than jointly, liable for the injury. *Cleveland* v. *Bangor*, 87 Me., 259, 264, 265.

It is unnecessary to pass upon the negligence of the nurse who applied electricity to the plaintiff or the defendants' liability therefor. In the eyes of the law, the plaintiff's cause of action here sued upon has been extinguished. The defendants were entitled to a verdict.

Exception overruled.

HENRY BERTHIAUME *vs.* CHARLES W. USEN.

HENRY BERTHIAUME, JR., PRO AMI *vs.* CHARLES W. USEN

York. Opinion, April 28, 1932.

MOTOR VEHICLES. PLEDGES.

While it is a familiar rule of law that a pledgee, without losing his lien, may return the pledged property to the pledgor as a special agent to sell it and pay the debt secured, the evidence in the case at bar did not support this contention. The defendant had neither property in nor possession of the car and no power to dictate as to its disposal. It was Capitelle's car and his promise to sell it was a mere nudum pactum. *His use of the car thereafter was as its owner, not as agent of the defendant. The plaintiffs' failure to establish that Capitelle was the defendant's agent bars their recovery in these actions.*

On general motions for new trials by defendant. Two actions on the case to recover for injuries sustained by the plaintiff, Berthiaume, Jr., occasioned by the overturning of an automobile in which he was a passenger, and by his father for expenses incurred as a result of the accident. The jury rendered a verdict for the plaintiff Berthiaume, Jr., in the sum of $6,625, and for the plaintiff Berthiaume, Sr., in the sum of $738. General motions for new trial in each case were thereupon filed by defendant. Motions granted. New trials ordered. The cases fully appear in the opinion.

Lloyd P. LaFountaine,
Hinckley, Hinckley & Shesong, for plaintiffs.
Wesley M. Mewer,
Hiram Willard,
Frederick R. Dyer, for defendant.

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

STURGIS, J. The plaintiff, Henry Berthiaume, Jr., a minor, received injuries in an automobile accident June 16, 1931, which

necessitated the amputation of his right arm. In his action here on review, he charged the defendant with responsibility for what he alleges was the negligence of the driver of the car and was given a verdict in the Trial Court, as was his father, Henry Berthiaume, in a suit to recover disbursements made in his son's behalf. The cases were tried together and come forward on general motions by the defendant for new trials.

In 1930 the defendant, Charles W. Usen, was the proprietor of several amusement enterprises at Old Orchard, Maine, and had in his employ as general mechanic one Joseph Capitelle, who owned a Marmon touring car which he kept in a garage attached or appurtenant to a cottage which he occupied as the defendant's tenant. Two weeks after Labor Day, when the amusement season closed that year, Capitelle locked his car in the garage, took the key to the car and the garage to the defendant's house and left town for the winter. Before he went, the defendant let him have fifty dollars, which, the evidence tends to prove, although by no means conclusively, was a loan. Capitelle says: "I told him (the defendant) if I didn't come back, he could keep the car on this year's (loan)." Whether this alleged statement was made before or after the car was locked in the garage and the keys surrendered does not appear.

Capitelle came back and, when he began work again the last of the following April or the first of May, the defendant turned back to him the keys to the car and garage and he kept them thereafter in his possession. He unlocked the garage and took the car out into the yard, but did not drive it. After two weeks, as he says, upon his statement that he could not repay the money which he had borrowed the fall before, the defendant "told me right off I had no business owning a car and the best thing was to get rid of it; and of course I said, 'Well, I will sell the car, the best thing I can do.' So he told me to go ahead and to take the dealer's plates and put them on the car and I did." He adds, "He told me to go ahead and sell the car, that was all, and get his money out of it and get mine." And states that "He (the defendant) didn't say anything after that."

In accordance with the defendant's suggestion, Capitelle put on dealer's registration plates which belonged to the Scarboro Motor

Mart, a corporation of which the defendant was treasurer, and thereafter drove with them, using the car when and as he pleased, without interference or suggestion from the defendant. He had new gaskets put in and the valves ground at a local garage and bought and installed a new radiator, all upon his own orders and at his own expense. He kept the car nights in front of his home in Saco and daytimes in a parking space. He claims, however, that he demonstrated the car to several persons in an attempt to make a sale, and says that he was demonstrating it to Berthiaume, Jr., as a prospective purchaser when the latter was injured.

Berthiaume, Jr., who, it seems, also worked for the defendant, says that he wanted to buy the car and joins Capitelle in the assertion that the day before the accident they arranged that he should ride home to Saco that night in it for a demonstration. For reasons and under circumstances which do not clearly appear, the two men stayed around Old Orchard until about five o'clock in the morning, when Capitelle found Berthiaume, Jr., asleep in the car, woke him up and started for Saco. Taking a roundabout way, Capitelle drove to Goose Fare bridge, so-called, where the car slewed around, hit the rail, turned over and struck a telephone pole. Berthiaume, Jr., says that, in spite of his request that the car be driven slower, it was traveling a little faster than thirty or thirty-five miles an hour when the accident happened. Capitelle attributes his loss of control of the car to a protruding timber in a depression in the road at the entrance of the bridge and claims that his speed had been reduced. No one else testifies on this point.

It is unnecessary to discuss at length what happened after the accident. A disinterested witness testifies that Capitelle, in a day or two, asserted that he owned the car, took the tires from it and gave the wreckage to a garage man in payment of the towage charges. On the other hand, witnesses whose reliability can not be questioned state that the defendant, upon inquiry after the accident, said he owned the car, a statement which he admits but explains as being made in an attempt to save Capitelle from the consequences of driving unlawfully under dealer's plates. These statements are inconsistent with and serve to weaken the testimony which the same

parties gave on the stand, but otherwise are of little probative value. The essential and controlling facts are found elsewhere.

We are convinced that the verdicts below were manifestly wrong. Assuming, without deciding, that Berthiaume, Jr., was himself in the exercise of due care when he was injured and Capitelle was guilty of negligence as alleged, on the record, the defendant had no title or property in the car nor responsibility for its operation at the time of the accident.

The plaintiffs contend that Capitelle pledged his car to the defendant in the fall of 1930 and regained possession of it the following spring as agent of the pledgee and solely for the purpose of sale for the latter's benefit, and invoke the familiar rule that a pledgee, without losing his lien, may return the pledged property to the pledgor as a special agent to sell it and pay the debt secured. *Robinson* v. *Larrabee*, 63 Me., 116; *Spaulding* v. *Adams*, 32 Me., 211; *Thayer* v. *Dwight*, 104 Mass., 254; *Kellogg* v. *Tompson*, 142 Mass., 76; Jones on Pledges, Sec. 43; Story on Bailments, Sec. 297. The evidence does not support this contention nor require the application of the rule.

If there was a pledge, it lies in the statement of Capitelle that, after borrowing fifty dollars from the defendant in the fall of 1930, he locked his car in the defendant's garage, handed over the keys and "I told him, if I didn't come back, he could keep the car on this year's (loan)." He did come back, the keys were returned to him and, so far as the evidence discloses, he immediately resumed complete and exclusive possession of the car. If we construe Capitelle's statement, if it was made, as a conditional agreement for a pledge of the car, if and when he failed to "come back," there never was any pledge. If we view it as a present contract of pledge subject to termination on his return, the lien of the pledge was extinguished when the condition was performed.

Nor is there evidence which will justify a finding that the automobile again came into either the actual or constructive possession of the defendant, as a pledge or otherwise. Capitelle retained the key to it, as also to the garage in which it was kept. After two weeks, as has been seen, he removed it from the garage, kept it at Saco and in parking places and dealt with it in all respects as his

own property. We can discover no ground upon which it can be held that, if there was a pledge, having been once extinguished, it was thereafter revived.

It necessarily follows that when Capitelle says the defendant advised him to sell the car and he agreed to do so and get their money out of it, the defendant had neither property in nor possession of the car and no power to dictate as to its disposal. It was Capitelle's car and his promise to sell it was a mere *nudum pactum.* His use of the car thereafter, as it had been since his return that spring, was as its owner, not as an agent of the defendant.

It is unnecessary to discuss other issues raised by pleading and proof. The plaintiff's failure to establish that Capitelle was the defendant's agent, bars their recovery in these actions on this record. New trials must be granted and the entry in each case is,

Motion granted.
New trial ordered.

ANGELINA BOUTHOT *vs.* DAVID BOUTHOT.

York. Opinion, May 16, 1932.

TROVER. PLEADING AND PRACTICE.

In an action of trover a plaintiff, regardless of the allegations in his writ, is limited in his recovery by his testimony as to the number of articles converted.

In the case at bar, the plaintiff's own testimony failed to show as converted a number of articles alleged in the declaration to have been converted. Under the circumstances it was error to have directed a verdict for the plaintiff, which was in effect to allow recovery for all articles named in the writ regardless of whether or not conversion was proved. The jury finding of $275 damages was excessive.

On exceptions and general motion for new trial by defendant. An action of trover to recover damages for certain articles of household furnishings alleged to have been converted by the defendant. To the direction of a finding for the plaintiff, defendant seasonably excepted, and likewise to the exclusion of certain testimony. The jury rendered a verdict for the plaintiff in the sum of $275. A general motion for new trial was thereupon filed by the defendant. Exceptions sustained. Motion sustained. The case fully appears in the opinion.

Hilary F. Mahaney, for plaintiff.

William P. Donahue, for defendant.

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

FARRINGTON, J. Trover. The presiding Justice in his instructions to the jury directed it as a matter of law to render its verdict for the plaintiff, stating that its only consideration was the question of damages which were returned in the sum of $275.

The case comes to us on a duly noted exception to that portion of the charge directing a finding for the plaintiff, on one other seasonably reserved exception to the exclusion of evidence along a certain line of inquiry, and on general motion.

The writ alleges conversion of the following specific articles: "One oak square table, one 9 x 12 tapestry rug, six oak leather chairs, one round oak table, one 9 x 12 congoleum, four chairs, one A B C electric washing-machine, one Capital Stewart Range, one plain square table, one oak bed, one bed, one oak chair, one ivory bed, one oak chair, one chifferobe, two oak dressers, one oak wash stand, one Singer Sewing Machine, one Glenwood stove, other household goods, . . ."

The plaintiff, through an interpreter, testified that she had in 1929, subject to a $195 mortgage to the Personal Finance Company (the mortgage not having been introduced as an exhibit in the case), "tables, beds, stoves, linoleums, and simply the outfit for a house," everything in the house. She stated that the defendant's wife went to her house on a Friday in October, 1929, and said, "You will have to let the furniture go," and that on the following

Monday an expressman, or truckman, one Fortin, came and took everything away except pictures on the walls and the small curtains, and that what was taken was moved to the garage of one Paquin and afterwards, at a time not stated, moved from there into the "cellar" of the defendant. She testified that she asked the defendant for the furniture and that he said, "Can't have it. . . You can't get him," and that he said he paid for it. She further stated that the furniture was insured and that the premiums were paid by her and her husband. It is important to note that she testified that the furniture taken away was "dining room set; kitchen table; chairs, stove, furnaces, linoleums, sewing machine, curtains, washing machine," *and that that was all.* She further stated that she paid $31 for the dining room set, $8 for the kitchen table, $25 for one stove, the name of which she did not remember, and $49 for "one of those round heaters," and $95 for the sewing machine, a total of $208. She stated that the A B C washing machine named in the writ was sold by her to make a payment of interest on the Personal Finance Company loan and that with reference to the washing machine she paid in part, and on being asked if her husband paid for it, she said that she did not know. She gave, as the alleged owner, her opinion that the furniture was worth $500. It also appeared from her testimony that all of the articles which she mentioned were at least twelve years old prior to the time when she testified, which was at the January term, 1932, the conversion being alleged as of July 1, 1931, and she made the same statement as to the chairs, linoleums and curtains concerning which she gave no cost price, which, it is needless to say, is not the measure of damages.

Regardless of the allegations of the writ, the plaintiff's own testimony limits her recovery in this case to the articles named above, which she said covered all that was taken. The number or kind of chairs is not stated by the plaintiff, nor does the record furnish any information as to the kind or number of linoleums or curtains, but on the admission of the plaintiff as to twelve years' usage of all the articles claimed by her to have been converted, we are forced to the conclusion that the sum awarded by the jury as damages is excessive. There was no evidence before the jury which could have

been reasonably construed as relating to values at the time of the conversion. No such question was asked of or answered by any witness.

Regardless of what the instructions were on the question of damages, they are not before us on any exception and we need not consider them. We must, as far as this record is concerned, approach the consideration of damages on the assumption that the jury was properly instructed, and we find the damages as fixed by the jury so clearly excessive that the general motion must be sustained.

The declaration alleges the conversion of certain specifically named articles of which the "six oak leather chairs, one round table," may well be the dining room set as to which the plaintiff testifies. The "Capital Stewart Range" and "Glenwood stove" are very likely what plaintiff calls "stove, furnaces." The "A B C electric washing machine" is out of the picture in any event, as the plaintiff had sold it. The "Singer Sewing Machine" we may assume to be the same one to which the plaintiff referred in her testimony. The "9 x 12 tapestry rug" and the "9 x 12 congoleum" may be what the plaintiff styles "linoleums." The "four chairs" and the "two oak chairs" may be the "chairs" which plaintiff says were taken away.

Whether the "kitchen table" which the plaintiff says was included in the furniture taken is the "oak square table" or the "plain square table" named in the declaration, it is impossible to say. It can not, however, include both, so that there are named in the declaration as having been converted, but as to which the plaintiff in her testimony makes no claim of conversion, one table, one oak bed, one bed, one ivory bed, one "chifferobe," two oak dressers, one oak wash stand. It appears from the records that "curtains" were included by the plaintiff in her statement as to what was taken and possibly those may be covered by what the declaration calls "other household goods" as to which we make no comment. It will be noted, however, that eight articles were definitely named in the declaration as to which there is no testimony from the plaintiff or any other person that there was any conversion. Under these circumstances, it was error to have directed a verdict for the plaintiff, which was in effect to allow recovery for all articles named in the writ regard-

less of whether or not conversion was proved. The presiding Justice did not in any way separate the specific articles named in the declaration but instructed the jury to find a verdict on the writ as it stood. He had no right to direct a verdict under such circumstances. He should have left it for the jury to determine on the evidence before it what articles had or had not been converted, or he should have given definite instructions to assess damages for such articles only as were by the evidence shown to have been converted.

We pass without comment the question as to whether or not the record discloses sufficient evidence that the plaintiff had such general or special property in the goods in question as entitled her to their immediate possession, so that the direction of a verdict might be sustained as far as that point is concerned, as the exception to such direction must be sustained for reasons already stated.

Although strongly impressed by argument of plaintiff's counsel relating thereto, we regard it as unnecessary to consider the other exception, as the entry must be,

Exception sustained.
Motion sustained.

NANCY C. DAVIS ET ALS

vs.

RICHARD E. MCKOWN, ADMINISTRATOR, ET ALS.

Hancock. Opinion, May 11, 1932.

WILLS. TRUSTS.

A direction in a will to trustees to pay sums annually from income to a designated beneficiary "so long as this trust continues," creates in the beneficiary a vested interest in the income of the trust fund throughout the whole term of the trust that the testator created.

An unqualified gift to beneficiaries following the death of a life tenant constitutes an absolute bequest to be possessed in the future.

A condition subsequent may properly be annexed to an equitable vested fee.

An executory devise does not vest at the death of the testator, but only on the happening of some future contingence. Estates of this character require no prior particular estate for their support. An executory devise may be limited over a defeasible fee — something that can not be effected by a remainder.

Where the devisees of the residue take in common, a lapsed devise of a portion of the residue does not inure to the survivors, but presumptively becomes intestate property.

The intention of the testator, if consistent with the rules of law, is the governing guide for the construction of wills. It may be implied, even if not expressed. But so far only as the testator has communicated, by his will, either in terms or by implication, his intention to the disposal of his estate after his death, can his intention control or have influence.

A widow may, by accepting the specific provision of her husband's will, preclude herself from any right of interest by descent in realty respecting which her husband died intestate. She may not hold under the will, also take by descent, unless the testator's intention that she should is plainly apparent.

No statute or rule of law, however, inhibits a widow from claiming her share in intestate personal estate, though she has accepted her husband's will.

In the case at bar, when the death of Florence C. Young defeated her equitable fee-simple conditional, the executory devise to Bert H. Young had lapsed. He had, by the will, only a contingent interest, which could not vest until the death of his wife in the lifetime of the testator's widow, and then only in event that his (Young's) wife died without issue. The event upon which the future estate was limited to take effect, remained uncertain. The executory devise lapsed at Mr. Young's demise, before the occurrence upon which the devise was contingent.

The testator's widow, by accepting his will, debarred herself from claiming her share in real estate not finally disposed of by the will. Any such real estate is intestate estate, to the exclusion of the widow. In the personal intestate estate, however, the widow shares. The distributees are to be determined as of the time of the decease of the testator.

On report. A bill in equity seeking the construction of certain provisions of the will of William H. Davis, late of Bar Harbor. Bill sustained. Decree in accordance with the opinion. The case fully appears in the opinion.

Deasy, Lynam, Rodick & Rodick, for plaintiffs.
Norman Shaw, for defendants.

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

DUNN, J. William H. Davis, late of Bar Harbor, died December 23, 1917, leaving a will, dated September 18, 1917, which has been duly probated.

This bill in equity, in the prayer of which the answers join, presents certain provisions in the will for construction.

The will instructs the payment, as soon as may be, of the testator's debts and funeral expenses; confirms the proceeds of policies of insurance on his life to the beneficiaries therein named; devises to his wife an absolute estate in the home property and household furniture and furnishings, and proceeds:

"FOURTH: I give, devise and bequeath all the rest, residue and remainder of my property and estate of every kind and nature to the trustees hereinafter named to hold, invest, reinvest, insure, protect and conserve the same and to collect the income thereof and apply it as follows:

"1. To pay to my wife, Nancy C. Davis, the sum of two thousand dollars ($2,000) per year in quarterly payments during her life.

"2. To pay to my daughter, Florence C. Young, the sum of five hundred dollars ($500) per year in quarterly payments so long as this trust continues.

"3. To add any balance of income to the principal of said trust estate.

"FIFTH: Upon the death of my wife, I direct my trustees hereinafter named to pay the following sums to the persons hereinafter named in this paragraph of my will, which sums I hereby bequeath to said persons, to wit:

"To Ella F. Whitcomb, wife of Dr. F. E. Whitcomb, of Orono, Maine, the sum of five hundred dollars ($500).

"To Josephine Campbell of Orono, Maine, the sum of five hundred dollars ($500).

"To my daughter, Florence C. Young wife of Bert H. Young of Bar Harbor, Maine, one-third of all the rest, residue and remainder of the principal of my estate.

"SIXTH: It is my will that the balance, to wit, two-thirds of the rest, residue and remainder of the principal of my estate, shall remain in trust as herein provided for five years after the decease of my wife.

"SEVENTH: At the expiration of five years after the decease of my wife the trust hereby created shall wholly cease and be determined and all the remainder of the principal of my estate, including any accumulated income, shall be paid to my said daughter, Florence C. Young, and I do hereby bequeath to her all the balance of said principal to hold for her own use and benefit in fee.

"EIGHTH: In the event that my daughter, Florence C. Young shall die without issue, before the death of my wife, it is my will that in such event the rest, residue and remainder of my estate shall, upon the termination of the trust hereby created, pass to the following named persons, to wit:

"To Bert H. Young, husband of my daughter, one-half.

"To Arno Davis, son of my brother, Fred A. Davis, one-fourth.

"To Robert Whitcomb, son of my wife's sister, Ella F. Whitcomb, one-fourth."

(The daughter died in the lifetime of the testator's wife, and without issue; but her husband did not survive her.)

Item ninth provided that, in case the testator's daughter died during the lifetime of his wife, leaving a child or children, that such child or children should have the same rights and interests as were bequeathed the daughter.

(This contingency did not happen.)

Item tenth empowers and authorizes the testamentary trustees, during the continuance of the trust, to sell and convey real or personal property, and to execute good and sufficient deeds and conveyances thereof; the purchaser not being required to see to the application of the purchase money.

The eleventh item will be quoted later.

Item twelfth, the last in the will, nominates executors and trustees, and directs the payment, from the residue of the estate, of inheritance taxes on specific legacies.

The testator's widow is still living. The daughter, Florence C. Young, died December 1, 1931.

At the death of the testator, the trustees took, by item fourth, a fee-simple in trust. The legal estate vested in them, although the entire equitable and beneficial estate was vested elsewhere, certain of it subject to being divested on the happening of either of the two contingencies that the will mentions. *Deering* v. *Adams*, 37 Me., 264; *Pearce* v. *Savage*, 45 Me., 90; *Hersey* v. *Purington*, 96 Me., 166; *Holcomb* v. *Palmer*, 106 Me., 17.

One question the bill presents is whether clause 2 under item fourth, directing that, "so long as this trust continues," the trustees pay five hundred dollars annually, in quarterly payments, from income, to the testator's daughter Florence, gave her a vested interest in the income of the trust fund throughout the whole term of the trust the testator created; that is to say, from his death until his widow shall be dead five years.

The mode of gift, and context, and the words used, make clear that the testator bequeathed annual instalments of income to his daughter, for the full period of the trust. Nothing was said as to what should be done with the daughter's portion of the income accruing since her death and to the termination of the trust. It was unnecessary that the testator speak specifically. The law cares for the situation. Such income must be paid to the executor of the daughter's will; she having died testate. *Union Safe Deposit, etc., Company* v. *Dudley*, 104 Me., 297; *Morse* v. *Ballou*, 109 Me., 264, 267.

The several devises, or more properly bequests, under item fifth, were present absolute bequests, to be possessed in the future. *Verrill* v. *Weymouth*, 68 Me., 318; *Buck* v. *Paine*, 75 Me., 582; *Paine* v. *Forsaith*, 84 Me., 66.

A question arises under item eighth, in connection with the settlement of the estate of Bert H. Young. Mr. Young survived the testator, but, as has been noted before, he predeceased his own wife

(the testator's daughter). The question is: Did Bert H. Young take, under the will, a descendable interest?

The nature of the devise to him may be more readily seen against the background of item seventh. By this item, Florence C. Young took, at the testator's death, a vested equitable fee, subject to the trust imposed thereon. *Buck* v. *Paine*, supra; *Paine* v. *Forsaith*, supra. The legal estate had been devised in trust, commensurate with the purposes of the trust.

Item eighth annexed a condition to the equitable fee. *Buck* v. *Paine*, supra. There was no legal repugnancy in annexing the condition, in effect a condition subsequent, to such fee. *Buck* v. *Paine*, supra; *Holcomb* v. *Palmer*, supra (at page 22).

The substance of this condition was that, if the testator's daughter, Florence C. Young, died without issue, before the death of the testator's wife, the estate the will gave the daughter (which, if she outlived the wife would, when the trust imposed upon it should be finally administered, culminate in a legal fee) should go over in fee-simple. The gift over was to Bert H. Young, and to Arno Davis, and Robert Whitcomb; to them as individuals rather than as a class; as tenants in common rather than as joint tenants; in the fractional proportions of one-half to Young, and one-fourth to each of the others. The testator's language, that of a father speaking of his child, signified a definite failure of issue in the life of the first taker; the period fixed being "before the death of my (testator's) wife."

On the death of Florence C. Young without issue, and the consequent divestment of her equitable fee-simple conditional, the devises over to Arno Davis and to Robert Whitcomb, both of whom were living, became operative. The rights of each in the residuum of the estate of the testator passed in interest, subject to the trust imposed, to be enjoyed when the trust estate shall cease and be determined.

But the devise over to Bert H. Young did not become effective. Like the other devises in the same item, this was an executory devise. An executory devise does not vest at the death of the testator, but only on the happening of some future contingence. Estates of this character require no prior particular estate for their support.

An executory devise may be limited over a defeasible fee — something that can not be effected by a remainder. Gardner on Wills, 454; *Doe* v. *Considine*, 6 Wall., 458, 18 Law Ed., 869.

When the death of Florence C. Young defeated her equitable fee-simple conditional, the executory devise to Bert H. Young had lapsed.

He had, by the will, only a contingent interest, which could not vest until the death of his wife in the lifetime of the testator's widow, and then only in the event that his (Young's) wife died without issue. The event upon which the future estate was limited to take effect remained uncertain. The executory devise lapsed at Mr. Young's demise, on May 20, 1931, before the occurrence upon which the devise was contingent. *Snow* v. *Snow*, 49 Me., 159; *Giddings* v. *Gillingham*, 108 Me., 512, 519.

The will does not dispose of the property which the executory devise, had it not lapsed, would have passed. The testator might have provided in his will for the contingency of Mr. Young's death; again, his omission to do so may have been intentional. No living person can know. The fact, however, is that the will provides no substitute devisee, nor does statute.

The lapsed devise was part of the residue of the testator's estate. Where the devisees of the residue take in common, the lapsed devise of a portion of the residue does not inure to the survivors, but presumptively becomes intestate property. *Strout* v. *Chesley*, 125 Me., 171.

Item eleventh of the will is as follows:

> "ELEVENTH: The bequests herein made to and for the benefit of my wife, Nancy C. Davis, are intended to be in lieu of all right of dower or by descent or other legal rights in my estate."

The language of this item is susceptible of the interpretation that the testator intended his widow should have no other interest in, or claim to, his estate, either real or personal, than the will provided she should have.

The intention of the testator, if consistent with the rules of law, is the great and governing guide for the construction of wills.

Morton v. *Barrett*, 22 Me., 257. It may be implied, even if not expressed. But so far only as the testator has communicated, by his will, either in terms or by implication, his intention as to the disposal of his estate after his death, can his intention control or have influence. *Nickerson* v. *Bowly*, 8 Met., 424.

The disposition of intestate estates is regulated, not by will, but by statute. "Property not disposed of by will shall be distributed as the estate of an intestate." R. S., Chap. 88, Sec. 2.

This statute traces back to the first statutes. Laws of 1821, Chap. 38, Sec. 16.

It applies to estates as it finds them; if there has been no will, then to all the estate; if there be a will, not disposing of all the estate, then to the estate not disposed of by such will. *Nickerson* v. *Bowly*, supra.

The statute must, of course, be construed with reference to other statutes relating to the same general subject-matter, though enacted at different times. *Hurley* v. *South Thomaston*, 105 Me., 301.

A widow may, by accepting the specific provision of her husband's will, preclude herself from any right or interest by descent in realty respecting which her husband died intestate. She may not hold under the will and also take by descent, unless the testator's intention that she should is plainly apparent. R. S., Chap. 89, Sec. 13; *Bunker* v. *Bunker*, 130 Me., 103. The silence of this testator's will is not indicative of any such intent. Moreover, he did not devise the property, in the event of the failure of the gift over, to anybody else.

The testator's widow, by accepting his will, debarred herself from claiming her share in real estate not finally disposed of by the will. Any such real estate is (subject to final administration of the trust) intestate estate, to the exclusion of the widow. *Bunker* v. *Bunker*, supra.

No statute inhibits a widow from claiming her share in intestate personal estate, though she has accepted her husband's will. *Bunker* v. *Bunker*, supra.

The personal property of which the testator's will does not ultimately dispose is (likewise subject to final administration of the

trust) intestate estate. The distributees, inclusive of the widow, are to be determined as of the time of the decease of the testator.

A decree in accordance with this opinion will be entered below. Costs as between solicitor and client are to be in the discretion of the single Justice entering the decree.

Bill sustained.
Decree in accordance with this opinion.

IN RE ESTATE OF JAMES N. HILL.

York. Opinion, May 17, 1932.

TAXATION. CHARITIES.

The legislature in exempting from taxation a gift to or for a charitable institution did not intend to exempt all gifts for charitable purposes.

A cemetery corporation is not an educational, charitable, religious or benevolent institution within the meaning of the statute.

In the case at bar, the ruling of the Judge of Probate assessing an inheritance tax on the bequest to the Berwick Cemetery Association was correct.

The bequest to the Sanford Cemetery can not be regarded as a funeral expense. The testator was not buried in the Sanford lot and the rule is unless the expenditure directed to be made has some relation to the testator's own interment, it can not be regarded as a part of his funeral expense.

On report. An action to determine the validity of an inheritance tax assessed against the Berwick Cemetery Association, a legatee under the will of James N. Hill, and to determine whether an inheritance tax should have been assessed on the bequest to the Sanford Cemetery. The executor of the estate had appealed assessments made on the first named bequest, and the State had appealed the ruling exempting the second named bequest. Appeal of executor

dismissed. Appeal of the State sustained. The case fully appears in the opinion.

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

Mathews & Varney, for defendant.

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

THAXTER, J. This case is before us on report to determine whether certain bequests in the will of James N. Hill, late of York, are subject to the payment of an inheritance tax. For the purposes of this opinion the bequests can be divided into two classes, the first of which includes six separate bequests to the Berwick Cemetery Association in trust to use the income to provide gravestones for the poor and to maintain and improve the grounds, and in trust to build a chapel, a receiving tomb, a memorial gate, and to macadamize the avenues. The total amount of these bequests is $70,439.78 and the Judge of Probate assessed a tax on them of $3,933.47. In the second class are two bequests in trust to provide for the erection of a monument on the lot in the Sanford Cemetery, in which the testator's mother, father and certain relatives are buried, and for otherwise improving the lot, and a specific sum of $1,000 to be deposited in some town or institution, the income to be used in the maintenance of such lot. The amount spent by the executor in carrying out the first of these two directions was $7,212.10, and the Judge of Probate ruled that this amount, together with the specific sum of $1,000, was properly included as a funeral expense and accordingly was not subject to a tax.

The executor claims that the ruling assessing a tax on the legacies to the Berwick Cemetery Association was erroneous, because they are charitable bequests, and the state claims that it was error to allow as a funeral expense the sum of $1,000 and the amount spent on the family lot in the Sanford Cemetery. We shall consider these two problems in their order.

Rev. Stat., 1930, Chap. 77, Sec. 1, provides in part that on property passing by will a tax shall be paid, assessed on the value of each bequest. There is excepted from the operation of the act legacies "to or for the use of any educational, charitable, religious, or

benevolent institution in this state." This exemption is narrower than that found in the enactments of many other jurisdictions.

A similar provision was construed in the case of *Hooper* v. *Shaw*, 176 Mass., 190, in which it was held that a legacy to the New England Trust Co. in trust to pay the income to aged men and women in want was subject to a tax. The Court said, page 192: "Giving the broadest latitude to the word 'institution,' and assuming that there is an exemption if a charitable institution of the kind described is either trustee or *Cestui Que Trust*, we can not read the words as meaning to embrace all charitable gifts."

We see no justification for holding that the legislature in exempting a gift to or for a charitable institution intended to include all gifts for charitable purposes. Accordingly the only question which we have to decide in this branch of the case is whether the Berwick Cemetery Association is a charitable institution as that term is used in the statute.

Conceding that under certain conditions a gift to a cemetery corporation may be regarded as charitable, and giving due consideration to the very laudable purposes which this testator had in mind, yet it is impossible to hold that his benefactions here in issue come within the terms of the statute granting exemption to bequests to or for the use of educational, charitable, religious, or benevolent institutions.

It is obvious that in dealing with cemetery corporations the legislature has not regarded them as included within the statutory provisions relating to charities. Chap. 24 of Rev. Stat., 1930, deals solely with burying grounds and cemetery associations. It is provided therein that they shall be organized as provided in Secs. 1 and 2 of Chap. 70. These latter are the clauses which prescribe the manner in which charitable corporations, and those created for purposes other than profit, may be brought into being. If cemetery corporations had been regarded by the legislature as in fact charitable, no such provision would have been necessary. By saying in effect that they shall be organized as are charitable corporations, it seems reasonable to assume that they were not viewed as such for purposes of statutory construction. Furthermore it is provided in Sec. 20 of Chap. 24 that the property of public cemeteries shall be

free from taxation and by the terms of Chap. 13, Sec. 6, Par V, there is a similar exemption of tombs and rights of burial. Such provisions seem superfluous if cemeteries are included within the general exemption from taxation (Chap. 13, Sec. 6, Par III), granted to benevolent and charitable institutions. The view of the legislature would seem manifest that they are excluded from such classification. The Massachusetts court has so interpreted analogous statutory provisions. *Milford* v. *County Commissioners*, supra.

We must accordingly hold that the decision of the Judge of Probate in assessing an inheritance tax on the bequests to the Berwick Cemetery Association was correct.

The payments authorized by the will for the improvement and care of the lot in the Sanford Cemetery were allowed by the Judge of Probate as a funeral expense; and, consequently, no tax was assessed against them. Both counsel concede that if they can not properly be so considered they are taxable. In such view of counsel we concur, for however commendable the purpose of the testator, the payments clearly do not come within the statutory exemption as to charities already discussed.

Funeral expenses have always been allowed as a proper disbursement in the accounts of executors and administrators, *Tobey* v. *Miller*, 54 Me., 480; *Phillips* v. *Phillips*, 87 Me., 324; and the propriety of such practice has been confirmed by statute. Rev. Stat., 1930, Chap. 76, Secs. 59, 62. Both by the terms of the statute and under the ancient common law practice the cost of a burial lot and of suitable monuments and tombstones is properly included under this head. It seems to make no difference that the expenditure may have been made under an express provision of the will, *Morrow* v. *Durant*, 140 Ia., 437; see cases cited in Notes 23 L. R. A. N. S., 474, and 28 A. L. R., 671; or that it may be in the form of a bequest, *In re Maverick*, 119 N. Y. S., 914. Some cases have allowed as an expense payments for the improvement, care, and upkeep of a family burial plot and for the erection of monuments thereon, provided the testator himself is to be buried therein. *In re Edgerton*, 54 N. Y. S., 700; *In re Fleck*, 35 Pitts L. J. N. S., 67, Note 28 A. L. R., 673. Prof. John C. Gray in an article in 15 Harv.

Law Rev., 509, gives an interesting discussion of this general subject. He says at page 515: "When an executor is directed to place monuments on a family burial ground where the testator directs or expects that he will himself be buried, the cost of such erections may come under a liberal interpretation of funeral expenses." Unless such expenditures have some relation to the testator's own interment, we see no ground for saying that they are a part of his funeral expenses; and we have been referred to no authority which is in conflict with this view.

As there is no contention that the testator was himself to be buried in the Sanford lot, we must hold that the decision of the Judge of Probate was erroneous in allowing as an expense of administration the payments for the improvement and maintenance of such lot.

Appeal of executor dismissed. Case remanded to the Supreme Court of Probate for decree in accordance with this opinion. Appeal of the State of Maine sustained. Case remanded to the Supreme Court of Probate for decree in accordance with this opinion.

JOHN ROUX, PRO AMI *vs.* SIMON LAWAND.

Androscoggin. Opinion, May 22, 1932.

PARTNERSHIP. BURDEN OF PROOF.

Partners are liable jointly, and also severally, for the tortious acts of a co-partner done in the line of, or reasonable scope of, the partnership business, whether they personally participate therein, or have knowledge thereof, or not.

If a partnership is liable for a tort, each member thereof is individually liable, and an action may be maintained against a member of the partnership as a joint tort-feasor. The theory is that of agency.

The test as to the liability of the firm for the tort of a partner is the question of agency; and generally the firm is liable if it would have been liable had the same act been committed by an agent intrusted with the management of the business.

One sued as surviving partner of a partnership dissolved by the death of his partner, for a tort committed by that partner, represents only himself. He is not the legal representative of a deceased person. Judgment, if recovered, will go against him as an individual, and not against him in any representative capacity.

Whether a partnership exists is an inference of law from the established facts.

The burden of proving that a partnership in fact existed is upon the party alleging it.

In the case at bar, viewing the testimony, in the light most favorable to the plaintiff, and giving him the benefit of every inference drawn therefrom, the evidence tended to sustain that, as between the defendant and the deceased person, at the time of the unfortunate disaster, there was that community of interest and property which, in general, constitutes partnership.

On exceptions by defendant. An action of tort for the recovery of damages for personal injuries sustained by the plaintiff, a minor, in a fire which destroyed a bootblacking establishment where the plaintiff was then employed. By agreement of the parties the case was referred to referees with the right of exceptions reserved. The referees found for the plaintiff in the sum of $4,500. Defendant seasonably excepted to the acceptance of the report. Exception overruled. The case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

Berman & Berman,

Harris M. Isaacson, for defendant.

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

DUNN, J. This action is against one Simon Lawand of Lewiston, in Androscoggin county, as the surviving partner of a partnership, alleged to have consisted of himself and his since deceased son, to recover damages for personal injuries from a tort, committed in his lifetime by the decedent, acting in the scope of the partnership business, on the plaintiff, then an employee of the firm.

The declaration in the writ is in common-law form, averring plaintiff's due care. *Nadeau* v. *Caribou, etc., Company*, 118 Me., 325.

The defendant pleaded the general issue, and seasonably denied the existence of a partnership. Court Rule X. The case was, thereupon, by consent of the parties, submitted to referees; the submission being made by a rule of court, the right to exceptions as to questions of law reserved. Court Rule XLII.

The referees found the proximate cause of the injury to the plaintiff (that is, the cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred) to have been the negligence of the copartner, in the usual course of the concern's business.

The copartner, it could have been fairly found from the evidence, while cleaning a hat in the back part of the hat cleaning and shoe shining shop of the firm, struck a match to light a cigarette, and got the hat afire. He threw the bruning hat to the floor; then picked it up, and flung it toward the sink, where it fell into a pail of inflammable fluid, which burst into flames. He took up the pail of blazing liquid and hurled the contents through a doorway, or opening, into a small compartment between the hat cleaning room and the shoe shining stands. The plaintiff, who had changed to working clothes, was in this compartment, standing before a mirror and combing his hair, previous to beginning his usual daily work shining shoes. Seeing the act of his employer, plaintiff started to run, but did not escape the flames; he was severely burned about the back and legs.

The referees further found that no negligence by the injured party combined as an efficient cause with the negligence of the injurer in producing the injury.

Damages were awarded in the sum of $4,500.

The copartner himself was fatally burned, dying before the commencement of the suit.

Defendant objected in writing to the acceptance of the report of the referees. Court Rule XXI. The report was accepted and an exception saved.

The substantial questions of law the exceptions raise are readily reducible to these: (1) Whether the plaintiff's testifying, over objection, before the referees, on examination in chief, to facts that transpired before the death of the copartner, was prejudicial to the defendant. The thesis of this exception is that the expression, "legal representative of a deceased person," as used in Revised Statutes, Chapter 96, Section 119, Paragraph II, includes a surviving partner, sued as such. (2) Whether there was legally competent evidence tending to establish facts from which it could have been inferred in an action of tort (where the doctrine of a partnership by estoppel does not apply) that a partnership actually existed.

Both questions must be answered adversely to the defendant.

The general doctrine of the joint and several liability of joint principals for torts applies to partnerships.

Partners are liable jointly, and also severally, for the tortious acts of a copartner done in the line of, or reasonable scope of, the partnership business, whether they personally participate therein, or have knowledge thereof, or not. *Head* v. *Goodwin*, 37 Me., 181, 190; *Lothrop* v. *Adams*, 133 Mass., 471, 479; *Brady* v. *Norcross*, 172 Mass., 331, 337; *Fennell* v. *Peterson*, 225 Mass., 598; *Teague* v. *Martin*, 228 Mass., 458; *McIntyre* v. *Kavanaugh*, 242 U. S., 138, 61 Law Ed., 205.

If a partnership is liable for a tort, each member thereof is individually liable, and an action may be maintained against a member of the partnership as a joint tort-feasor. The theory is that of agency. *Locke* v. *Stearns*, 1 Met., 560; *Staples* v. *Sprague*, 75 Me., 458. The test as to the liability of the firm for the tort of a partner is the question of agency; and generally the firm is liable if it would have been liable had the same act been committed by an agent intrusted with the management of the business. *Lothrop* v. *Adams*, supra.

One sued as surviving partner of a partnership, dissolved by the death of his partner, for a tort committed by that partner, represents only himself. He is not the legal representative of a deceased person. Judgment, if recovered, will go against him as an individual, and not against him in any representative capacity. *Holmes*

v. *Brooks*, 68 Me., 416, involved an inquiry of kindred character.

Whether a partnership exists is an inference of law from the established facts. *Bailey Company* v. *Darling*, 119 Me., 326.

The plaintiff had the burden of proving that partnership in fact existed. *Bailey Company* v. *Darling*, supra.

The testimony was conflicting as to whether a partnership, in which the defendant and decedent were partners, existed after July, 1927. Admittedly, for some years prior to 1919, defendant and his now dead son had been partners at 255 Lisbon street, Lewiston, in a business similar to that being carried on at the time of the injury done the plaintiff. Defendant, there was testimony, sold his share of this business to an Italian, who, with the now deceased son of the defendant, continued to run it. In 1920, another son of the defendant opened a shoe shining establishment at 39 Lisbon street, where shortly afterwards, he and his father became partners. In 1921, the business at 255 Lisbon street was sold to one Vyr; and the since deceased son of defendant, who had been conducting it, came into business with his father and brother, at 39 Lisbon street; this was the place where plaintiff was injured, on August 1, 1930.

The partnership at 39 Lisbon street continued at least to 1926, when the son who had opened the shop removed to Augusta.

Whether, later, still another son was admitted to the partnership, and subsequently withdrew, or dissolution of the partnership was contemplated but never consummated, or the partnership was dissolved, or a new partnership, inclusive only of those who had been members of the first partnership, was formed, were disputed propositions before the referees.

Viewing the testimony, as the plaintiff was entitled to have it viewed, in the light most favorable to him, and giving him the benefit of every inference to be drawn therefrom, evidence tended to sustain that, as between the defendant and the deceased person, at the time of the unfortunate disaster, there was that community of interest and of property, which, in general, constitutes partnership. *Barrett* v. *Swann*, 17 Me., 180; *Staples* v. *Sprague*, supra; *Bailey Company* v. *Darling*, supra.

The decision of the referees, as to both law and fact, was treated, and correctly, when their report was under consideration for acceptance, as final.

Exceptions overruled.

CHARLES H. MILAN *vs.* HAROLD GRAHAM.

Penobscot. Opinion, May 26, 1932.

BILLS AND NOTES.

The holder of a note on which he is endorser, producing it in an action, is deemed to be a holder in due course until the contrary is shown by convincing evidence.

The testimony being that the note was discounted in due course of business, it must be presumed, when, after maturity, an endorser sues on it that it came into the endorser's hands for value.

On exceptions by defendant. An action of assumpsit on a promissory note, endorser against maker. Hearing was before the Court without a jury, exceptions reserved to either party in matters of law. The Court found for the plaintiff. Exceptions by defendant overruled. The case sufficiently appears in the opinion.

E. P. Murray, for plaintiff.

Clinton C. Stevens,

William H. Robinson, for defendant.

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

BARNES, J. On exceptions by defendant this case comes up to determine whether the maker of a negotiable promissory note is held to pay it according to its terms.

It was a four months' note, given by defendant, the maker, to J. R. Mulvaney, Inc., a seller of automobiles.

On the day of its making, or immediately thereafter, the note was endorsed by plaintiff and discounted at a bank. After its maturity plaintiff brought suit and at trial produced the note.

Defense pleaded is failure of consideration, in whole or in part, and that plaintiff was not a holder in due course.

The hearing was before the Court, without jury, with right of exceptions in matters of law reserved to either party.

Plaintiff introduced the note, and rested. Defendant put in his evidence and the Court found for plaintiff for the amount of the note.

The bill of exceptions presents that there was not any evidence upon which the judgment could be legally based.

On its back the note bore two endorsements, J. R. Mulvaney, Inc., and C. H. Milan, the last being the signature of the plaintiff.

Thus the Court had before it a note complete and regular on its face.

His endorsement thereon shows that plaintiff was a holder, and defendant's testimony that he endorsed it to give it value at a bank. That he produced it in suit was a right given him by statute, and he is deemed to be a holder in due course until the contrary is shown by convincing evidence.

These are some of the pronouncements of our Chap. 164, R. S.

The testimony being that the note was discounted, in due course of business, it must be presumed, when, after maturity, an endorser sues on it that it came into the endorser's hands for value. *Breckenridge* v. *Lewis*, 84 Me., 349; *Dugan* v. *United States*, 3 Wheat., 172.

Exceptions overruled.

GEORGE WALTERS *vs.* UNITED STATES GARAGE, INC.

Cumberland. Opinion, May 28, 1932.

BAILMENTS. MOTOR VEHICLES. DAMAGES.

The owner of a public garage for the storage of automobiles is bound under the implied conditions of his contract to store, safely keep and redeliver the car to the owner on demand.

He is liable for damages to the car resulting from the negligence of any of his officers, agents or employees in the performance of any duty in regard to his care or custody which is within the general scope of their employment.

In such a bailment for hire the contract is in its nature a direct and personal obligation by which the bailee undertakes personally to safely keep the property committed to his care.

If the performance of this obligation is delegated to a servant, the bailee remains liable for breach of it although it be unauthorized and outside the scope of the servant's employment.

In the case at bar, the defendant's night man, left in sole charge of the garage, without authority, took the plaintiff's car out for a pleasure ride and, while intoxicated, wrecked it. The bailment being a direct and personal obligation on the part of the defendant to safely keep the property committed to his care, he was liable for the damages caused by his servant.

On exceptions and general motion for new trial by defendant. An action on the case for breach of a contract of bailment. Plaintiff's car stored with defendant was wrecked by an employee of the defendant who was using the car without authority. Trial was had at the October term of the Superior Court for the County of Cumberland. To the denial of defendant's motion for directed verdict exception was seasonably taken, and also to the ruling of the presiding Justice instructing the jury to find for the plaintiff and to assess damages. The jury rendered a verdict in the sum of $600. A general motion for new trial was thereupon filed by the defendant. Exceptions overruled. Motion overruled. The case fully appears in the opinion.

William B. Mahoney,
Theodore Gonya, for plaintiff.
Udell Bramson, for defendant.

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

STURGIS, J. The defendant corporation, operating a public garage in Portland, through its general manager, entered into a contract with the plaintiff to store his Reo automobile. The contract, while general in its terms, provided for live storage at the rate of $8 a month and, expressly or impliedly, authorized removal and use of the car only by the owner or his designated employee. Sometime in the night of March 15, 1931, the defendant's night man, then in sole charge of the garage, without authority, took the plaintiff's car out for a pleasure ride and while intoxicated wrecked it.

At the trial of this action, in which the plaintiff declared in assumpsit for a breach of the defendant's contract to safely keep, store and redeliver the car in the same condition as when accepted, the presiding Justice, having denied the defendant's motion for a directed verdict, instructed the jury to find for the plaintiff and assess damages. After verdict for $600 the defendant filed its exceptions and a motion for a new trial on the ground that the damages were excessive.

The defendant corporation was a bailee for hire of the plaintiff's automobile and, under the implied provisions of its contract, bound to store, safely keep and redeliver the car to the owner on demand. Under the general law of bailment it was liable for damage to the car resulting from the negligence of any of its officers, agents or employees in the performance of any duty in regard to its care or custody which was within the general scope of their employment. *Eaton* v. *Lancaster,* 79 Me., 477; *Hanna* v. *Shaw,* 244 Mass., 57. Having left its night man in sole charge of its garage and delegated to him its duty of safely keeping the car, it was also liable under its contract, we think, for his personal use of and damage to the car, although it was unauthorized and outside the scope of his employ-

ment. This broader view of the law of bailments, although not universally accepted, is supported by an increasing weight of authority.

In Sherman & Redfield Law of Negligence, Sec. 150, 154, we read:

> "The only ground upon which a master can avoid liability for unauthorized and willful acts of a servant is that they are not done in the course of the servant's employment. When they are so done, the master is responsible for them. When not so done, yet if they directly cause a failure to perform a duty incumbent upon the master, he is responsible on that ground. . . . Where the servant by his wrongful act deprives the plaintiff of the benefit of some act which it was the duty of the master to perform and performance of which is, in whole or in part, delegated to that servant, the master is responsible for the servant's acts, no matter how willful, malicious or unauthorized it may be."

And in Wood on Master and Servant, Sec. 321, the statement is found:

> "When by contract or by statute the master is bound to do certain things, if he intrusts the performance of that duty to another, he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act; while, when the action sounds entirely in tort, lack of authority on the part of the servant avoids liability."

In *Maynard* v. *James*, 109 Conn., 365, 65 A. L. R., 427, in which it appeared that an employee of a garage keeper, without authority, wrecked a patron's automobile while using it for his own pleasure, the opinion of that Court in part is:

> "The argument of the defendants is largely based upon the thesis that they are not liable for the negligence of the helper

because at the time of the accident he was not acting within the scope of his employment. However that may be, their contention overlooks a clear breach of duty which fastens an unquestionable liability upon them. One of the bases of recovery stated in the complaint is that the defendants did not regard their undertaking to store and safely keep the car for the plaintiff, and the Trial Court states as one of their conclusions that they did not perform this obligation. When the plaintiff left the car in the garage, the defendants, as bailees for hire, assumed the obligation not only to use due care in the performance of the services required, but to keep it in their garage or other appropriate place ready for redelivery to the plaintiff when he should come for it. . . . The driving of the car out of the driveway into the street, and its subsequent operation, was a wholly unauthorized use which, had the defendants done it themselves, certainly would have constituted a clear breach of duty. . . . This duty of the defendants was contractual in its nature; it required performance, and while no doubt they might delegate that performance to another, for breach of it, whether by themselves or by that other, they would be liable."

In *Evans* v. *Williams*, 232 Ill., App. 439, that Court observes:

"It is well established that the bailee is not an insurer and is liable only for the exercise of ordinary care in protecting the property intrusted to him, but it does not follow that the limitations on liability for a servant's negligence, in the usual action by a third party sounding in damages for tort alone, should be extended to an action for breach of a contract of bailment. In bailment, the contract is in its nature a direct and personal obligation by which the bailee undertakes personally to keep safely the property committed to his care. It is an obligation from which he can not relieve himself without the other's consent. . . . The actual work of guarding the property may be delegated to an employee, and in the customary way of conducting many businesses this must be done during

certain hours of the day, but the bailee is not thereby relieved from the personal obligation of his contract. An employee to whom such duty is delegated stands in the place of his employer and any negligence of this employee in protecting the property is the negligence of the employer, who can be made to respond in damages caused thereby."

In *Corbett* v. *Smeraldo*, 91 N. J. L., 29, on facts similar to those in the case at bar, it is said:

"We think this case does not involve the question of the master's responsibility for the tortious acts of his servants. It involves rather the question of the master's liability for breach of his own contract. . . . What were the terms of the contract? Those terms are rarely expressed at length. Much must be left to implication and be determined in accordance with the business usages and customs of the times.... Storage involved keeping the automobile there and not permitting it to go out without the plaintiff's authority. If the defendant chose to intrust that duty to his night man, he was liable, not because the night man was negligent, but because the defendant himself had been guilty of a breach of his contract of storage. . . . There was a breach of the contract to store as soon as the automobile was taken out of the garage."

In *Insurance Co.* v. *Sturtevant*, 116 Ohio State, 299, an extended discussion of the question here involved includes the following:

"The distinction between the doctrine by which the master is held liable for a breach of his contractual obligation to another, notwithstanding the fact that the breach was committed by his servant without his knowledge or authority, while the subject of contract was in the possession of the servant by the authority of the master, and the doctrine by which the master is held not liable for the tort of his servant committed while the servant authorizedly is in possession of the master's property, but is using it for his own purpose and not

for the purpose of the master, is that the doctrine first above relates to a contractual obligation to a stranger to the servant, which the master has himself assumed and entered into, and from which he can not absolve himself save by performance; and since he elects to perform through his servant, the servant acts in his place and stead and can no more extinguish the obligation of his master under the contract by any act of his than the master can by his own act; whereas, the latter doctrine relates to no contractual obligation entered into by the master, but to a duty imposed by law upon every member of society, and liability thereunder arises from a violation of duty. If, then, the servant violates a duty and incurs liability while he is acting for himself and not for his master, the liability is his. The master is not absolved from an existing liability by the act of a servant; he simply has not incurred liability."

In the recent case of *Marine Ins. Co.* v. *Grand Central Garage*, 9 Pac. Rep., 2d Series, 682 (Nev., 1932), where the night man in a garage, without authority, took out a patron's car for a pleasure ride and wrecked it, that Court held that the act of the night man, although outside the scope of his employment, was not a defense to an action for a breach of the contract of storage. This case follows text and decision already cited.

Other cases reaching the same result by a somewhat different line of reasoning are *Southern Garage Co.* v. *Brown*, 187 Ala., 484; *Mehesy* v. *Mission Garage*, 60 Cal. App., 275; *Millwork Co.* v. *Garage Co.*, 30 Del., 383; *Insurance Co.* v. *Sales Co.*, 85 Ind. App., 675; *Vannatta* v. *Tolliver*, 82 Pa. Sup., 546; *McLain* v. *Automobile Co.*, 72 W. Va., 738. The point is discussed in the text of 38 Corpus Juris 86. It is annotated in 15 A. L. R., 686, 42 A. L. R., 138, and 65 A. L. R., 427.

We have carefully examined the cases cited by the defendant which seem to take an opposite view of the question here raised. *Firemen's Fund Ins. Co.* v. *Schreiber*, 150 Wis., 42, denies recognition of the exception to the general law of bailment, which has already been noted in the text and judicial opinions which have

been cited. This case has been repeatedly considered by other courts but so far as we can discover has not yet been followed. The conclusions in its majority opinion are at variance with the general consensus of legal opinion on the question. We are not convinced that it should be followed in this jurisdiction.

No more do we find warrant for a rejection of the majority view by a reading of *Smith* v. *Bailey,* 195 Mich., 105; *Indemnity Co.* v. *Fawkes,* 120 Minn., 353; and *Handley* v. *O'Gorman,* 45 R. I., 242. These cases appear to lack the element of a delegation of contractual obligation by the master or are governed by the general rule without consideration of the exception here invoked.

Our conclusion is that the action being for a breach of the defendant's contract of bailment, upon the undisputed facts, the plaintiff was entitled to recover for the damage done to his automobile. The amount assessed by the jury was not excessive. The rulings of the trial Judge were without error.

Exceptions overruled.
Motion overruled.

HENRY CLEAVES SULLIVAN, ADMR.

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Cumberland. Opinion, May 31, 1932.

CONTRACTS. INSURANCE. CONVICTS. CONSTRUCTION OF STATUTES.

Contracts cannot change statutory laws. It is, therefore, a general principle of construction that statutory provisions which are applicable to, consequently enter into, and form a part of the contract, as much as if incorporated therein.

A convict serving a life term in prison is to all intents and purposes civilly dead.

Civil death is the state of one who, although possessing natural life, is on account of commission of crime for which he has been convicted, incarcerated, in execution of sentence for so long as he shall live — and thereby lost all civil rights; he is considered, in law, dead. His capacities among his fellow members of society are extinct. He can no longer perform any legal function. It is not that he is in fact deceased, but dead in the law.

From the moment of his imprisonment the statute operates as to personalty clearly enough to deprive the person civilly dead of his property.

His rights and responsibilities are transferred to his legal representatives as would be done had he really died. After administration charges are paid and debts satisfied, distribution of his estate should follow.

In interpreting statutes, effect is given to legislative intent. Adherence to the precise words of the statute should not be so rigid as to defeat purpose. The equity of a statute is usually an index of the intention of the legislature.

There is in every contract of life insurance an implied obligation on the part of the insured that he will do nothing wrongfully to hasten its maturity.

In the case at bar, life imprisonment (civil death) of the insured did not accelerate his insurance contract; the risk was that of natural, actual death.

On report on an agreed statement of facts. An action of assumpsit brought by the Administrator of the Estate of Kenneth C. Williams, a convict serving a life sentence in the State Prison, against the Prudential Insurance Company of America, to recover the proceeds of an insurance policy on the life of the said Williams. Judgment for defendant. The case fully appears in the opinion.

Francis W. Sullivan, for plaintiff.

Charles J. Nichols, for defendant.

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

DUNN, J. This case was reported on a statement of facts, as agreed to by the parties, to determine if the action, the basis of which is an endowment policy, in all essential features a policy of life insurance, is sustainable.

The policy, admittedly a Maine contract, in full force, is dated August 16, 1926. It was made payable to the insured, one Kenneth C. Williams, if he should live to the policy anniversary date next

preceding the sixtieth anniversary of his birth; otherwise to his executors or administrators.

The principal question is whether the policy is due, not because of the physical death of the insured, but because of his imprisonment, in 1930, when he was twenty-one years old, in the State Prison, under a legal sentence, for the term of his life, for killing his wife.

In other words, does the policy, itself silent as to coverage of the contingency, oblige payment of liability, as for actual death, upon the life imprisonment of the insured — the punishment affixed by law — upon his just conviction for murder.

The policy prescribes, as a condition precedent to recovery, on the occurrence of death, the formality of notice and proof. Since the defendant denies all liability, this requirement may well be found to have been waived.

The main issue is whether, within the legal interpretation and construction of the policy, the insured is dead.

The statute relating to civil death, Rev. Stat., Chap. 76, Sec. 19, subsisted at the time of making the contract. Contracts cannot change statutory laws. It is, therefore, a general principle of construction, that statutory provisions which are applicable to, consequently enter into, and form a part of, the contract, as much as if incorporated therein. 6 R. C. L., 855; 1 Cooley's Briefs, 690; 1 Couch on Insurance, Sec. 150 *et seq.; Gross* v. *Jordan*, 83 Me., 380, 383; *Holt* v. *Knowlton*, 86 Me., 456; *Peabody* v. *Stetson*, 88 Me., 273, 282; *Marston* v. *Kennebec Mut. Life Ins. Co.*, 89 Me., 266.

A convict serving a life term in prison is, to all intents and purposes, civilly dead. R. S., *supra*. "His estate shall be administered upon and distributed, and his contracts and relations to persons and things are affected, in all respects, as if he were dead." R. S., *supra*.

Civil death is the state of one who, although possessing natural life, is, on account of the commission of crime for which he has been convicted, incarcerated, in execution of sentence, for so long as he shall live, and thereby lost all civil rights; he is considered, in law, dead. Bouvier's Law Dict. His capacities among his fellow members

of society are extinct. Abbott's Law Dict. He can no longer perform any legal function. It is not that he is in fact deceased, but dead in the law. "There is a death in deede, and there is a civill death, or a death in law." Co. Litt., 200.

From the moment of his imprisonment, the statute operates as to personalty, clearly enough, to deprive the person civilly dead of his property.

His rights and responsibilities are transferred to his legal representatives, as would be done had he really died. After administration charges are paid, and debts satisfied, distribution of his estate should follow.

A man civilly dead is disabled to sue in his own name; he cannot prosecute actions begun before his imprisonment. *Knight, Ex'r.* v. *Brown*, 47 Me., 468.

Contracts of partnership are affected, as the statute uses the term, by the civil death of the party; so also are contracts altogether personal, as to serve the other party to the contract; and contracts where one is acting for another, such as agencies or powers of attorney, where the agency or power is not coupled with an interest. As to these civil death, and its consequences work a termination not unlike a revocation by natural death. Other contracts are, in general, affected only in the sense that the administrator of the party civilly dead must fulfil all his engagements, and may enforce all those in his favor.

In interpreting statutes, effect is given to legislative intent. Adherence to the precise words of the statute should not be so rigid as to defeat purpose. *Gray* v. *County Commissioners*, 83 Me., 429. A thing within the letter of a statute is not within the statute, if contrary to the intention of it. *Carrigan* v. *Stillwell*, 99 Me., 434. The equity of a statute is usually an index of the intention of the legislature.

There is, in every contract of life insurance, an implied obligation on the part of the insured, that he will do nothing wrongfully to hasten its maturity. Where, according to the laws, capital punishment was inflicted on conviction of murder, death in such manner was held not covered by insurance, though the policy contained no express exception; the considerations were based upon public

policy. 8 Couch on Insurance, Sec. 2156; *Burt* v. *Union Cent. Life Ins. Co.*, 187 U. S., 362, 47 Law Ed., 216; *Northwestern Mut. Life Ins. Co.* v. *McCue*, 223 U. S., 234, 56 Law Ed., 419. There are, it is true, decisions to the contrary. *Collins v. Metropolitan Life Ins. Co.* (Ill. 1907), 83 N. E., 542; *Fields* v. *Metropolitan Life Ins. Co.* (Tenn. 1923), 249 S. W., 798.

But the reasoning of the Supreme Court of the United States is here adopted, as extending in equal degree, at least, where life imprisonment is limited to the felonious homicide in which the characteristic distinction is the presence of malice; and civil death with deprivation of property results when the sentence of the condemned murderer is put into effect. R. S., Chap. 129, Sec. 1; R. S., *supra.*

Imprisonment of this insured did not accelerate his insurance contract; the risk was that of natural, actual death.

In accordance with the stipulation in the report, the mandate will be,

Judgment for defendant.

DOROTHY A. PUTNAM *vs.* ELMER W. FULTON.

Cumberland. Opinion, June 2, 1932.

JAILS. EXECUTIONS. SIX MONTHS' BONDS.

The keeper of a county jail is under no obligation to receive a debtor who offers to deliver himself into custody in compliance with the requirements of a six months' bond unless there is filed with the jailer either an attested copy of the execution on which the debtor was arrested or of the bond.

If the jailer received him without either, the delivery would be sufficient, but he would not be bound to do so nor would he incur any liability for not doing so.

In a suit by a judgment creditor against a jailer for damages because of his not having received the debtor into custody, a declaration alleging that the debtor offered to so deliver himself but not alleging that he did deliver himself nor that he accompanied the offer with evidence of the authority of the jailer to receive him, is bad on demurrer.

On exceptions by plaintiff. An action of tort against the defendant, a turnkey and deputy sheriff in charge of the Aroostook County jail, alleging damage because the defendant unlawfully refused to accept one Floyd H. Putnam into his custody when he presented himself offering to surrender himself to relieve the existing sureties on a six months' bond. To the sustaining of a demurrer filed by the defendant, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

William Lyons, for plaintiff.

J. Frederic Burns, for defendant.

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

PATTANGALL, C. J. Action against deputy sheriff in charge of county jail, alleging damages because defendant unlawfully refused to accept plaintiff's judgment debtor into his custody, when the debtor appeared at the jail and offered to surrender himself to relieve his sureties on a six months' bond.

Defendant demurred generally to plaintiff's declaration and demurrer was sustained. The case comes here on exceptions to the ruling.

The declaration sets out the following facts: that plaintiff was the owner of a judgment against one Floyd H. Putnam; that a capias execution had been issued thereon on which the debtor was arrested; that when he was about to be committed, he tendered a bond with sufficient sureties conditioned as follows:

> "Now if the said Floyd H. Putnam, shall, within six months from the time of executing this bond, cite the said Dorothy A. Putnam before two Justices of the Peace, and submit himself to examination, agreeably to the 124th Chapter of the Revised Statutes and acts amendatory thereof and additional thereto, and take the oath prescribed in section fifty-five of said Chapter; pay the debt, interest, costs and fees arising in said execution; or deliver himself into the custody of the keeper of the jail to which he is liable to be committed under said execution, then this obligation shall be void; otherwise it shall remain in full force. . . ."

that upon acceptance of the bond the obligor was released from arrest; that defendant was a deputy sheriff and keeper of the county jail; that on December 2, 1931, and within six months next after the date of said bond, Putnam presented himself at the jail and offered to deliver himself into the custody of the defendant as keeper of the jail, in accordance with the conditions and provisions of the bond, the jail being that to which Putnam was liable to be committed under the execution; and that the defendant with intent to aid and abet Putnam from paying the amount of the execution, refused and neglected to accept him into his custody as keeper of the jail, but allowed him to escape, and without performing either of the other conditions contained in the bond.

Plaintiff's claim against this defendant is based upon an alleged breach of legal duty on his part in not receiving the judgment debtor into his custody when the debtor "offered" to deliver himself. But the condition of the bond was that he should deliver himself, not that he should offer to do so.

Defendant argues that a mere offer to deliver is not sufficient unless the offer was made in such a manner and under such circumstances as compelled acceptance and that the declaration sets out no cause of action because it lacks affirmative allegation in this respect.

We think his position is sound. Our Court said in *Jones* v. *Emerson*, 71 Me., 405:

> "The universal practice has been for the debtor to deliver to the jailer, at the jail, when he delivers himself up to custody, either an attested copy of the execution and return thereon or of the bond. In *White* v. *Estes*, 44 Me., 21, the debtor delivered both. If the jailer receives him without either, the delivery would undoubtedly be sufficient, but he would not be bound to receive him without one or the other."

and in *Hussey* v. *Danforth*, 77 Me., 17:

> "It has been the practice for the debtor to deliver to the jailer, when he surrenders himself into custody, either an attested copy of the execution and return thereon, or of the

bond, and he would not be obliged to receive him without one or the other, . . ."

To the same effect is *Jordan* v. *McAllister*, 91 Me., 481:

"To comply with this condition, so as to save the penalty of his bond, it was necessary for him, within the time named, either to deliver himself into the custody of the jailer and be received into jail, or to deliver himself to the jailer at the jail in such a manner as would make it the duty of the jailer to receive him into custody. The jailer was not obliged to receive him unless at the same time he had produced and delivered to the jailer sufficient evidence of his authority to keep and hold him until discharged by authority of law, such as an attested copy of the bond or of the execution and officer's return thereon. . . ."

From these cases it appears that a jailer may receive one who offers to place himself in custody without being presented with an attested copy of the execution and return thereon or of the bond, but that he is not obliged to do so.

There is no allegation that this debtor presented the jailer with either of the necessary documents. It can not be argued that this is only open on defense and not properly raised on demurrer because there is no allegation that the judgment debtor did "deliver himself into the custody of the keeper of the jail" as required by the terms of his bond. The allegation is that he "offered to deliver himself."

Had actual delivery been alleged, the allegation that the offer to deliver was accompanied by a presentation to the jailer of the document or documents which compelled the acceptance of the debtor into custody might have been dispensed with. But neither of these allegations appears. All of the material allegations contained in the declaration may be taken as true and no legal liability attach to defendant.

There is an allegation to the effect that the refusal of the jailer to take the judgment debtor into custody in the absence of evidence of legal authority to do so — or to state it in another way,

the jailer's refusal to waive the presentation of such evidence — was prompted by a desire on his part that the debtor should escape imprisonment.

Unless defendant failed to perform a legal duty to the damage of plaintiff, no action lies. The motive which may have prompted him not to do that which he was under no obligation to do is entirely immaterial.

Exceptions overruled.

JOHN R. GILMARTIN, AS COLLECTOR OF TAXES FOR THE CITY OF PORTLAND, 1930

vs.

CONSTANCE EMERY.

Cumberland. Opinion June 4, 1932.

DOMICIL. TAXATION.

To abandon domicil of origin and establish domicil of choice, three facts must appear, (1) *abandonment of domicil of origin,* (2) *selection of a new locus,* (3) *the animus manendi.*

The burden of proving change of domicil is on the one alleging change.

In the case at bar, the defendant did not withdraw her registration as a voter in Portland until July, 1930, but did vote in the June primary of that year. The defendant did not introduce enough evidence to sustain the burden of proving change of domicil before April first, 1930. The plaintiff was entitled to judgment in the sum of $6,461.76 with interest.

On report. An action of debt to collect taxes alleged to be due the City of Portland for the year 1930. The sole question at issue was restricted by stipulation to the issue of the defendant's domicil on April 1, 1930. Judgment for the plaintiff. The case fully appears in the opinion.

Harry C. Wilbur, for plaintiff.
Verrill, Hale, Booth & Ives, for defendant.

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

BARNES, J. The case comes up on report, in an action of debt for the taxes on personal property.

By stipulation of counsel the sole issue is whether defendant's domicil on April first, 1930, was in Portland; and, if this be decided in the affirmative, judgment shall be for plaintiff in the sum of $6,461.76, with interest from the date of the writ; otherwise judgment to be for defendant.

Defendant was born in Portland and her domicil was without interruption the same as her father's, in Portland, until his death, in April, 1929.

For more than twenty years before his death, defendant's father, with his family, lived during the winter seasons in Portland, and for the summer months in a house in the town of Cumberland.

In May, following the death of her father, defendant opened the Cumberland house, and lived in it through the summer.

In September of that year she and her sister, the surviving heirs of the father, sold the Portland residence, dividing the furniture therein, and defendant bought the sister's interest in the Cumberland property. She then moved to the Cumberland house a few pieces of her share of the furniture formerly in the Portland house. The remainder, "the bulk of it," she placed in storage.

She lived in the Cumberland house through the summer of 1929, and on October first departed for travel in Europe, returning to her Cumberland house on June 7 or 8, 1930.

She testified that at the time of sale of the Portland house she had an intention as to her future, permanent residence, namely, "to establish my residence at Cumberland Foreside."

To promote her business and property interests she retained in her employ while absent, a caretaker in Cumberland, a chauffeur, and an attorney at law.

From September, 1920, she had been a registered voter in Portland, and it was on July 28, 1930, that she caused her name to be stricken from such registration list.

For the maintenance of government, town, county and state, municipal officers annually assess taxes.

As to personal property generally, the law is that it shall be assessed to the owner in the town where he is an inhabitant on the first day of each April. R. S., Chap. 13, Sec. 14.

The relation of inhabitant is mainly a political relation.

To render a person liable to assessment for taxes on personal property, it is essential to demonstrate that he is an inhabitant of a definite town. And it is our understanding that the word "domicil," as used in the stipulation herewith, expresses the combination of circumstances that establish a person as an inhabitant of a town for purposes of taxation on his personal property generally. We use the word here with that meaning, and the question before us is whether defendant's domicil, before April first, 1930, had been changed from Portland to Cumberland.

Decisions of this court on descent and distribution of estates turn upon the same conclusion, as do questions of pauper settlement, and of taxation.

All are matters regulated under statute law. Cases arising under the statutes generally applicable to either are analogous, and decisions in one case may be cited as governing in others of the classes named.

A person may have at one time several residences, meaning houses equipped for use as his dwellings; but for the purpose of fixing his status as subject to municipal taxation he shall be deemed to have but one domicil at a time.

This invariably has been held to be the law in this state where litigation has arisen in cases of the classes mentioned above.

It is also settled that the burden of proving change of domicil is upon the one who asserts such change, and the presumption of continuance of domicil is enough, until disproved. *Holyoke* v. *Holyoke*, 110 Me., 469.

Defendant admits that her domicil and established residence for purposes of municipal taxation in the spring of 1929 was in Portland.

To avoid payment of the taxes assessed upon certain of her personal property, the sum declared upon in this writ, it is incumbent upon her to prove that, prior to April first, 1930, she abandoned

her domicil and established such in Cumberland, with the intention of remaining there for an indefinite time.

"In order to establish a domicil of choice evidence of three important facts must appear, (1) abandonment of domicil of origin, (2) selection of a new locus, (3) the animus manendi." *Mather* v. *Cunningham*, 105 Me., 326.

Did defendant here change her domicil before April first, 1930?

And if she changed it, did she do so with the intention of making Cumberland the site of her domicil for an indefinite time?

We must find from the record before us, by direct proof, so far as proof may be found, and from inferences logically drawn, affirmative answers to both questions, or otherwise the tax was legally assessed and must be paid.

The act of change from a home is easily demonstrable.

To determine the intent of the actor is sometimes more difficult.

The purpose with which one changes his residence may be expressed in testimony by the party alleging change of residence. *Parsons* v. *Bangor*, 61 Me., 457. *Knox* v. *Montville*, 98 Me., 493.

So too, oral declarations made by the party whose domicil is in dispute, as to the intent with which removal was accomplished, when part of the *res gestae*, are admissible in evidence in a contest to which he is a party. *Gorham* v. *Canton*, 5 Me., 266; *Wayne* v. *Greene*, 21 Me., 357; *Corinth* v. *Lincoln*, 34 Me., 310; *Etna* v. *Brewer*, 78 Me., 377; *Knox* v. *Montville*, supra.

"Residence, being a visible fact, is not usually in doubt. The intention to remain is not so easily proved. Both must concur in order to establish a domicil.

"And, as both are known to be requisite in order to subject one to taxation, or to give him the right of suffrage, any resident who submits to the one, or claims the other, may be presumed to have such intention." *Gilman* v. *Gilman*, 52 Me., 165-177.

If, when opening her Cumberland residence in 1929, the defendant had formed a firm intent to change her domicil to that town, there was the concurrence of residence and intent necessary to effect change of domicil.

Without reciting the testimony, we find defendant testified that after her father's death she decided she found her greatest interest in the Cumberland home, the garden there was her chief hobby;

that recollections of family life associated with that home were the more pleasant; that she could not afford to maintain two homes, as her father had since 1900; that she knew "the rates" would be less in Cumberland; that she preferred to be identified with that town; that she wished to be free to travel, especially in winters.

These expressions are admissible because they have a tendency to show her intention to establish her domicil in Cumberland when she sold her Portland home, though not necessarily controlling.

And, so far as they throw light on whether or not she had a firm intention to change, they are admissible if expressing her decision at the time she took the step to sell.

But plaintiff contends that other evidence shows conclusively that until after the tax was assessed there was no abiding determination to change domicil accompanied by any act indicative thereof. He argues that, at the very time of selling the family home in Portland, defendant purchased a lot on Chadwick Street, in the same city, which she admits.

And she testified she bought with the purpose, at some time to build a home on Chadwick Street, but that it was to be a "secondary home."

Plaintiff further urges that the storing of the furniture of the Portland home, and the fact that defendant did not take it to the Cumberland house; that she took her passport for foreign travel, in the summer, from Portland; that she registered as from Portland in hotels, during the foreign trip; that her agent, an attorney at law, registered her motor as that of a Portland resident, in 1930; that no list of property subject to taxation in Cumberland was submitted to the assessors of Cumberland in 1930; that in the June primaries of that year defendant voted in Portland; that she did not notify the Portland board of registration of voters that she had moved to Cumberland until July, 1930; that these facts prove defendant had not changed her residence prior to April, 1930.

Several of the acts cited by plaintiff as proof of no change of domicil up to the time of their doing, are of the sort that do not separately prove the point, as, for illustration, the voting in the primary. Such voting was legal and proper, and would tend to prove change in domicil, if it were shown that defendant knew of the statute giving her the right.

Plaintiff argues that if she had consulted her attorney, or any person who knew the law governing registration and enrolment, on the question of her right to vote in Portland in the primary election, and as to the effect of her voting in either town on the probability that her intent, in the preceding summer was to change her domicil and become an inhabitant of Cumberland, she would undoubtedly have been informed that under the law she could register, enroll and vote in Cumberland, if her intent the summer before was a firm intent to change her residence, but that, if her change of domicil had not been established in Cumberland for three months, next preceding that election she could vote legally only in Portland. Such would have been sound advice, and the argument is persuasive.

Defendant is presumed to know the law, and her act in voting in Portland, if done with full knowledge, to the charitably minded tends to show either lack of firm intent to change her domicil in 1929, or ignorance of the law.

Plaintiff further contends that the natural conclusion on all the evidence must be that the determination to change her domicil had not become fixed in defendant's mind until after the tax was assessed.

A fact of considerable significance is that on March 29, 1930, the third day before the taxes for the current year would be assessed, defendant cabled her agent from Italy.

She was then traveling with Mrs. Margaret S. Fogg, of Scarborough, Maine.

As a witness Mrs. Fogg said the cablegram was sent from a hotel where she and defendant were guests, and that defendant came to her, after sending the message, and said, "I have sent a cable to Robert to change my residence to Cumberland."

This statement, made at the time of sending the cable, or immediately after that act, is admissible as evidence, and it renders admissible the cable as well as a prior statement of the witness that a great many times during the winter then ending the defendant had said she "had been considering moving out of the city of Portland into Cumberland."

The cablegram, which bore date of March 29, 1930, was addressed to her counsel in Portland and contained these words, "Please arrange establish residence in Cumberland." What is this

cable's evident meaning? It may be arrange and establish my residence in Cumberland; or it may be arrange to establish my residence in Cumberland. Whatever its meaning, it looks to the future; demands action.

From the record we can find no act done in furtherance of the plan of the sender.

And from all the admissible evidence we conclude that defendant has not sustained the burden of proving change of domicil prior to April first, 1930.

In accordance with the stipulation, the judgment will therefore be for plaintiff in the sum of $6,461.76 with interest from the date of the writ.

So ordered.

GEORGE S. CHAPMAN *vs.* CITY OF PORTLAND.

Cumberland. Opinion June 8, 1932.

MUNICIPAL CORPORATIONS.

One is not entitled to relief by injunction unless he shows that without such relief, he will suffer irreparable injury to his property or property rights and has no adequate remedy at law therefor, or a multiplicity of suits will result.

The validity of the general delegation of police power under the Statute and the exercise of it by the municipality, within proper limits, is not and can not be questioned.

The citizen has a constitutional and common law right to travel and transport his property by motor vehicles over the public highways, including the streets of a city, and, subject to statutory or municipal regulations, has the right to make a reasonable use of such vehicles in the business of carrying passengers or freight for hire.

This right to use the public highways and streets for the conduct of a private business, however, is in the nature of a special privilege which the State, or municipality under its delegated power, may either condition, restrain, extend or prohibit.

The City of Portland, in the exercise of its delegated police power, is authorized to limit the number of public vehicle stands upon its streets and fix their location, or even to prohibit them altogether to the end that, without undue impairment of the public hackney service, traffic congestion may be prevented and the safety and convenience of public travel promoted.

Failing to show that he is or can be injured by the operation of a regulation, a complainant has no right to be heard in an attack upon its constitutionality.

There is no unlawful delegation of authority by the municipality in providing that applications for the use of public vehicle stands in a restricted area must be made in writing to the Chief of Police and receive the approval of the City Manager and Committee on Public Safety.

What a municipality may forbid altogether, it may forbid conditionally unless its written permission is obtained, and the issuance of a permit therefor may be delegated to a city officer or a less numerous body than the one which enacts the prohibition.

In the case at bar, Article 7 of the Street Traffic ordinance of the City of Portland, primarily prohibits all taxicabs or public vehicles from standing on Congress Street between the designated intersections. The establishment of a stand in this restricted area was subject to the consent of the abutting owners of the properties enumerated in the ordinance. If they give their consent, the ordinance becomes self-acting and the stands can be established. If they withhold consent, the stands are barred.

Under this ordinance abutting owners of the properties enumerated were given no power to control of the use of the stands which were established. Their power was only to modify the general prohibition of the ordinance and remove restrictions which otherwise remain absolute.

The plaintiff in this case might be benefited by the modification to the absolute prohibition, but he could not be deprived by it of any constitutional or property right. Having failed to show in his pleadings that the regulation is void or that he would be injured by its enforcement, his Bill is without equity.

On report. A Bill in Equity brought by a licensed taxicab operator of the City of Portland to enjoin the City of Portland from attempting to enforce ARTICLE 7, Section 1, of an ordinance relating to street traffic. The defendant demurred to the complaint and the sitting Justice, by consent of the parties, reported the case to the Law Court for final determination of all questions of law raised in the plaintiff's bill of complaint. Demurrer sustained. The case fully appears in the opinion.

Richard B. Wilkes, for plaintiff.
H. C. Wilbur,
Leon V. Walker, for defendant.

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

STURGIS, J. In this Bill in Equity, the complainant attacks the constitutionality of Section 1 of ARTICLE 7 of an ordinance of the City of Portland which governs taxicab or public vehicle stands. A general demurrer having been filed, with the consent of the parties, the case is reported to the Law Court.

Supplementing its ordinance relating to Hackney Carriages and Vehicles for Conveyance of Passengers, which regulates the operation of public vehicles used for the conveyance of persons for hire and requires the drivers thereof to be licensed, the City of Portland, in its ordinance relating to Street Traffic as now amended, includes the following provision:

ARTICLE 7

Section 1. * * * No taxicab or public vehicle shall stand on Congress Street, between State and Myrtle Street, except that with the consent of the abutting owner there may be stands for one car only in front of the Congress Square Hotel, in front of the Fidelity Building, in front of the Guppy's Drug Store, in front of the Chapman Building, east of the marquee over the entrance to the Arcade. Additional taxicab stands may be established on Congress Street between the above named streets by the City Manager and the Committee on Public Safety, but no stand shall be granted for any space when the distance from the curb to the nearest car rail is less than sixteen feet. Any person, firm or corporation seeking the privilege of using any stand, including those expressly enumerated above, shall make application in writing to the Chief of Police and such application must be approved by the City Manager and the Committee on Public Safety.

The plaintiff alleges that, having been duly licensed by the City of Portland to operate taxicabs, by the enactment of ARTICLE 7, which is set out in full in the pleading, he is prohibited from parking, and we infer he means standing, his taxicabs in front of the

places enumerated, where the establishment of stands is conditioned upon the consent of the abutting owners. He does not allege that any taxicab or public vehicle stands have been established in these places or that he has applied for and been denied, or some other taxicab operator or owner granted, the privilege of using such a stand if and when established. This proceeding is brought in anticipation of the enforcement of the regulation, not as a result of it. In this situation, even if the provision of the ordinance complained of is unconstitutional and void, the plaintiff is not entitled to relief by injunction unless he shows that, by the enforcement of it, he will suffer an irreparable injury to his property or property rights and has no adequate remedy at law therefor, or a multiplicity of suits will result. Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 254; 14 Ruling Case Law, 439, 440; 118 American State Reports, 372, 42 So., 784.

The ordinance was duly enacted under the general authority conferred by the Legislature upon all towns and cities of the State to make and enforce by suitable penalties by-laws and ordinances not inconsistent with law for the regulation of all vehicles used therein (including public vehicles) "by establishing the rates of fare, routes and places of standing and in any other respect." R. S., Chap. 5, Sec. 136, Par. IX.

The validity of this general delegation of police power and the exercise of it by the municipality, within proper limits, is not and can not be questioned. The citizen has a constitutional and common law right to travel and transport his property by motor vehicles over the public highways, including the streets of a city, and, subject to statutory or municipal regulations, has the right to make a reasonable use of such vehicles in the business of carrying passengers or freight for hire. This right to conduct a private business on the public highway, however, is not inherent or vested, but is in the nature of a special privilege which the State, or municipality under its delegated power, may either condition, restrain, extend or prohibit. *Buck* v. *Kuykendall*, 267 U. S., 307; *Packard* v. *Banton*, 264 U. S., 140; *State* v. *Barbelais*, 101 Me., 512, 64 A., 881; *Burgess* v. *Brockton*, 235 Mass., 95, 126 N. E., 456. The City of Portland undoubtedly, in the exercise of its delegated police

power, is authorized to limit the number of public vehicle stands upon its streets and fix their location, or even to prohibit them altogether, to the end that, without undue impairment of the public hackney service, traffic congestion may be prevented and the safety and convenience of public travel promoted.

The plaintiff finds in ARTICLE 7, as he reads it, a delegation of authority to certain abutting owners to designate who, among those licensed as public vehicle operators, may occupy the public street in front of their premises as stands for their cars, with the power to exclude others of like qualifications from a similar use. If the regulation effects this result, it would seem, to that extent at least, to be of doubtful validity. *Cincinnati* v. *Cook*, 107 Ohio State, 223, 140 N. E., 655. We are not of opinion, however, that this construction of the ordinance is warranted.

Primarily, ARTICLE 7 prohibits all taxicabs or public vehicles from standing on Congress Street between the designated intersections. The only modifications of the general and absolute prohibition are that (1) with the consent of the abutting owners, there may be stands for one car in front of four designated properties, and (2) additional stands may be established by the City Manager and Committee on Public Safety. No stands shall be granted where the car rail is less than sixteen feet from the curb. And any one seeking to use any of the stands, "including those expressly enumerated," must make written application to the Chief of Police and obtain the requisite approval.

Reading the several provisions of this regulation as one, we are not convinced that the abutting owners enumerated are given any power to grant or refuse the use of vehicle stands, if and when established, in the street in front of their premises. Their consent is necessary only for the establishment of stands. If they give it, by force of the ordinance itself, the stands are established. If they withhold it, under the general prohibition, stands are barred. Under the ordinance, this is the extent of their authority. Their rights outside the ordinance, to control the use of public streets in front of their premises, is not here in issue.

Carefully analyzed, the power here delegated to abutting owners is only to modify the general prohibition of the ordinance and re-

move restrictions which otherwise remain absolute. The plaintiff may be benefited by the modification. He can not be deprived by it of any constitutional or property right. Failing to show that he is or can be injured by the operation of the regulation, he has no reason or right to be heard in an attack upon its constitutionality. *Cusack Co.* v. *Chicago*, 242 U. S., 526; *Coal Co.* v. *Pennsylvania*, 232 U. S., 531.

The plaintiff is in no stronger position in respect to his complaint because those seeking to use stands established on Congress Street in the area restricted by ARTICLE 7 must apply to the Chief of Police in writing and have the application approved by the City Manager and Committee on Public Safety. The right of application for the privilege of using established stands in the restricted area is open to all. It is not to be presumed that the officers or the Committee will exceed their lawful authority or, in its exercise, arbitrarily discriminate between applicants. Unless good and sufficient reasons for disapproval exist, we have no reason to doubt that all entitled to use established stands will obtain just and equal action upon their applications. The presumptions of law so point.

Nor does this requirement constitute an unlawful delegation of authority. What a municipality may forbid altogether, it may forbid conditionally unless its written permission is obtained. The issuance of a permit therefor may be delegated to a city officer or a less numerous body than the one which enacts the prohibition. *Com.* v. *Parks*, 155 Mass., 531; 30 N. E., 174; *Com.* v. *Ellis*, 158 Mass., 555; 33 N. E., 651; *Com.* v. *Davis*, 162 Mass., 510; 39 N. E., 113; *Davis* v. *Massachusetts*, 167 U. S., 43; *Packard* v. *Banton*, supra.

The plaintiff having failed to show in his pleadings either that the provisions of the ordinance of which he complains are void, or that he will be injured by its enforcement his bill is without equity. The certificate must, therefore, be,

Demurrer sustained.

Mr. Justice Farrington took no part in the decision of this case.

NATHANIEL W. SHAW ET ALS *vs.* ALICE M. MCKENZIE.

Cumberland. Opinion June 13, 1932.

DEEDS. EVIDENCE.

When a deed is found in the possession of the grantee, delivery is presumed.

Only clear and convincing evidence can overcome the presumption.

Evidence admitted without objection must be considered even though it would have been excluded on objection, but the weight to which it is entitled is determined by established legal rules.

Hearsay evidence, not within any exception to the general rule, has no probative force and will not sustain a verdict lacking other support.

Declarations of a predecessor in title, offered for the purpose of invalidating a duly recorded deed which appears to be sufficient in all respects and which bears the insignia of genuineness, are not admissible.

The rule is the same, whether the present holder of the title acquired it by purchase, by gift, by inheritance or by devise, and may properly be invoked when the sole issue is the delivery of the deed on which the predecessor's title rests.

In the case at bar, plaintiffs' contentions were not sustained by any competent evidence and the verdict in their favor must be set aside.

On general motion for new trial by defendant. A writ of entry in which plaintiffs alleged that defendant had disseized them of certain lands located in the City of Portland. Trial was had at the November Term, 1931, of the Superior Court for the County of Cumberland. The jury rendered a verdict for the plaintiffs. A general motion for new trial was thereupon filed by the defendant. Motion sustained. The case fully appears in the opinion.

Sherman I. Gould,
Ralph M. Ingalls, for plaintiffs.
Max L. Pinansky,
Abraham Breitard, for defendant.

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

PATTANGALL, C. J. On motion. Real action. Verdict for plaintiffs. Defendant claims title to the property in question under a devise to her in the will of Martha E. Hawkes whose title depended upon a deed executed by her husband in 1901 but not recorded until 1912. He died testate in 1910, his will containing no specific mention of this property and giving his wife a life interest in the residuary estate. Plaintiffs claim title as remaindermen, asserting that the deed to Mrs. Hawkes was never delivered to her during her husband's lifetime, and that therefore the property was a part of the residuary estate.

There is no dispute but that the deed was in the possession of Mrs. Hawkes at the time of her death in 1929 and had been in her possession for seventeen years prior thereto; and no question but that it is genuine and correct in form. Under these circumstances, delivery is presumed, *Coombs* v. *Fessenden*, 116 Me., 306, 101 A., 465; *Gatchell* v. *Gatchell et als*, 127 Me., 331, 143 A., 169; and that it was delivered on the day of its execution, *Poor et al* v. *Larrabee et al*, 58 Me., 543. The presumption is stronger in cases of voluntary conveyances than in cases of ordinary bargain and sale. *Douglas* v. *West*, 140 Ill., 455, 31 N. E., 403; *Latimer* v. *Latimer*, 174 Ill., 418, 51 N. E., 548; *Shields* v. *Bush*, 189 Ill., 534, 59 N. E., 962. When a deed is found in the possession of the grantee, nothing but the most satisfactory evidence of non-delivery should prevail against the presumption. Devlin on Deeds, Sec. 294. Only clear and convincing evidence can overcome the presumption. *Stewart* v. *Silva*, 192 Cal., 409; 221 Pac., 191; *Post* v. *Weaver*, 302 Ill., 171, 134 N. E., 26.

The evidence relied upon by plaintiffs in the instant case is the statement of one of them, corroborated by the testimony of his wife, that after the death of Mrs. Hawkes, in answer to a question asked by him, defendant, referring to a time shortly after Mr. Hawkes' death, stated that "She (meaning Mrs. Hawkes) hadn't found the deed then. She didn't know about it then."

This evidence went in without objection, apparently on the theory that it was an admission against interest on defendant's part and amounted to a statement, based on her personal knowledge, that the deed had not been delivered to Mrs. Hawkes during her

husband's lifetime. Defendant denied having had any such conversation with the witness.

The verdict indicates that the jury believed the testimony of the plaintiff witness and that of his wife; and if the case presented the simple issue of the comparative veracity of the parties, this Court could not disturb its findings, but even if such a conversation took place, it fails to satisfy the burden which rests upon plaintiffs.

Analysis of the alleged admission of defendant, in the light of certain undisputed facts, entirely eliminates the theory that she assumed to speak of her own knowledge.

It appears that defendant did not come in contact with Mrs. Hawkes after Mr. Hawkes' death in 1910 until the latter part of 1922. The deed was recorded in 1912. She had no possible means of first-hand knowledge as to its having been found between 1910 and the time of record, and her statement as to what Mrs. Hawkes knew or did not know about the deed necessarily rested on hearsay.

Since this evidence was admitted without objection and no motion was made to strike it from the record, it becomes what has been designated in some of our decisions as consent evidence. *Moore* v. *Protection Insurance Co.*, 29 Me., 97; *Brown* v. *Moran*, 42 Me., 44; *Tomlinson* v. *Clement Bros.*, 130 Me., 189, 154 A., 355. But it is only to be given the weight to which it is entitled and must be weighed according to the rules established by law. *Goddard* v. *Cutts*, 11 Me., 440; *Titcomb* v. *Powers*, 108 Me., 347, 80 A., 851; *Elwell* v. *Borland*, 131 Me., 189, 160 A., 27.

Hearsay evidence has no probative force and will not sustain a verdict lacking other support. *Updegraff* v. *Lumber Co.* (Ark.), 103 S. W., 609; *Miller & Co.* v. *McKenzie* (Ga.), 55 S. E., 952; *Equitable Mfg. Co.* v. *Watson* (Ga.), 46 S. E., 440; *Panhandle Railway Co.* v. *Curtis* (Tex.), 190 S. W., 837; *Childers* v. *Pickenpaugh* (Mo.), 118 S. W., 471. The admission of such evidence without objection does not add any weight to it if intrinsically it had none and should have been excluded upon objection. *Sharp* v. *Baker*, 22 Tex., 306.

Counsel for plaintiffs argues that the alleged statement of defendant, while appearing to be based on personal knowledge, was a repetition of what she had been told by Mrs. Hawkes. There is no

evidence of that, and had such a claim been made in the first instance, the evidence would undoubtedly have been objected to and excluded.

Testimony of declarations of Mrs. Hawkes in denial of title could not have been received against defendant. The admissibility of such evidence is fully discussed in *Phillips et als* v. *Laughlin*, 99 Me., 26, in which Chief Justice Wiswell, speaking for the Court, laid down the rule that "in the trial of an action involving the title to real estate, the declarations of a predecessor in title of a party as to the invalidity of a deed which appears to be sufficient in all respects, which bears all the insignia of genuineness and which has been duly recorded, are not admissible."

Numerous cases in various jurisdictions may be cited in support of this position. In *King et al* v. *Slater* (Ark.), 133 S. W., 173, the Court said, "While acts and declarations of a person in possession of land are admissible to show the character and extent of his possession, they are not admissible to contradict the title of his grantee, the issue being whether his deed had been delivered."

In *Jackson* v. *Cary*, 16 Johns, 302, defendant had established a clear legal title and it was attempted on the part of the plaintiff to show that she had repeatedly admitted that she had only a life estate and that the grantor of the plaintiff had a right to convey the fee subject to her life estate. Chief Justice Spencer held such evidence inadmissible.

"The declarations of a party in possession are admissible in evidence against the party making them or his privies in blood or estate, not to attack or destroy the title, but simply to explain the character of the possession." *Gibney* v. *Marchay*, 34 N. Y., 303.

"Declarations of a grantor in possession are not admissible to defeat the grantee's title where such declarations were not of a character explaining or qualifying the possession. The concession of a grantor that he held as tenant or of the limits of his possession may be given in evidence against his grantee, but this has never yet been so holden as to one who held by a deed on record showing him in possession in his own right or where the boundaries are certain by his deed." *Carpenter* v. *Hollister*, 13 Vt., 552, 37 Am. Dec., 612.

"Declarations of a decedent going to show the extent of his possession are competent. Declarations as to title are not competent." *McGuire* v. *Lovelace* (Ky., 1910), 128 S. W., 309.

"The declarations of a party when in possession of land are, as against those claiming under him, competent evidence to show the character of his possession and the title by which he held it, but not to sustain or destroy the record title." *Dodge et al* v. *Freedman's Savings & Trust Company*, 93 U. S., 379.

"There are certain limitations upon the admissibility of declarations in disparagement of interest. It seems to be a well settled principle that such declarations are not admissible for the purpose of destroying a record title." 2 Am. & Eng. Ann. Cases (Notes) 5.

Following the decision in *Phillips et als* v. *Laughlin*, supra, our court considered the subject in *Fall* v. *Fall*, 100 Me., 102, 60 A., 718, 720, extending the doctrine to cases in which titles by inheritance were involved and, by inference, titles by devise. The opinion states, "The excluded declaration bore not upon the quality of any possession of the declarant and it had no reference to identity or location of boundaries or monuments or to any matter concerning physical condition or use. Its sole purpose was to destroy what was apparently an invulnerable muniment of title by deed and record, and to show that the title which the record declared did exist, did not, in fact, exist. We think such declarations limited to such a purpose are not admissible, whether the declarant was in or out of possession at the time or whether she is now dead or alive. We conceive there can be no real distinction in principle between the case of a tenant holding by inheritance and one holding by deed. In either case such declarations are open to the same objection."

Again in *Munsey* v. *Hanly*, 102 Me., 424, 67 A., 217, the Court said, "When admissions and declarations do not relate to the declarant's possession but to his legal title which such evidence is not competent to defeat, then such admissions and declarations are not admissible." And in *Farnsworth* v. *Macreadie et als*, 115 Me., 507, 99 A., 455, "The declarations of a former owner of real estate against interest are not admissible to deny title."

The evidence relied upon to support the verdict when taken literally carries no weight. It acquires none by attaching to it infer-

ences and implications which would have compelled its rejection had they been suggested at the trial below.

Motion sustained.

DUNN, J. Concurred in result.

GLADYS B. HALL

vs.

WILLIAM N. CROSBY, LENA WIGHT AND WILLIAM W. WIGHT.

FRED B. HALL

vs.

WILLIAM N. CROSBY, LENA WIGHT AND WILLIAM W. WIGHT.

Oxford. Opinion June 14, 1932.

EVIDENCE. PLEADING & PRACTICE. DAMAGES.

Evidence limited to the showing of injury known in law as permanent, unless such injury is specially pleaded, is not admissible.

In order, however, for the jury to determine what sum, if anything, plaintiff should recover for suffering at the time of the accident and up to the day of trial, it is permissible to allow a doctor to testify as to the condition of a fractured bone at the time of trial, altho the answer might show permanent injury.

Rule XXXV of the Rules of Court, that cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of Court, does not bar cross-examination by counsel of a co-defendant where their interests are actually and actively adverse.

Where several are sued as joint tort-feasors a defendant, or witness introduced by him, may be subjected to cross-examination by a co-defendant whose interest is adverse to that of the principal who introduced the witness.

In the case at bar, the questions asked the physician as to whether the condition of the wife could be remedied by operation were proper inasmuch as the husband's and wife's actions for injury to the wife were tried together, and it being the duty of the husband to provide surgical aid in restoring the wife.

The denial of the right of one of the defendants to cross-examine a witness introduced by the other defendant was improper and constituted reversible error.

On exceptions and general motion for new trial by defendants. Actions of negligence against three, sued as joint tort-feasors. To the admission of certain testimony, defendants seasonably excepted, and to the refusal of the presiding Justice to allow the attorney for one defendant to cross-examine a witness introduced and examined by a co-defendant, exception was also taken. A verdict for the defendant Crosby was directed in each case. Verdict was rendered by the jury for the plaintiff Gladys Hall against Lena Wight for $5,000, and against William W. Wight for $5,000. A verdict was rendered by the jury for Fred Hall against Lena Wight for $1,250, and against William W. Wight for $1,250. General motion for new trial was thereupon filed in each case by the defendants Wight. Exception to refusal to allow cross-examination by attorney for defendants Wight, of witness introduced and examined by defendant Crosby, sustained. The cases fully appear in the opinion.

George A. Hutchins,
Ralph T. Parker, for plaintiffs.
Berman & Berman,
Edward Murray, for defendant Crosby.
Fred H. Lancaster,
John J. Connor, for defendants Wights.

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

BARNES, J. These cases come up on exceptions and general motions for new trials by defendants Wight. They are actions for negligence in the driving of automobiles, tried in the Superior Court and argued here together.

Plaintiff in the first action was seriously injured in a collision of two automobiles.

Her husband is the plaintiff in the second action.

Mrs. Hall was a passenger in a Ford car, owned by defendant, Lena Wight, and driven at the time of the accident by William W. Wight, her minor son.

The occasion of the ride was that Mrs. Wight was taking her son from their home to Orono, and Mrs. Hall was invited to accompany them and to drive the car on the return.

A boy friend of William sat in the right front seat, and between the two boys sat a daughter of Mrs. Hall, nine years of age. Mrs. Wight sat in the rear seat, on the right side, Mrs. Hall in the rear, left seat, and between them a daughter of Mrs. Wight. The relation of the mother and son, in the premises, is that of principal and agent.

The collision occurred about six-thirty in the afternoon, on Hammond Street, in the residence section of Bangor, less than two hundred feet westerly from the point where trolley tracks, leading from the north, enter that street. Here, on the northerly side of the street, defendant Crosby resides. Hammond Street is the principal thoroughfare from eastern to central Maine, and is a modern road, the travelled part being a twenty feet strip of cement, with wide gravelled shoulders. The street runs easterly into the city, is straight and practically level at the location of the collision.

The Crosby dwelling stands fifty-eight feet northerly of the cement roadway, a garage east of the house, and from it a straight, wide driveway runs to the road. Mr. Crosby accompanied by his wife, backed his car, as he testified, toward the street, stopped it before entering upon the street, looked westerly and saw the Wight car approaching, and then as he thought about a thousand feet away. He testified that after pausing he backed across the street onto the right hand side of the cement, facing east, and had started ahead when the Wight car struck his car in the rear.

The Wight car overturned and lay just off the cement, on the right side of the road, headed toward Bangor. Mrs. Hall was seriously hurt and brought suit against the three defendants.

Mr. Crosby retained an attorney and the Wights another. At the trial six exceptions were reserved, five because evidence was admitted, over objections of both counsel for defendants, regarding damages for permanent injury, the sixth because counsel for defendants Wights was not allowed to cross-examine a witness introduced by the other defendant.

Of the five exceptions, the first was reserved in the examination of Dr. Lee, an orthopedic surgeon.

In the accident, Mrs. Hall suffered fractures of one of her pelvic bones. Dr. Lee was shown an X-ray picture of the bone after heal-

ing had taken place, and was asked what the picture showed, "as the position of the bone at the present time."

In order for the jury to determine what sum, if anything, plaintiff should recover for suffering at the time of the accident and up to the day of trial, it was essential that they know whether or not a pelvic bone was fractured, and if so, whether in the process of healing the bone had united so as to bear its share in the support of the body, in normal juxtaposition with the other members furnishing pelvic support.

It is argued that the answer might show permanent injury. Any report on the result after fracture of a bone may lead to inquiry as to permanent injury. But it is none the less receivable to shed what light it may on the character and intensity of the suffering caused by the injury. The question was clearly admissible.

The second exception was reserved to admission of the following interrogatory: "I show you plaintiff's exhibit, No. 7 and ask you what that shows."

The answer was that the picture showed a symmetrical pelvis.

Not being prejudiced by the answer, defendant takes nothing from this exception. *State* v. *Loring*, 123 Me., 181, 122 A., 417.

The third was reserved to refusal to have stricken out a portion of an answer as being objectionable dissertation.

Asked, "And will you indicate on plaintiff's exhibit No. 10 where the fractures of the pelvic bone were?", the doctor answered, "Just about where this string is there, and a similar fracture below here in such a way that this is driven in, in that manner, and broke this bone and made it over-ride just the same as you would hit a barrel and drive a stave in. Simply compresses it in that way. Narrows the outlet. Instead of over-riding in the middle as it does there it overrides at the point of fracture." The question was relative to the doctor's interpretation of an X-ray picture which was an exhibit and to be taken out with the jury.

The answer is not objectionable. True, it may be said to exhibit zeal in expressing what the plate revealed, but the language can not be held prejudicial to defendants and the illustration of "overriding" is apt.

The fourth exception was reserved to the admission of the ques-

tion, "Can the condition which you find there at the present time be improved by surgery, Doctor?" Bearing in mind that the testimony on which the husband's case was being tried was being put in at the same time with the wife's, and that it is a husband's duty to provide surgical aid in restoring a wife, the question should be put and answered.

The last of the exceptions on this line was as to disturbance with control of the bladder.

No allegation of injury to that organ was in the pleadings, and the testimony shows that any suffering from injury to the organ or to nerves controlling it had been cleared up and discontinued before the trial; so we hold that admitting the question and answer was not harmful.

In a case of exceptions to the admission of evidence limited to the showing of injury of the kind known in law as permanent, unless such injury is specially pleaded the exceptions would be sustained, as has been recently held in *Fournier* v. *The Tea Co.*, 128 Me., 393, 148 A., 147.

But at the trial of the cases at bar the evidence objected to constituted an essential part of proof, as to suffering until healing be complete so far as the wife is concerned, and to inform the jury as to probable expense to be required of the husband, as well as for loss of consortium for the same term. The record shows that when the ruling was made the Court said he was receiving testimony as to what the injuries were, on the ground of pain and suffering, and no exceptions were taken to his directions to the jury in his charge.

The last exception arose during the cross-examination of a witness introduced and examined in chief by counsel for defendant Crosby.

This witness was the automobile body mechanic who examined Mr. Crosby's car after the accident.

Plaintiffs claimed damages for injuries inflicted by the defendants, as tort-feasors, from either or any of them as the evidence should show liability, joint or several.

The mechanic had answered all questions put to him by Mr. Crosby's counsel and by counsel for plaintiffs.

Counsel for defendants Wight requested permission to examine

the witness and was denied. He considers this action by the court reversible error.

No ruling of this court can be found, in a civil action, where one of several codefendants has been refused the privilege of cross-examining a codefendant when their interests were adverse. But on the criminal side the same question arose and was decided, in 1923, in the case *State* v. *Crooker*, 123 Me., 310, 122 A., 865. In that case the right was accorded to a corespondent on the authority of the constitution, which grants to one accused of crime confrontation of the witnesses against him, the Court saying, "To be confronted by the witnesses against him does not mean merely that they are to be made visible to the accused so that he shall have the opportunity to see and hear them, but it imports the constitutional privilege to cross-examine them."

In the same case it was said by way of dictum that the testimony of a witness introduced by and for the corespondent was unimportant and that no rights of appellant were sacrificed in denying his cross-examination.

It is of course obvious that where a writ is sued out against three for damages as tort-feasors their interest may be adverse, and the point is to be settled upon evidence. Suppression of evidence as to the part played by one of the three may result in absolution of that one.

Rule XXXV of the Rules of Courts, that cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of Court, does not bar cross-examination by counsel of a codefendant, for where interests are actually and actively adverse there are as many "sides" as adverse interests, or because the situation presents an exception to the rule.

If justice is to be established and right to other defendants sued as joint tort-feasors is to be done, it would seem that a defendant, or witness introduced by him, should be subjected to cross-examination by a codefendant whose interest is adverse to that of the principal who introduced the witness.

It may be that the ruling complained of was of little importance in arriving at a verdict; but it is of the highest importance that the general practice, in the application of rules of evidence, should be uniform and settled.

"A fair and full cross-examination to develop facts in issue or relevant to the issue is a matter of absolute right and is not a mere privilege to be exercised at the sound discretion of the presiding judge, and the denial of the right is prejudicial error." *Grossman* v. *Rosenberg*, 237 Mass., 122, 129 N. E., 424, 425.

In a case in equity before this court, Mitchell, T. R. Sampson, and Abigail Sampson were defendants, and filed separate answers. Discussing the rule that the answer of Mitchell is not to be taken as evidence against Abigail Sampson, the court proceeds:

"This is the general rule. There are exceptions; but this case does not come within them, the defendants not being copartners, nor in a situation to authorize the admissions of one to become evidence against the other. The reason of the rule is, that the defendant sought to be affected, could have had no opportunity for cross-examination.

"An order might have been obtained to examine Mitchell as a witness; in which case he would have been subject to a cross examination by the other defendants." *Robinson* v. *Sampson*, 23 Me., 388.

By parity of reasoning such should be the privilege of a defendant at law.

But one case has been brought to our attention involving the point at issue here.

In that case one, "Hildenbrand appeared on the trial by Sullivan and Sullivan and the defendant insurance company by Mr. Gorman. Cross-examination of witnesses was conducted by Mr. Sullivan.

"On the latter's ceasing, Mr. Gorman, in several instances, asked the privilege of further cross-examination. This was permitted by the court in every instance where the interests of the Hildenbrands and the company were adverse, as in connection with the question whether the car involved in the collision was insured. In all other instances it was denied."

Held that the procedure was correct, under a rule similar to our Rule XXXV. *Kiviniemi* v. *Hildenbrand*, Wis. (1930), 231 N. W., 252.

Hence we conclude, on principle and authority that the ruling complained of was contrary to sound judicial discretion and was error. This exception is sustained.

Since the case is subject to a new trial it will serve no useful purpose to discuss rights under the motion.

Exception to refusal to allow cross-examination, by a defendant, of witness introduced and examined by a codefendant, where the interests of the defendants are adverse, sustained.

STATE OF MAINE *vs.* LEO RHEAUME.

Androscoggin. Opinion June 15, 1932.

PLEADING AND PRACTICE. MISTRIAL.

A party is not permitted to take his chance of a favorable verdict, and then, if it is adverse, interpose an objection to it based on facts which were known to him before it was rendered.

A motion for a mistrial is addressed to the discretion of the presiding Justice and, unless there is a clear abuse of such discretion, no exception lies to his ruling.

In the case at bar, the facts as to the juror's illness were known to respondent's counsel before the verdict was rendered. His motion for a mistrial should have been made immediately on the discovery of the facts.

On exceptions. The respondent was tried on an indictment charging him with assault with a dangerous weapon with intent to kill and murder. After a verdict for the State, the respondent filed with the presiding Justice a motion for a mistrial on the ground that one of the jurymen had been ill during the course of the trial, and unable to comprehend all of the testimony. The motion was denied and an exception taken. Exception overruled. Judgment for the State. The case fully appears in the opinion.

Harold L. Redding,

Harris M. Isaacson, for the State.

A. F. Martin, for respondent.

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

THAXTER, J. The respondent has been convicted of assault with a dangerous weapon with intent to kill. During the deliberations of the jury, one of the jurymen was taken ill, and, by agreement of respondent's counsel and the attorney for the State, a physician was called to attend him, who, after an examination, reported to the court that the juror was able to continue with his duties. The interrogation of the physician by the Court and by counsel for the defense indicates that the juror had a high blood pressure, which resulted in a severe headache and in weakness, and that he had had one dizzy spell during the course of the trial in the afternoon. Without objection being then made he returned to his work, and the deliberations of the jury were resumed. After a verdict of guilty had been recorded, the Court and counsel for the respondent interrogated the juror, who stated that he felt much better, that he had had a bad headache in the afternoon accompanied by a dizzy spell, but that nevertheless at all times during the course of the trial he had been possessed of all his faculties. The defense then filed a motion for a mistrial on the ground that the juror had been unable to hear and comprehend all of the testimony, and that the respondent's constitutional rights had been thereby violated. To the overruling of such motion an exception was taken.

To dispose of this it might perhaps be sufficient to say that the motion should have been made immediately on the discovery of the juror's alleged incapacity. Under such circumstances as these, a party is not permitted to take his chance of a favorable verdict, and then, if it is adverse, interpose an objection to it based on facts which were known to him before it was rendered. *Brown* v. *Reed*, 81 Me., 158, 16 A., 504; *State* v. *Bowden*, 71 Me., 89; *Tilton* v. *Kimball*, 52 Me., 500. But beyond this it may be advisable to point out that such a motion is addressed to the discretion of the presiding Justice. *Commonwealth* v. *Wong Chung*, 186 Mass., 231; 71 N. E., 292. He is in contact with actual conditions, and peculiarly qualified to render a decision. Unless there is a clear abuse of such discretion, no exceptions lie to his ruling. An examination of the record here discloses that not only was there no abuse of his prerogative by the Justice, but that the motion is without any merit whatsoever.

Exception overruled.
Judgment for the State.

STATE OF MAINE *vs.* JOHN P. CHANDLER.

York. Opinion June 25, 1932.

MOTOR VEHICLES. OPERATOR'S LICENSE. CONSTITUTIONAL LAW.

In the exercise of its police power, the State of Maine has full power and authority to prescribe uniform regulations necessary for public safety and order in respect to the operation of motor vehicles on its highways.

It has the right to require licenses for the operation of motor vehicles on its ways and to charge a fee therefor reasonably required to defray the expense of administering the regulations or constituting a fair contribution to the cost of constructing and maintaining the public highways.

The power to require licenses for the operation of motor vehicles on its ways and to charge a fee therefor extends to nonresidents as well as residents.

If the Legislature had seen fit, it could have rightfully required all nonresidents to obtain a license from the State before operating their motor vehicles upon its ways and granted exemption to none. The absence of such a provision in favor of nonresidents does not render the law discriminatory.

In extending the privilege of using its highways without obtaining a local license, the State did not exceed its power in limiting that concession to residents of other states or countries, the laws of which require operators' licenses and have been complied with.

The fact that a nonresident has not obtained an operators' license in the state of his residence (the same being not there required) and, therefore, is unable to bring himself within the class benefited by such an exemption does not create a discrimination against him. He is and remains on an equal footing with the residents of Maine.

The State is not bound to make a special classification with respect to exemption for him and those similarly situated.

On report, on agreed statement of facts. The sole question at issue was whether a resident of a State which does not require an operator's license to drive a motor vehicle may operate his motor vehicle in the State of Maine without being here licensed so to do. The Court found such operation in Maine unlawful, and remanded the case to the lower court for trial. The case fully appears in the opinion.

Ralph W. Hawkes, County Attorney, for the State.

John P. Deering, for respondent.

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

STURGIS, J. The respondent, a resident of Florida, permitted by the laws of that state to operate a motor vehicle without a license, on July 17, 1931, while touring in Maine, was arrested for operating a motor vehicle on the public highways without the license required by the Motor Vehicle Law. The case is reported from the trial Court on an Agreed Statement.

The following summary indicates the scope of the licensing provisions of the law as set out in the several sections of Chapter 29 of the Revised Statutes:

"No person shall operate a motor vehicle upon any way in this state unless licensed according to the provisions of this chapter" (Sec. 39). This provision "shall not apply * * to a nonresident operator, other than the operator of any such vehicle belonging to a foreign corporation doing business in this state, * * provided said operator has complied with the provisions of law of the state or country of his residence relative to operators' licenses. But this exemption regarding operators' licenses shall not apply to any operator resident in any other state or country whose laws do not require such operators' licenses" (Sec. 40). Except as suspension or revocation of a license of a nonresident in the state of his residence is ground for similar action here, his right to operate cars in this state is subject to suspension or revocation for the same causes, under the same conditions and in the same manner as is that of residents. The penalties for operation thereafter are those prescribed for operation by a resident without a license (Sec. 45).

The annual fee for an operator's license is $2, payable to the secretary of state to be transmitted with other moneys collected from his administration of the Motor Vehicle Law to the state treasurer (Sec. 33). These moneys are appropriated for and are to be used (or an amount equivalent thereto) for the administration of the office and duties of the state highway commission, including the expenses of administering the motor vehicle department and licensing of operators and registration of vehicles, to meet all provisions or bond issues for state highway construction, to fulfill the requirements of the joint fund for the construction and permanent im-

provement of state aid highways and for the repair and maintenance of state and state aid highways (Sec. 117).

The respondent maintains that this license regulation denies to him, as a resident of Florida which permits motor vehicles to be operated on its highways without a license, privileges which are accorded to the residents of many states, outside of Maine, which have this requirement. This he charges is a denial of the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

The right of a state in the exercise of its police power to prescribe uniform regulations necessary for public safety and order in respect to the operation of motor vehicles on its highways has been repeatedly recognized and sustained. *The Hodge Drive-It-Yourself Co.* v. *Cincinnati* (U. S.), 52 Sup. Ct. Rep., 144; *Sprout* v. *South Bend*, 277 U. S., 163, 168; *Morris* v. *Duby*, 274 U. S., 135; *Kane* v. *New Jersey*, 242 U. S., 160; *Hendrick* v. *Maryland*, 235 U. S., 610. See *State* v. *Mayo*, 106 Me., 62, 75 A., 295; *State* v. *Phillips*, 107 Me., 249, 78 A., 283; *McCarthy* v. *Leeds*, 116 Me., 275, 279, 101 A., 448. It includes the right to require licenses for operation of such vehicles on its ways and the charge of a fee therefor reasonably required to defray the expense of administering the regulations, or even including a reasonable charge as a fair contribution to the cost of constructing and maintaining the public highways. *Sprout* v. *South Bend*, supra; *Kane* v. *New Jersey*, supra; *Hendrick* v. *Maryland*, supra. This power extends to nonresidents as well as to residents. *Hess* v. *Pawloski*, 274 U. S., 352; *Kane* v. *New Jersey*, supra.

Under the Maine law, all residents are required to take out a license from the state before operating their motor vehicles on the public highways. The fees charged for licenses, so far as here appears, are reasonable and properly appropriated. If the Legislature had seen fit, it could have rightfully extended this license requirement to all nonresidents and granted the exemption to none. The absence of such a provision in favor of nonresidents would not render the law discriminatory. *Kane* v. *New Jersey*, supra; *Storaasli* v. *Minnesota*, 283 U. S., 57. No more, in our opinion, does the inclusion of a grant of exemption only to those having licenses from the states of their residence.

In *Storaasli* v. *Minnesota*, the facts are closely analogous. The statutes of Minnesota provide that vehicles owned by nonresidents, properly registered in the country or state of the owner and carrying license plates of such state, are authorized to use its highways for ten days without registration or tax and, upon making proper filing with the registrar of motor vehicles within the ten-day period, are authorized to use the highways of the state for a total period of ninety days without any payment whatever. The appellant, a member of the military forces of the United States resident upon the Ft. Snelling Reservation, but a nonresident of Minnesota, attacked this provision as depriving him of the equal protection of the laws by refusing him the privileges accorded to residents of neighboring states who had registered their vehicles therein. The Court said:

> "As was pointed out in *Kane* v. *New Jersey*, the absence of any such provision in favor of nonresidents would not render the law discriminatory. A resident of the state who desires to operate his car for a single day is liable for the entire year's tax. If the state determines to extend the privilege to nonresidents, it may with propriety limit the concession to those who have duly registered their vehicles in another state or country. The mere fact that Appellant has not so registered his car and can not, therefore, bring himself within the class benefited by the exemption, does not create a discrimination against him. The state was not bound to make a classification with respect to exemptions for him and those similarly situated. * * We find no improper classification or discrimination."

The same principles seem to be involved in the case at bar. The respondent's inability to bring himself within the class benefited by the exemptions conceded to nonresidents in the matter of operators' licenses leaves him on an equal footing with the residents of the state. He is entitled to no more. There is "no improper classification or discrimination."

In accordance with the stipulations accompanying the report, the case is remanded to the lower court, where the respondent must stand trial.

So ordered.

LOUIS C. LEVESQUE *vs.* LEVITE E. PELLETIER.

MABEL E. LEVESQUE *vs.* LEVITE E. PELLETIER.

LOUIS C. LEVESQUE *vs.* BENJAMIN THIBODEAU.

MABEL E. LEVESQUE *vs.* BENJAMIN THIBODEAU.

Aroostook. Opinion June 29, 1932.

MOTOR VEHICLES. NEGLIGENCE.

The operator of an automobile owes a duty to his invited guest to exercise in his own 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.

The driver of an automobile attempting to pass another is liable for injuries to a guest in that car if he fails to observe the law of the road, provided such failure is found to have been a proximate, contributing cause of the accident, or if it is proven that some act of his, which the ordinarily prudent man would not have done, contributed to the guest's injury as the proximate cause thereof.

A driver, experienced in operating on a gravelled road, must be charged with knowledge that swerving, at speed, into loose coarse gravel, is with risk of loss of control; to swerve at marked angle, with great risk.

Overtaking and passing an automobile calls for caution, and a driver of the overtaking automobile proceeds to pass at his peril, and does not attempt to pass, if ordinarily prudent, unless the situation facing him is such as to reasonably assure an ordinarily prudent driver that the passing can be accomplished with safety to himself and to the leading automobile and all occupants of the road, who are also in the exercise of due care.

In the case at bar, the jury were justified in finding that Mrs. Pelletier, the driver of the automobile in which the plaintiff Mabel Levesque was riding as her guest, did not exercise proper care in turning sharply into the loose gravel at her right. They were likewise justified in finding that defendant Thibodeau was negligent in his attempt to rush by the leading car under the circumstances and that the negligence of the two defendants resulted in the right turn that precipitated the Pelletier car into the ditch, there being concurrent negligence on the part of the defendants.

Four actions on the case to recover damages for injuries sustained by the plaintiff, Mabel E. Levesque, an invited guest, riding in the automobile of defendant, Levite E. Pelletier, and by her husband, Louis Levesque, to reimburse him for expenditures in behalf of his wife and for loss of consortium. The injuries were occasioned by the overturning of the automobile of defendant Pelletier immediately after it was passed by the automobile of the defendant Thibodeau coming up from the rear. The jury rendered verdicts against both defendants, who filed motions for new trials. Motions overruled. The cases fully appear in the opinion.

Bernard Archibald,
John B. Pelletier, for plaintiffs.
Locke, Perkins & Williamson,
J. Frederic Burns,
O. L. Keyes, for defendant Pelletier.
Cook, Hutchinson, Pierce & Connell,
J. C. Madigan, for defendant Thibodeau.

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

BARNES, J. Four actions, the injured woman against two defendants, her husband against same defendants, were tried together.

The injuries occurred at the overturning of defendant Pelletier's automobile, in the ditch of a highway in St. John Plantation, Aroostook County, immediately after defendant Thibodeau had passed the Pelletier car.

They were severe, Mrs. Levesque losing her right arm. The jury returned verdicts for her in the sum of $10,000 against each defendant, and for her husband, to reimburse him for expenditures in her behalf and for loss of consortium, in the sum of $2,000 against each defendant.

There is no contention that the amount of damages found is excessive.

The cases are here upon motions for new trials, on the ground that the verdicts are against evidence, and the weight of evidence.

The accident happened soon after three o'clock on the afternoon of September 17, 1930. Mrs. Levesque was a passenger in defendant Pelletier's car.

Defendant Pelletier's wife was driving the car, occupying the left front seat.

Mrs. Levesque, her guest, sat in the right front seat, and defendant Pelletier and Paul Michaud occupied the rear seat.

The car was running easterly, on a straight, level road, a State Aid, improved road. No vehicle or person was visible east of the Pelletier car, when defendant Thibodeau, coming from the west overtook and passed it. The accident followed at once. Thibodeau heard a crash, after he had passed the Pelletier car, and while he was still on the left of the middle of the road. He looked to the southerly side of the road, toward the rear and saw the car turning over on the shoulder of the road; and a commercial traveller, Mr. Lee, rounding a curve about four hundred feet in advance of the Pelletier car, saw it overturning.

Another witness, William Pelletier, from his dooryard, perhaps a hundred feet westerly of the spot where the car overturned, was the only eyewitness of the accident.

A Mr. Plourde, who was standing in a gravel pit, a little more than three hundred feet from the highway, heard a horn sounded and cars running on the road and saw the cars pass the mouth of the gravel pit road.

These all testified at the trial.

The status of Mrs. Pelletier, driving her husband's car, is admitted to be that of his servant or agent.

The negligence charged to defendant Pelletier in the writs against him is that his wife did not possess and exercise ordinary skill in driving, management and control of his automobile, and did recklessly, carelessly and at an excessive rate of speed operate the car.

In the cases against Thibodeau, the allegation of negligence is that at a time and place when the Pelletier car was so situated that due care would prevent an attempt to pass it, because there was not sufficient space between the left edge of the Pelletier car and the left edge of the travelled part of the highway, defendant Thibodeau, without warning, and without waiting until the Pelletier car should be turned to the right, recklessly, carelessly and at an excessive rate of speed, and without giving proper signals or warnings, did pass the Pelletier car and did so operate his car that the other was

by him crowded from the highway. There is no evidence of collision or contact of the cars.

Since no exceptions to the conduct of the case nor to instructions on the law were presented to us we are to decide upon the record before us only whether the findings of fact by the jury were supported by a fair preponderance of the evidence. In none of the cases at bar does contributory negligence of plaintiff appear.

Upon both car drivers it was incumbent that they exercise ordinary care in driving.

As the jury found the facts, they concluded each driver failed to use ordinary care, and that this failure, which is negligence, was the proximate cause of Mrs. Levesque's injuries.

In the guest cases the operator of the car must, "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." *Chaisson* v. *Williams*, 130 Me., 341, 156 A., 154, 156.

In the cases against defendant Thibodeau, he can be held negligent if he failed to observe the law of the road, provided such failure is found to have been a proximate, contributing cause of the accident, or if it is proven that some act of his which the ordinarily prudent man would not have done contributed to Mrs. Levesque's injury as a proximate cause thereof.

It is evident that the special conditions and circumstances at the time of this accident are of prime importance.

The roadway, its condition, the speed of the cars, these are to be scanned closely, that we may determine what the jury found as evidence of negligence.

First, as to the guest cases.

Mrs. Pelletier was driving a five-passenger sedan, a six-cylinder car, of 4,200 pounds weight, its four door windows all opened, on a straight stretch of road, with no other traveller within vision.

She occupied the middle of the road. From the record it appears that the road was what is known as a gravelled road, built of sandy material, very slightly crowned, probably seventeen feet wide from

the fringe of grass and weeds on one side of the wrought part to similar growth on the other, and perhaps nineteen feet in width from shoulder to shoulder, its surface, on the middle section, coated with gravel.

On either side were ditches, at the right a ditch about eighteen inches deep.

During the season of 1930 a coating of coarse gravel had been spread upon the road surface in the vicinity of the accident. The gravel was deepest in the middle of the road, a layer about four inches deep covering a middle lane, wider than an automobile, and thinning, as it was spread, toward the edges. Beyond the gravel, toward either edge it is fairly evident that a hard surface extended for about two feet to the shoulder of the road.

The gravel surface had been compacted and rolled down in a single traffic lane nearly upon the middle of the road. The remainder of the wrought part of the way showed no wheel tracks.

There is no doubt that the layer of gravel extended at nearly maximum depth for a short space outward from each wheel track, and that the wheel tracks were smooth ribbons of packed sand and gravel, beaten paths probably not wider than the tire of a large automobile.

Mrs. Pelletier testified that she had driven automobiles for ten years. Her home is in Fort Kent, and the road through St. John Plantation is one of the main highways to the village where she lives.

The condition of this road should have been well known to her, for according to her husband's testimony she had been making the trip to take him home "all the time."

She was driving her husband, a railroad engineer, homeward from St. Francis, where his daily run ended, and had invited Mrs. Levesque to accompany her. Michaud, a railroad fireman, was the other passenger.

The report is not definite as to the speed of either car as they passed the mouth of the gravel pit road.

The estimates of the speed of the Pelletier car that were given the jury varied from thirty miles to forty miles an hour.

It is apparent that Mrs. Pelletier was driving at high speed, and

all witnesses agree that her car was running in the smooth, hard wheel tracks.

All who were in her car testified that they did not hear any signal that a following driver desired to pass them.

Each testified that the first indication of the presence of the Thibodeau car was when its head appeared, passing the rear door of the Pelletier car, on its left side.

According to the testimony, before Mrs. Pelletier was aware of the coming of the Thibodeau car, her husband from the back seat said, "Give him the road," and, glancing to her left, she saw the Thibodeau car speeding by her.

The cars were then just east of the mouth of the gravel pit road, and Mrs. Pelletier testified that then, before she changed the course of her car, the front wheels of the Thibodeau car had got by her seat.

At her husband's suggestion, or command, Mrs. Pelletier acted.

She testified, "I dodge my wheel and I don't know how far," and it seems she did not lessen her speed.

Her husband testified that his wife noticed the passing car at the time he spoke, "and she hauled out to the side, probably a little more than she should have, and we struck in that loose gravel and went in the ditch."

Asked by his counsel how far his car proceeded, "along the road, in the road, before either of the wheels left the roadbed, after she saw Thibodeau," Mr. Pelletier replied, "We went in the ditch immediately."

Paul Michaud, plaintiff's witness, testified to a zigzagging course upon the roadbed, before the wheels reached the ditch, but when asked at what angle Mrs. Pelletier veered to her right, answered, "she made a sharp go to the right."

Mrs. Levesque testified that her driver gave the wheel "one yank to the right-hand side, and then she tried to get back onto the road and that is where she lost control of the car."

Two days after the accident, Lewellyn Willette, a member of the State Highway police, visited the place of the accident, observed certain marks indicating where it had occurred and made some measurements.

He testified that the point where the wheel ran over the shoulder of the road into the ditch was twenty-five feet east of the east line of the gravel pit road.

Mr. Plourde and William Pelletier testified that the Thibodeau car was by the side of the larger car when they crossed the mouth of the gravel pit road, and defendant Pelletier testified that he had just got by the mouth of the road when Thibodeau's car came into his sight.

So the jury was justified in finding it proven that the turn to the right, from the firm wheel tracks to the loose gravel was at a wide angle. Both right wheels dropped over the shoulder into the right-hand ditch.

The car ran on for sixty-three feet and until its right forward wheel was brought back onto the shoulder of the road, then tipped over off the road.

There is abundant evidence to justify the jury in finding that, at the speed at which her car was travelling it was negligence for Mrs. Pelletier to turn into the unstable surface of loose gravel at an angle that would bring her forward wheel into the ditch in so short a distance.

A driver, experienced in operating on a gravelled road, must be charged with knowledge that swerving, at speed, into loose, coarse gravel, is with risk of loss of control; to swerve at marked angle, with great risk.

A turning to the right that would direct her left wheels gradually to the right wheel track may have been prudent. But the rate of speed would be an important condition in determining the prudence of such turning.

The instant her car wheels left the wheel tracks they would be in the deepest portion of the layer of loose gravel.

Hence in each of the suits, *Louis C. Levesque* v. *Levite E. Pelletier*, and *Mabel E. Levesque* v. *Levite E. Pelletier*, the verdict must stand.

In considering the question of negligence on the part of defendant Thibodeau, factors other than those already discussed are to be considered.

He is in court to answer in damages only if it is proven that,

upon the highway at about the time of the accident, he did what the reasonably prudent man, in his position would not have done, or, if he failed to do what the reasonably prudent man would, then and there, have done.

At greater or less distance, immediately before the accident, he had followed the Pelletier car for a quarter of a mile of open, straight road.

At some point, probably not far from the William Pelletier house, he determined to overtake and pass that car.

He was then travelling in the compacted wheel tracks.

And from the record we conclude that then he must, or should have, realized that all four of his wheels must necessarily travel over or through loose gravel before his left wheels could reach the hard surface on the left side of the road. He is chargeable with knowledge that unless the speed of the leading car were reduced he must speed up materially in order to get into clear, ahead of it, before he should reach a turn in the road about four hundred feet beyond the gravel pit road.

Overtaking and passing a car is an everyday occurrence with one who drives upon a highway.

But it calls for caution, and the driver of the overtaking car proceeds to pass at his peril, and does not attempt to pass, if ordinarily prudent, unless the situation facing him is such as to reasonably assure an ordinarily prudent driver that the passing can be accomplished with safety to himself and to the leading car and all occupants of the road, who are also in the exercise of due care.

What would prudence suggest to Mr. Thibodeau as necessarily to be done before he should undertake to pass?

In two essentials our statutes give advice.

"The driver of any vehicle overtaking another vehicle proceeding in the same direction shall pass at a safe distance to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle.

"The driver of an overtaking motor vehicle not within a business or residence district as herein defined shall give audible warning with his horn or other warning device before passing or attempting

to pass a vehicle proceeding in the same direction." R. S., Chap. 29, Sec. 70.

It is not claimed that the defendant attempted to return to the middle of the road after passing. He passed, and without collision or contact with the leading car. He took the left side and there drove until he brought his car to a stop. Did he pass at a safe distance? This was for determination of the jury, on a fair preponderance of all the evidence.

The distance between the cars as he passed is not stated otherwise than "almost to touch," "close enough to bump," "very close," "It couldn't have been over two inches," and by the use of like expressions.

"When two persons are travelling in a highway in the same direction there is no rule of law that compels one to travel behind the other, or gives one the exclusive right to precede the other. The rear traveler may pass to the front whenever he may do so in safety, with the exercise of ordinary care." *Clifford* v. *Tyman*, 61 N. H., 508.

Defendant's car, a Ford of that year, was equipped with a horn afterward tested by the police and found to be "all right."

Did he give audible warning before attempting to pass? William Pelletier, called by the plaintiff, testified that he heard the horn.

Mr. Plourde, probably more than three hundred feet from the highway, also among plaintiff's witnesses, testified that he heard it. But all unite in describing the sound as weak.

The occupants of the leading car deny hearing any sound of horn.

The driver of an overtaking car is not obliged at all times to fall in behind and trail his leader. After suitable and audible signal, "The driver of a vehicle upon a way about to be overtaken and passed . . . shall give way to the right in favor of the overtaking vehicle." R. S., Chap. 29, Sec. 72.

If the jury found that defendant Thibodeau attempted to pass the leading car without giving audible warning and without waiting for the leading car to be withdrawn from the middle of a road but seventeen feet wide in the used part, this conclusion would properly affect their finding as to the degree of care he then exercised.

He testified to sounding his horn once, and at a point about a hundred feet west of the entrance to the gravel pit. True, he further said, "A few seconds after I blew my horn they started getting over towards the right."

In cross-examination he amplified this, stating that when he started to go by the Pelletier car, "I would say that one of their left wheels was right about where the right rut is." It may well be that the jury gave little weight to Mr. Thibodeau's testimony on this point. It may be they decided that the warning of the horn was inaudible to Mr. Pelletier and his driver; that it was negligence to attempt to rush by the leading car in the circumstances as they visualized them; that this negligence on the part of defendant Thibodeau was coupled with that of Mrs. Pelletier, and that its consequence and result was the unfortunate right turn that precipitated the car in the ditch, concurrent negligence as understood in law.

Interpreting the testimony as we must, in the light most favorable to plaintiff in each case, we can not find the verdicts unwarranted.

Motion overruled in each case.

ISRAEL KETCH *vs.* B. S. SMITH.

Aroostook. Opinion July 8, 1932.

MONEY HAD AND RECEIVED. PLEADING AND PRACTICE.

An action for money had and received lies when one has in his possession money which in equity and good conscience belongs to another, or if, having had the money, he has paid it out with knowledge of the plaintiff's right to it.

In the case at bar, if the plaintiff was ever entitled to the money, he apparently refused to accept it and elected to bring an action or replevin for the return of the automobile. On such refusal the defendant very properly returned the money to his principal from whom he had received it. Having done so, after the plaintiff by his conduct had indicated that he did not intend to claim it, the defendant is not liable in this action.

On exception by defendant. An action for money had and received. The cause was submitted at the April Term, 1931, of the Superior Court for the County of Aroostook, to the presiding Justice on an agreed statement of facts. To the rendering of a judgment for the plaintiff, defendant seasonably excepted. Exception sustained. The case sufficiently appears in the opinion.

W. P. Hamilton, for plaintiff.

C. M. Fowler, for defendant.

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

THAXTER, J. The case is before us on exceptions by the defendant to a ruling by the presiding Justice ordering a verdict for the plaintiff in the sum of $292.43.

The plaintiff was the owner of a Holmes note given by S. B. Schriver and Thelma Schriver to F. E. Peterson and secured by a lien on an automobile for which the note was taken in payment. The plaintiff, having taken possession of the car, started foreclosure. The makers of the note were sued on another note by L. S. Bean Co., who caused the automobile to be attached by this defendant, a deputy sheriff, as the property of the Schrivers on the premises of this plaintiff. The defendant at that time informed the plaintiff that L. S. Bean Co. had given him the money to pay the balance due on the mortgage, and the defendant took this money from his pocket but the plaintiff refused to talk with him. The plaintiff after the sixty days had expired, within which his foreclosure would ordinarily have been perfected, replevied the automobile. In this suit judgment was rendered for the defendant on the ground that at the time of the attachment there was still outstanding an equity of redemption, that the plaintiff had by his conduct waived a tender of the amount due on the mortgage, and that he had not given to the officer the required statutory notice which was a condition precedent to his bringing his action. Neither an exception nor motion was filed in the case but another replevin action was brought which was decided in favor of the defendant on the ground that the question was *res adjudicata*. Exceptions were taken and such decision was affirmed. *Ketch* v. *Smith*, 128 Me., 171, 146 A., 247.

The facts clearly set forth in the opinion of the court in that case are made a part of the record here. The defendant, who was the attaching officer, returned the money to L. S. Bean Co. from whom he had received it. Subsequently this action was brought by the same plaintiff for money had and received.

An action for money had and received lies when one has in his possession money which in equity and good conscience belongs to another, or if, having had the money, he has paid it out with knowledge of the plaintiff's right to it. *Maxwell* v. *Adams*, 130 Me., 230, 232, 154 A., 904.

In the instant case, if the plaintiff ever was entitled to the money, he apparently refused to accept it and elected to bring an action of replevin for a return of the automobile. On such refusal the defendant very properly returned the money to his principal from whom he had received it. Having done so after the plaintiff by his conduct had indicated that he did not intend to claim it, the defendant is not liable in this action. *McKeen* v. *Boothby*, 129 Me., 324, 152 A., 53.

Exception sustained.

JULIA SHINE *vs.* RUTH B. DODGE.

Androscoggin. Opinion July 14, 1932.

FRAUD. EVIDENCE.

In an action of deceit for fraudulent representations in the sale of certain shares of corporation stock where the issue was restricted to a charge that the plaintiff was induced to buy the shares of stock by the false representation of the defendant that the corporation was sound financially, when in truth it was insolvent, evidence as to the amount that defendant had herself invested in the enterprise, her alleged guarantee of the payment of dividends, the salaries that she and her husband drew as officers of the company, and the facts as to the management of the corporation after the purchase of the stock by the defendant is irrelevant and inadmissible.

In the case at bar, the only evidence bearing on the question of the financial status of the company at the time of the two transactions indicated that it was not insolvent, but that it was solvent. Moreover in so far as the second purchase is concerned, the plaintiff herself testified that the real inducement of the purchase was her belief that the stock was good, based on the fact that she had up to that time received regular dividends on it.

To charge the defendant with liability for want of knowledge in 1926 that the company was not sufficiently well fortified financially to stand the strain of hard times, would in effect make her a guarantor of the soundness of the securities which she sold. There was no evidence whatsoever that supported the material allegations of the plaintiff.

On exceptions and general motion for new trial by defendant. An action of deceit for fraudulent representations in the sale by the defendant to the plaintiff of shares of the stock in the Sagadahoc Fertilizer Co. Two separate sales of stock were had, the first in 1926 and second in 1929. The sole question at issue related to false representations of the financial soundness of the company when in truth it was insolvent, made by the defendant to the plaintiff. The jury rendered a verdict for the plaintiff in the sum of $15,148.21. To the admission of certain evidence, defendant seasonably excepted, and after the verdict filed a general motion for new trial. Motion sustained. New trial granted. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

Clifford E. McGlauflin, for defendant.

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

THAXTER, J. The plaintiff, according to her declaration, seeks to recover in deceit for fraudulent representations in the sale to her by the defendant of certain shares of stock of the Sagadahoc Fertilizer Co. After a verdict for the plaintiff of $15,148.21 the case is before us on the defendant's motion for a new trial and on exceptions to the admission of certain evidence. As the motion must be sustained, it is not necessary to discuss the exceptions.

The case has been previously considered by us on an exception to a ruling sustaining a demurrer to the declaration. *Shine* v. *Dodge*, 130 Me., 440, 157 A., 318. In the opinion filed at that time

the legal insufficiency of many of the allegations of the declaration was pointed out, and the issue was restricted to a charge that the plaintiff was induced to buy the shares of stock by the false representation of the defendant that the Sagadahoc Fertilizer Company was sound financially, when in truth it was insolvent. The record now before us discloses no evidence whatsoever supporting this claim.

It appears that there were two separate purchases of stock by the plaintiff, the first of one hundred and forty-five shares in 1926, and the second of twenty shares in 1929. At the time of the first transaction, according to the plaintiff's testimony, the defendant represented to her that the company had a safe and sound business and was sound financially. In the attempt to state the conversation of the parties, much seems to have been injected into the testimony that this court in the previous opinion has held irrelevant. The amount that the defendant had herself invested in the enterprise, her alleged guarantee of the payment of dividends, the salaries that she and her husband drew as officers of the company, and the facts as to the management of the corporation after the purchase of the stock by the defendant, had no bearing on the narrow issue presented by the pleadings. We must assume that the presiding Justice so informed the jury in his charge; but in view of the fact that there was no evidence to sustain the true issue, it seems clear that the jury considered these factors as worthy of consideration.

The only evidence relating to the financial condition of the company in 1926 indicates that it was solvent. From the balance sheet and from the testimony of the plaintiff's own witnesses explaining the ledger entries, it appears that at that time the corporation had current assets of about double the amount necessary to pay its debts, and that eliminating all doubtful items such as good will and promotion there was enough to pay off the preferred stock at par and still leave a substantial balance for the common stock. The uncontradicted evidence clearly indicates that the plaintiff's representation as to the company's solvency was in accord with the facts.

At the time of the second purchase in 1929 the picture as shown by the balance sheet is not so favorable, but even then it appears that the company was solvent and that there were sufficient assets after the settlement of liabilities to pay off the preferred stock at

par. Disregarding this evidence, however, the plaintiff's own testimony clearly refutes her allegation that she bought the second lot of stock in reliance on the defendant's representations. She states categorically that she believed at that time that the stock was good because she had received her dividends on it during the preceding years. It was this fact which seems to have been the inducement for the second purchase.

The plaintiff made an unfortunate investment and her situation must have been particularly appealing to the sympathy of a jury. The subsequent history of the company shows that it was not sufficiently well fortified financially to stand the strain of hard times, but to charge the defendant with liability for the want of such knowledge in 1926 would in effect make her a guarantor of the soundness of the securities which she sold.

Motion sustained.
New trial granted.

SARAH E. SACKNOFF *vs.* ANNA G. SACKNOFF.

Cumberland. Opinion July 20, 1932.

HUSBAND AND WIFE. MOTOR VEHICLES. NEGLIGENCE. CONSTRUCTION OF STATUTES.

At common law, no right or cause of action existed between the spouses while the marriage relation continued.

As to third persons, the joinder of the husband was required in all actions by or against a married woman, unless he was an alien who had always resided abroad or was regarded as civilly dead.

Chapter 112 *of the Acts and Resolves of* 1876, *authorizing a married woman to prosecute and defend suits at law or in equity, either in her own name without the joinder of her husband, or jointly with him, is in derogation of the common law and has been construed strictly.*

The statute authorizes suits by the wife against third persons, but not against her husband.

It only authorizes her to maintain alone such actions as previously could be sustained when brought by her husband alone or by him as a party plaintiff with her.

The subsequent reënactment of this statute without change in three general revisions of the statutes must be deemed legislative affirmance of the construction given it by the judiciary.

The doctrine of stare decisis *applies to the law so established and re-affirmed.*

In the case at bar, the plaintiff's husband could not maintain an action for his wife's injury. He could neither sue himself nor his employer. This disability on his part is a bar to this action by his wife.

The rule that the contributory negligence of the husband is not imputed to the wife, riding merely as a passenger in an automobile under the husband's sole control and management, is not involved in this case nor a warrant for a departure from the settled law which is applicable.

On report on an agreed statement of facts. An action to recover for personal injuries sustained by the plaintiff, a passenger in an automobile owned by the defendant and driven by plaintiff's husband. The accident happened when plaintiff's husband fell asleep while driving. The case was heard at the April Term, 1932, of the Superior Court for the County of Cumberland, and by agreement of the parties reported to the Law Court on an agreed statement of facts. Judgment for the defendant. The case fully appears in the opinion.

Bernstein and Bernstein, for plaintiff.

Berman and Berman, for defendant.

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

STURGIS, J. Action on the case for negligence, reported on an Agreed Statement of Facts. By stipulation of the parties and by the certificate, judgment as here rendered is final.

The facts stated show that on April 5, 1931, the plaintiff, while riding as a guest in the defendant's automobile, was injured through the negligence of her husband who, temporarily in the defendant's employ, was driving the car. Due care on the part of the plaintiff is conceded.

Under the common law, a husband and wife were deemed to be one person and, while the marriage relation continued, the legal

identity of the wife was suspended or merged in that of the husband. Between the spouses, no right or cause of action existed. *Perkins* v. *Blethen*, 107 Me., 443, 78 A., 574, 575; *Abbott* v. *Abbott*, 67 Me., 304. As to third persons, the joinder of the husband was required in all actions by or against a married woman, unless he was an alien who had always resided abroad or was regarded as civilly dead. *Spiller* v. *Close*, 110 Me., 302, 86 A., 173; *Laughlin* v. *Eaton*, 54 Me., 156; *Ballard* v. *Russell*, 33 Me., 196. And it was held that, if the husband had no cause of action against a tortfeasor guilty of an assault upon his wife because of his own complicity, his disability as a party plaintiff barred an action for the wrong. The wife could not sue alone. *Abbott* v. *Abbott*, supra.

In Chapter 112 of the Acts and Resolves of 1876, the legislature provided that a married woman "may prosecute and defend suits at law or in equity, either of tort or contract, in her own name, without the joinder of her husband, for the preservation and protection of her property and personal rights, or for the redress of her injuries, as if unmarried, or may do it jointly with her husband."

This statute, being in derogation of the common law, has been construed strictly. "The provision authorizing a married woman to prosecute suits at law in her own name, as if unmarried, refers to those by the wife against third persons, and not to those against her husband." *Morrison* v. *Brown*, 84 Me., 82, 24 A., 672; *Hobbs* v. *Hobbs*, 70 Me., 383. "It relates to cases when, by the very assumption, the hunsband may be a party with the wife, or not, at her election." *Hobbs* v. *Hobbs*, 70 Me., 381. And, "It only authorizes her to maintain alone such actions as previously could be sustained when brought by the husband alone or by the husband and wife jointly. It enlarges not her right of action, but her sole right of action. It does not enable her to maintain suits which could not have been maintained before, but to bring in her own name those which before must have been brought in the husband's name, either alone or as a party plaintiff with her." *Libby* v. *Berry*, 74 Me., 286. This interpretation of the scope and meaning of the statute was recognized and approved in *Howard* v. *Howard*, 120 Me., 480, 115 A., 259.

The Legislature has accepted and affirmed this construction of

its enactment. After the earlier cases, cited, were decided, in three general revisions of the statutes, the Act of 1876 was reënacted without change. Now and subsequent to *Howard* v. *Howard*, supra, it again appears as Sec. 5, Chap. 74, R. S. (1930). The language of Appleton, C. J., in *Cota* v. *Ross*, 66 Me., 161, 165, is appropriate: "After the repeated construction of a statute, its reënactment upon the revision of the statutes is always regarded as a legislative affirmance of the statute as previously construed by the judiciary."

The law so established and reaffirmed is the rule of this case. "If the doctrine of *stare decisis* is ever to have force, it is when the repeated adjudications of the courts have received the legislative sanction upon a general revision of preceding statutes. If it be deemed expedient, the legislature can change the law; but it is not for the court to usurp legislative authority." *Cota* v. *Ross*, supra.

An action for the plaintiff's injury, in the case at bar, could not be maintained by her husband alone or in joinder with her. It is elementary that the same person can not, in the same suit, sustain the two-fold character of plaintiff and defendant to enforce a right or redress a wrong. The incongruity of an action by a servant against his master for damages for injuries caused solely by his own negligence is apparent. The logic of the common law rule is that "If there was no injury to him (the husband), there was none to her (the wife). They were one." *Abbott* v. *Abbott*, supra. And if there is no injury, there is, of course, no right of action. *Nichols* v. *Valentine*, 36 Me., 322, 324. Under the settled law of this jurisdiction, the plaintiff can not maintain this suit.

It is true, as argued by counsel, that, along with the doctrine of the unity of the spouses and the resulting limitations upon the wife's right of action, this Court has recognized the rule now generally accepted, that the contributory negligence of the husband is not imputed to the wife riding merely as a passenger in a car under his sole control and management. *Kimball* v. *Bauckman*, 131 Me., 14, 158 A., 694; *Mitchell* v. *B. & A. Railroad Co.*, 123 Me., 176, 122 A., 415; *Cobb* v. *Power & Light Co.*, 117 Me., 455, 104 A., 844. But adherence to that rule is not warrant for a departure from the settled law applicable to this case. The doctrine of imputed negligence is not here involved.

Counsel have called attention to and ably discussed the views of other courts upon the question here raised. The weight of authority seems to be opposed to a recovery by a married woman from her husband's employer for personal injuries due solely to her husband's negligence. And although the reasons advanced for so holding differ, and the effect of the legislative and judicial mandates which we find in our law is not considered, the concurrence of opinion there indicated, that this new field of litigation in tort actions, directly or indirectly between the spouses, should be opened up only by express and unequivocal legislative enactment, is impressive. The cases supporting this view are *Maine* v. *James Maine & Sons Co.*, 198 Iowa, 1278; 201 N. W., 20; 37 A. L. R., 161; *Riser* v. *Riser*, 240 Mich., 402; 215 N. W., 290; *Emerson* v. *Western Seed & Irrig. Co.*, 116 Neb., 180; 216 N. W., 297; 56 A. L. R., 327. See also Harvard Law Review, Vol. XLIII, No. 7 (May, 1930).

On the other hand, in New York a married woman has been allowed to recover in this kind of a case. In *Schubert* v. *Schubert Wagon Co.*, 249 N. Y., 253; 164 N. E., 42, 43; 64 A. L. R., 293, that court views its Domestic Relations Law (Consol. Laws, Chap. 14, Sec. 57) that "a married woman has a right of action for an injury to her person, property or character . . . as if unmarried" as the rule, and the disability of the spouses to maintain actions for personal injuries against each other as an exception "engrafted upon this rule . . . by authority and tradition." With a challenge to the reasoning of the Iowa, Michigan and Nebraska decisions cited, it is there held that the action is within the statute rather than the exception. This case can not be followed here. As already noted, the common law has not been so extended by the Married Women's Act, so called, of this state. It remains the rule and not the exception.

Poulin v. *Graham*, 102 Vt., 307, 147 A., 698, follows the reasoning and result of the Schubert case. It is to be assumed that the statutes of Vermont warrant its acceptance as "satisfactory." The statutes of Maine do not.

This brief review covers all the cases from other states, directly in point, which have been cited. All are instructive but none can determine the question here, owing, as has been said, "to the great divergence of language in the statutes affecting the powers of mar-

ried women and the different results to which the courts necessarily have been led." And to further quote, "The Common law, with its statutory modifications, must be taken as it is in this State." *Perkins* v. *Blethen*, supra.

The entry upon this Report must, therefore be,

Judgment for the defendant.

STATE OF MAINE *vs.* ROBERT BAITLER.

Kennebec. Opinion July 21, 1932.

CRIMINAL LAW. GAMBLING. R. S., CHAP. 136, SEC. 18.

An automatic vending machine which produces metal tokens or checks in varying numbers to be played back into the machine one by one, is a device producing things of value by chance, and in violation of the provisions of Sec. 18, *Chap.* 136, *R. S.*

A thing of value to be the subject of gaming may be anything affording the necessary lure to indulge the gambling instinct.

In the case at bar, tokens sufficient to play the game to a finish might be received; or might not. The same player could operate the machine, over and over again, with unlike results. The element of chance was always present. The allurement of something for nothing, was attendant.

The use to which the machine was put classes it in the category of a gambling device.

On appeal by respondent. A criminal action instituted against the respondent for unlawfully permitting divers persons to gamble with a machine commonly known as a "Five-cent Slot Machine." The cause was submitted, on an agreed statement of facts, to the presiding Justice at the February, 1932, Term, of the Superior Court for the County of Kennebec, and by agreement of council reported to the Law Court for its determination. Judgment for the State. Case remanded for sentence. The case fully appears in the opinion.

H. C. Marden, County Attorney, for State.
Louis J. Brann,
Peter A. Isaacson, for respondent.

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

DUNN, J. This case was reported on an agreed statement of facts. The complaint charges, and the respondent denies, by his plea of not guilty, that he permitted gambling in a place under his control. R. S., Chap. 136, Sec. 1. The determinative question is whether an automatic vending machine that he had in his restaurant, where patrons used it, was also a device producing things of value, by chance. R. S., Chap. 136, Sec. 18.

In return for a nickel, the machine delivered, with certainty, to every customer, a package of candy mints, of equivalent retail value. At the same time, and by the same operation, metal tokens or checks became available to purchasers of the mints — not to all alike, but in varying number, from two to twenty — in accordance with the functioning of the contrivance.

These tokens had no monetary or commercial value. They were designed to be played back into the machine, one by one.

Putting back the tokens did not cause the vending, or delivering of merchandise.

On the top of the machine, in an inclosed frame, bearing the legend "Play Ball," were three reels. When a token was inserted, the reels started to spin, thus beginning the playing of an imaginary, or (to use the expression of the agreed statement), symbolic game of baseball. The element of skill on the operator's part was, seemingly, a factor, but the mechanics of the device itself was controlling.

In a broad sense, the player operated the reels; that is, he could stop them, as their respective combinations were presented to view; and thereby make a desired play in the game; he could start the reels again, if he had tokens. The number of plays was dependent upon the number of tokens. The player began, as has already been said, with not less than two nor more than twenty. At uncertain intervals during the game, the machine dropped additional tokens, in uncertain numbers. A token permitted a play; another token,

another play. The play could go on only to the extent that tokens were dispensed and returned.

The tokens were things of value. They evidenced right to operate the "amusement." Each was a ticket to part of the game. "A thing of value to be the subject of gaming may be anything affording the necessary lure to indulge the gambling instinct." *Painter* v. *State* (Tenn., 1932), 45 S. W. (2d), 46.

There was, as hereinbefore stated, lack of uniformity in the number of tokens delivered. Some customers got more than others; some less. Tokens sufficient to play the game to a finish might be received; or might not. The same player could operate the machine, over and over again, with unlike results. The element of chance was always present. The allurement of something for nothing was attendant.

The use to which the machine was put classes it in the category of a gambling device. The following cases are in point, or analogous: *Painter* v. *State*, supra; *Rankin* v. *Mills Novelty Co.*, 32 S. W. (2d), 161 (Ark., 1930); *Snyder* v. *City of Alliance*, 179 N. E., 426 (Ohio App., 1931); *Harvie* v. *Heise*, 148 S. E., 66 (S. C., 1929); *State* v. *Marvin*, 233 N. W., 486 (Iowa, 1930); *State* v. *Mint Vending Machine Co.*, 154 Atl., 224 (N. H., 1931); *Gaither* v. *Cate*, 144 Atl., 239 (Md., 1929); *Green* v. *Hart*, 41 Fed. (2d), 855; *Jenner* v. *State*, 160 S. E., 115 (Ga., 1931); *Chambers* v. *Bachtel*, 55 Fed. (2d), 851; *Colbert* v. *Superior Confection Co.*, 6 Pac. (2d), 791 (Okl., 1931); *Lang* v. *Merwin*, 99 Me., 486; *State* v. *Googin*, 117 Me., 102. See, too, 12 R. C. L., 730; 27 Corpus Juris, 989; Note to *State* v. *Gambling Instruments*, 38 A. L. R., 73.

The respondent violated the statute when he allowed people to play the machine. He is adjudged guilty of the commission of the offense charged in the complaint.

Judgment for the State.
Case remanded for sentence.

RUTH JOHNSON, PRO AMI

vs.

AMERICAN AUTOMOBILE INSURANCE COMPANY.

Androscoggin. Opinion July 22, 1932.

LIABILITY INSURANCE. CONTRACTS. R. S., CHAP. 60, SEC. 178.

If the language of an insurance policy is ambiguous, or susceptible of interpretations differing in import, construction should be most strongly against the insurer, on whom the obligation of the contract rests, and who is supposed to choose the wording.

If the terms of the policy, however, present no ambiguity, they are to be taken and understood according to their plain and ordinary sense.

Parties contracting in writing are supposed to have the intentions which their agreement effectually manifests.

A contract should be so construed as to give it only such effect as was intended when it was made.

The phrase "while being used with the consent of the assured," in the additional coverage clause in a motor vehicle liability insurance policy, has been construed as referring to the time of the casualty, and not to the time of granting consent.

The terms of a policy cannot be enlarged or diminished by judicial construction. The function of the court is not to make a new contract, but to ascertain the meaning and intention of that actually made.

In the case at bar, the extended coverage clause afforded protection to any person operating the car with the consent of the insured. The court found, however, that the employee at the time of the accident was not using the automobile with the consent of the insured.

Appeal from a decree dismissing plaintiff's bill of complaint brought under R. S., Chap. 60, Sec. 178, to reach and apply to satisfaction of her judgment against one George B. Rix, the insurance money provided by an automobile liability policy issued by the defendant to one James F. Becker insuring him and those persons designated in the extended coverage clause against loss or ex-

pense resulting from claims on account of injuries or death suffered by any person or persons due to the operation of his automobile described in the policy. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Berman & Berman, for plaintiff.

Skelton & Mahon, for defendant.

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

DUNN, J. The defendant is a corporation writing liability insurance on automobiles. It executed and delivered to James F. Becker, a policy covering his car. On June 6, 1931, while this policy was in force and effect, George Benson Rix, an employee of Mr. Becker, crashed the automobile into a telephone pole, to the consequent physical injury of the plaintiff, a young woman who was riding gratuitously in the vehicle. She brought an action in tort against the automobile driver; judgment was entered on a verdict for $1,800, with taxable costs. This judgment remaining unsatisfied for twenty days, the creditor — the present plaintiff — sued in equity, to reach and apply the insurance money, in the amount of her judgment. R. S., Chap. 60, Sec. 178 et seq. The cause was heard on bill, answer, replication and proof. The bill was decreed dismissed. The plaintiff appealed.

The appeal, as argued, is reduced to the single question: Was the automobile, at the time of the accident, being operated, within the scope of the "extended coverage" clause in the liability policy, "with the consent of such named Assured," (*i.e.*, the consent of the owner of the automobile)?

The "extended coverage" clause reads:

> "That in addition to the Assured named in this policy, such insurance as is granted hereunder shall be available, in the same manner and under the same conditions and to the same extent as it is available to such named Assured, to any person or persons while riding in or legally operating the automobile covered by this policy, and to any person, firm or corporation legally responsible for the operation thereof; but only while it is being used . . . with the consent of such named Assured, . . ."

Rix, the employee, had been told, around half past eight in the morning, to drive the car to his home — the approximate distance of a mile — there wash and polish it, and bring it back "about 11:30 at the latest."

He drove the car home and washed it. But, he testified, it could not be polished until dry; and as he thought it would dry more rapidly in motion than when idle, he drove three and one-half miles, still farther in opposite direction from his employer's, to his aunt's house; and thence to a neighbor's, where he was asked to take the plaintiff to Lewiston to do an errand. He did so, the injury taking place on the way back. The employer knew nothing of the trip until afterward.

The accident, it was testified, occurred at 11:15 o'clock. There was not then remaining time, even had there been no mishap, for the employee to have taken the plaintiff to her home, returned to his own, polished the car, and been at his employer's at half past eleven.

The Justice below found the fact to be that, on the ride involving the collision, the automobile was not being used with the consent, express or implied, of the "named Assured," but that the employee was using it in disregard of, and unrelation to, the specified object for which it had been intrusted to him.

Evidence abundantly sustains the finding. The trial court concluded, as a matter of law, that Rix was not covered by the terms of the policy, as to the accident.

Plaintiff's counsel cite, as supporting the appeal, the cases of *Dickinson* v. *Maryland Casualty Co.*, 101 Conn., 369, 125 Atl., 866; *Stovall* v. *New York Indemnity Co.* (157 Tenn., 301), 8 S. W. (2d), 473; *American Automobile Insurance Co.* v. *Jones* (163 Tenn., 605), 45 S. W. (2d), 52; *Peterson* v. *Maloney* (181 Minn., 437), 232 N. W., 790; *Holton* v. *Eagle Indemnity Co.* (196 N. C., 348), 145 S. E., 679; *Maryland Casualty Co.* v. *Ronan*, 37 Fed. (2d), 449; *Odden* v. *Union Indemnity Co.* (156 Wash., 10), 286 Pac., 59.

In the Dickinson Case, it was held (but not with full concurrence), that slight deviations from route and purpose, by one who had the use of a car to go home and change his clothes, and hurry

back, did not destroy the insurer's liability. The deviations consisted in driving to a saloon, and taking in passengers; thence a mile farther away to another saloon; and on to a third. The driver, being doubtful if he still had time to carry out his original plan, then started toward a place where he could see the city clock. Due solely to his negligence, the car skidded, striking a tree, and one of the passengers was mortally hurt.

Somewhat broadly stated, the Stovall Case extends the protection of the "omnibus" clause, not only to the taking and use of the car at the outset, but also to the particular use at the time in question.

The facts were these. A salesman employed by a dry goods concern of Memphis, Tennessee, was attending a convention in that city. A car belonging to the firm, which had been assigned to him, for business only, in his Mississippi territory, but which was forbidden to him for his own use, he brought to Memphis, and stored in the name of his employer, in a public garage. The claim check for the car, he delivered to his superior officer, the sales manager. On the closing day of the convention, the salesman obtained the check from the manager, got the car, and carried certain customers of the firm to the railroad station. After returning the car to the garage, he did not turn in the check at the store, as he should have done; nor was he asked for it.

During the afternoon, he "slipped off" without the knowledge of his employer (the employee testified that had he asked for leave, it would not have been granted), went to the garage, presented the check, removed the automobile, and started for Sardis, Mississippi, to visit his fiancee. On the road, he negligently inflicted actionable damage. The opinion interprets the words, "providing such use or operation (of the insured automobile) is with the permission of the named Assured," as excluding, by intention, a person whose primary taking of the car was unauthorized, rather than one who, having been given the use of the car, subsequently drove it to a place, or for a purpose, not within the contemplation of the owner, when he parted with its possession. The retention of the claim check, after the trip to the railroad station, was regarded as a retention of the constructive possession of the automobile itself.

In so far as departure by a salesman, from prescribed route, was relied on for a reversal of judgment, the Jones case affirms the Stovall Case.

Peterson v. *Maloney*, decides that only permission to take and use the car in the first instance, need have been given. In that case, the defendant had requested, and been allowed the use of the machine, to see his mother and doctor. Instead, he went some twelve miles away, for other personal purposes. The court held that, in the absence of restriction or qualification, except as embodied in the request, the change of purpose did not, in relation to insurance protection, annul the character of the use of the vehicle.

Without discussing other cases, thus was it concluded that, initial use of the car having been with the owner's permission, or consent, liability insurance became available.

Touching the question here presented, the cited decisions are not persuasive.

It is the general rule that if the language of an insurance policy is ambiguous, or susceptible of interpretations differing in import, construction should be most strongly against the insurer, on whom the obligation of the contract rests, and who is supposed to have chosen the wording. *Barnes* v. *Dirigo, etc., Ins. Co.*, 122 Me., 486, 120 A., 675.

Another rule, which safeguards the first against any abuse of its application, is this: If the terms of the policy present no ambiguity, they are to be taken and understood, as a usual thing, according to their plain and ordinary sense. *Imperial, etc., Ins. Co.* v. *Coos County*, 151 U. S., 452, 38 Law ed., 231; *Cushman* v. *Northwestern Ins. Co.*, 34 Me., 487; *Dunning* v. *Mass., etc., Assn.*, 99 Me., 390, 59 A., 535. Parties contracting in writing are supposed to have the intentions which their agreement effectually manifests. *Richardson* v. *Maine Ins. Co.*, 46 Me., 394; *Hathorn* v. *Hinds*, 69 Me., 326; *Union Water Power Co.* v. *Lewiston*, 101 Me., 564, 65 A., 67.

True, literalism should not be pushed to the length of frustrating, in whole or in part, the general intention the contract evidences; nor, on the other hand, should words be made to mean what they do not really say. A contract should be so construed as to give it only such effect as was intended when it was made. Astute

and subtle distinctions should not be attempted, to take a plain case from the operation of material bounds. *Mack* v. *Rochester, etc., Ins. Co.*, 106 N. Y., 560; 13 N. E., 343; *Lyman* v. *State, etc., Ins. Co.*, 14 Allen, 329.

In the instant case, the instruction by the employer, that Rix take the car home and wash it, was simply consent that the car be used, within reasonable and incidental limits, for that purpose. Such use brought the employee within the additional coverage clause in the liability policy. If, while consent continued, civil liability for damages had been incurred, the policy would have afforded security.

But, as the Justice found — and his finding has the weight of a jury verdict — the car was not, when the employee's guest was injured, "being used with the consent of the named Assured." The plaintiff could not, therefore, avail herself of the insurance.

The phrase "while being used," has been construed as referring to the time of casualty, and not to the time of granting consent. *Johnston* v. *New Amsterdam Casualty Co.* (200 N. C., 763), 158 S. E., 473. Permission to use an automobile to attend a funeral was not inclusive of a pleasure trip. *Frederiksen* v. *Employers' Liability Assur. Corp., Ltd.*, 26 Fed. (2d), 76. Express permission for one purpose did not imply all purposes. *Trotter* v. *Union Indemnity Co.*, 35 Fed. (2d), 104. A liability policy did not cover an automobile which was being used by insured's employee on his own business, without permission. *Denny* v. *Royal Indemnity Co.* (26 Ohio App., 566), 159 N. E., 107.

The terms of a policy cannot be enlarged or diminished by judicial construction. *Denny* v. *Royal Indemnity Co.*, supra. The function of the court is not to make a new contract, but to ascertain the meaning and intention of that actually made.

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* JOHN J. O'DONNELL ET ALS.

Cumberland. Opinion July 27, 1932.

CRIMINAL LAW. EVIDENCE. PLEADING AND PRACTICE. CONFESSIONS. ADMISSIONS.

After a verdict in a criminal cause a general motion for a new trial must be addressed to the presiding Justice.

Filing such motion operates as a waiver of exceptions to the refusal to direct a verdict.

When, considered as a whole, circumstantial evidence leads to a conclusion of guilt, with which no material fact is at variance, it is not, as a matter of law, inferior to direct evidence, and neither the court nor the jurors can conscientiously disregard it.

Confessions elicited by any expectation of favor or by menaces are not permissible in evidence, not because of having been extorted illegally, but because the party making them is supposed to be liable to be influenced, by the hope of advantage, or fear of injury, to state things which are not true.

A confession is the voluntary acknowledgment of the criminal act charged, or of participation in its commission. Incriminating admissions may be made without any intention of confession.

Failure of a respondent to testify at his trial presents no evidence of his guilt.

In the case at bar, the respondents were proven guilty, in accordance with the law, upon sufficient evidence.

After conviction on an indictment for robbery, in the Superior Court for the County of Cumberland, respondents filed general motions for new trial. The motions were overruled. Appeals were thereupon taken. Appeals dismissed. Motions denied. Judgment for State. The case fully appears in the opinion.

Herbert J. Welch, for respondents.

Walter M. Tapley, Jr., County Attorney, for the State.

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

DUNN, J. On Friday, September 18, 1931, at about eleven o'clock in the forenoon, three armed and masked persons, two of them wearing overalls, suddenly and unexpectedly entered the office

of the Cabot Manufacturing Company, in Brunswick. They ordered the paymaster to put up his hands, turn around, and look out a window. The other employees were made to hold up their hands, and face the wall. All were covered by revolvers. One of the intruders gathered the money (amounting to eight thousand, one hundred twenty-nine dollars and forty-six cents, from which the weekly payroll was being prepared) from a table, into a bag, and made away with it. The other stick-up men immediately followed, the last one backing out. Neither the paymaster, from whose possession the money was taken, nor any employee of his office, nor a clerk in an adjoining office, describes the appearance of the robbers, except in general respects. No one else connected with the company then knew of the deed. All these facts are about as morally certain as human evidence can establish things.

John J. O'Donnell, Gregory Griffin, Dennis Franco, George Loring and Phillip Williams, all of Portland, some of them of brief residence there, were suspected of the crime. They were jointly indicted. All except Loring, who apparently was not in custody, were tried together, before the Superior Court in Cumberland County, at the January Term, 1932. As to Franco, the jury verdict, by direction of the presiding justice, was not guilty. O'Donnell, Griffin and Williams were found guilty.

Exceptions were taken, during the trial, to the admission of certain evidence. On the part of Williams, exceptions included the admission (after preliminary proof, in the absence of the jury, of its voluntary character) of an alleged confession of his guilt. None of the exceptions were perfected. At the conclusion of the evidence, motions that verdicts of not guilty be ordered, were overruled. To the overruling of these motions, exceptions were noted.

After verdict, general motions for new trial were addressed to the presiding justice (as motions in criminal cases must necessarily be. *State v. Dodge*, 124 Me., 243, 127 A., 899). Filing the motions operated as a waiver of exceptions to the refusal to direct verdicts. *State* v. *Simpson*, 113 Me., 27, 92 A., 898; *State* v. *DiPietrantonio*, 119 Me., 18, 109 A., 186. The motions were overruled.

Separate appeals have brought the case to the Law Court. R. S., Chap. 146, Sec. 27. In each instance, the question is whether, in view of all the evidence, the decision from which the appeal was

taken is wrong. *State* v. *Lambert*, 97 Me., 51, 53 A., 879; *State* v. *Albanes*, 109 Me., 199, 83 A., 548; *State* v. *Priest*, 117 Me., 223, 103 A., 359; *State* v. *Dodge*, supra. That decision held that the jury was warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict, that the respondents were guilty of robbery.

Circumstances are woven into the texture of the case for the government. The admission of circumstantial evidence is too well established to need the citation of authority. When, considered as a whole, circumstantial evidence leads to a conclusion of guilt, with which no material fact is at variance, it is not, as a matter of law, inferior to direct evidence, and neither the court nor the jurors can conscientiously disregard it. 16 Corpus Juris, 763.

The case will be as clearly presented, perhaps, as in any other way, if it be now stated that there was evidence tending to prove that on Wednesday, two days before the robbery, an Essex automobile of the sedan type, painted green, belonging to a Portland physician, was stolen.

In the afternoon of that same day, it is shown that Williams and O'Donnell (of the respondents) came to Brunswick, in a car similar in description; that they stopped at the home of Sybil and Marguerite Peters, where permission was asked, and granted, to leave the car in the garage until the next night (Thursday). According to Marguerite Peters, the men remained there the greater part of the afternoon, returning again in the evening, when her sister Sybil was also at home. Later in the evening, Griffin (the third respondent) and a man unknown to the Peters girls, arrived in another automobile. The four — Williams, O'Donnell, Griffin and the stranger — left the Peters' house together, so both girls say. O'Donnell contradicts the statement about leaving the car, and says he never even knew of its being left there.

The testimony records no further incident until Friday morning.

Then, between 10 and 10.30 o'clock, so Sybil Peters swears, O'Donnell came to her house, and drove the car away. This, too, is denied by O'Donnell.

Edward M. Brown, a deputy sheriff, testifies that on Friday morning, not far from eleven o'clock, while crossing the bridge leading from Brunswick to Topsham, he saw O'Donnell, sitting side-

wise, nearly facing the driver, in the front seat of a green sedan, which was coming into Brunswick. The deputy did not know the driver, nor the two men on the rear seat. He states he thought the car was an Essex, but it may be that his recognition was too slight to be of consequence. The evidence of this witness is valuable as affording room for the jury to find that O'Donnell was in Brunswick, or on the edge of Brunswick, on a day when his own testimony would show that he was not there, and at an hour approximating that of the commission of the crime, at which time he claims he was asleep in a Portland hotel.

A little after one o'clock Friday afternoon, Ezbra D. Brown, of Brunswick, found a green Essex sedan abandoned, in a wood lot back of his home. A dealer's license plates were on the car. In it were blue denim overalls; also a leather bag, which the witness called a Boston bag, containing a bottle of medicine, and a "lung tester, or some rubber affair."

Francis A. Forgione, the Portland physician whose automobile was stolen, attests confidently to his ownership of the car discovered in the woods. He well describes it, and, supplementing recollection from minute or record, gives its motor and serial numbers.

Around ten o'clock Saturday night (that of the day next after the robbery), Williams and Griffin appeared at the home of the latter's sister-in-law, in Hopedale, Massachusetts. A year or more had passed since Griffin had seen his marriage relative; he gave her one hundred dollars at this time, as a wedding present.

Where, for the next fortnight, Griffin and Williams were staying, and whether separately or together, is not more definite than intermittently in Massachusetts towns. Griffin was at his brother's (this sister-in-law's) in Hopedale, frequently. Williams came with him several times. A taxicab driver testifies that on the Saturday night of their first appearance, he drove them to a place called the Blackstone Inn, where they drank and gambled. They had, he gives evidence, "considerable money." They left, about five o'clock the next morning, in the cab in which they had come.

O'Donnell, on his version, went to Boston from Portland, on the Monday following the robbery, to see about an attached car; he says that he returned on Thursday. A few days later, the evidence shows he was in Hopedale, Massachusetts, looking for Griffin. He

found him at a show in Milford. Where O'Donnell, or, for that matter, Williams and Griffin were, from that time until October 2nd, is differently indicated. Apparently all three were in Massachusetts, crossing occasionally into Rhode Island; there is allusion to "running stuff" (liquors) out of Providence.

On Friday, October 2nd, Williams, Griffin and O'Donnell came to a lodging house in Milford, Massachusetts, looking for a room where the three might be together. No such room was available until Sunday. A large room was engaged for that time. Williams and Griffin then left; O'Donnell remained, engaging and paying for a smaller room to occupy for the intervening time. He registered as John Curran.

Williams and Griffin did not come back till Monday noon. They then paid for the large room one week in advance; O'Donnell moved in with them. They said they might remain all winter, and asked if more "boys" could be accommodated.

The next morning the landlady learned that two strange men had been admitted to her house during the night, occupying a room (vacant the evening before) next the large room. On being questioned as to the newcomers, Williams said it was so late when they came in (impliedly all together) that they did not want to ring the bell. The men then registered and paid. One of them was known as Leo; the other as Frisco.

A little before one o'clock that afternoon, the five left in a new Chrysler car, going in the direction of Blackstone. Williams, it appears, had bought the car in Rhode Island, a few days before, paying five hundred dollars for it. Griffin was with him at the time.

Up to Wednesday afternoon, none of the men had been back to the lodging house. That afternoon, as a result of something she read in a newspaper, the landlady notified the police; an officer came and searched the rooms the men had occupied. In the room of Williams, Griffin and O'Donnell, there was a locked suitcase, which the officer opened, removing three revolvers, two boxes of cartridges, and some loose cartridges.

Of the roomers, no one of the five was again at the house.

They had been arrested, early in the morning of that day, at the Blackstone Inn. They were taken to the police barracks at Wren-

tham, Massachusetts for an hour or so, and thence to headquarters at the State House in Boston.

The government insisted that Williams (who was also known to the Massachusetts authorities as Goldberg, or Goldenberg) there made the aforementioned confession. This confession, a piece of evidence by itself, relating only to himself, constitutes an important chapter in the case against him.

Confessions elicited by any expectation of favor or by menaces are not permissible in evidence, not because of having been extorted illegally, but because the party making them is supposed to be liable to be influenced, by the hope of advantage, or fear of injury, to state things which are not true. *Com.* v. *Knapp*, 9 Pick., 496; *State* v. *Soper*, 16 Me., 293, 298; *State* v. *Grover*, 96 Me., 363, 52 A., 757.

Upon admission of Williams' confession into the evidence, its probative force was for the jury, depending upon all the circumstances under which it had been obtained; the respondent had the right to ask the jury to give little heed to it, or to disregard it utterly, if they found it to have been improperly obtained. *State* v. *Grover*, supra; *State* v. *Priest*, supra.

There was testimony that the confession of Williams was obtained through beating and bruising him, and threatening him, while he was in the custody of the Massachusetts police. When he was brought before the Municipal Court in Brunswick, Maine, on the following day, he had bruises above his eye and forehead. Evidence in rebuttal, besides denying ill treatment and threats, suggests a different source of the infliction of the injuries. Through this evidence, the jury could have found that the contention of the defense had been negatived.

The gist of the confession follows:

Williams and four companions (O'Donnell, Griffin, Franco and Loring) left Portland for Brunswick, after nine o'clock on the morning of the robbery, in a Hudson automobile. They stopped at a private garage in which was a previously stolen Essex car. Three of the party (Williams being one) drove in this car to a side road, where they rejoined the others. Williams and Loring now changed to overalls. They, with O'Donnell and Griffin, drove in the Essex to

the yard of the Cabot mill; Franco was left in charge of the Hudson car.

On reaching the yard, Griffin, the driver of the Essex car, remained with it; Loring, Williams and O'Donnell entered the mill office, masking their faces with handkerchiefs. While the other two kept the office force within range, Williams took the money (some of it in envelopes, and some in loose bills), and put it into the cloth bag which he had with him; all three then departed.

They were driven in the Essex car to where the Hudson was waiting. They "made a shift"; then drove to a farm house, where they divided the money. Five hundred dollars was put aside for the owner of the Hudson car; one hundred and fifty dollars for the man who stole the Essex car; and two hundred and fifty dollars for some other purpose; the "split" was fourteen hundred dollars apiece. The group then separated. Williams, O'Donnell and Griffin went back to the Portland hotel where they had been staying.

The next day, Williams and Griffin went to Massachusetts, where, several days later, they were joined by O'Donnell. Williams did not see Franco after leaving Maine; apparently he did not see Loring. To continue further from the confession, the guns used in the robbery were taken by Loring, to whom they belonged.

If Williams is right regarding the guns, those in the suitcase in the lodging house might not have had connection with the robbery. This was for the jury to decide. And right here it may be stated that one of the revolvers found by the officers was positively identified as the property of a man in Brunswick, Maine, whose testimony is that the gun had been taken from his room without his permission. Evidence goes to show that a girl afterward gave it to Griffin. One of the other guns is said to have looked like that which one of the robbers laid for a moment on a table in the mill office. Quite naturally, there was then but slight opportunity for inspection. It may be added that both the Peters girls recognized this gun as resembling one which Williams had shown them, explaining he had it for protection in his business as a salesman.

It is important to notice and appreciate how little of the evidence which corroborates the confession of Williams could possibly have been anticipated by him.

Before leaving the aspect of the case immediately relative to Williams, let it be observed that Sybil Peters states Williams wrote her from the Portland jail to come to see him, which she did, accompanied by her sister. She says he advised them to leave town, and avoid being summoned to court. The sister's testimony is substantially the same. They were dismissed from the stand without cross-examination on the point.

This brings the case to where there may be consideration of evidence against O'Donnell, individually.

The government does not rely, in his instance, on a confession, but on his admission of independent facts, from which, when considered with other facts, it is insisted, his guilt was inferable. A confession is the voluntary acknowledgment of the criminal act charged, or of participation in its commission. Incriminating admissions may be made without any intention of confession.

One Ralph Frisco (who should not be confused with the respondent Dennis Franco) was arrested when O'Donnell was. Frisco is testified to have said, in the presence and hearing of O'Donnell, that he came from Portland to Massachusetts, in company with one Dominick Leo, in response to O'Donnell's telegram. Lieut. Ferrari (the Massachusetts police detective to whom the confession of Williams was testified to have been made) quotes Frisco as saying that in reply to O'Donnell's inquiry as to what was doing down in Portland, he had told him they were looking for him (O'Donnell) down there; and that in the course of their conversation O'Donnell said his "split" was fourteen hundred dollars. O'Donnell having admitted that he heard what Frisco had said, the lieutenant asked him, "What do you say about that?" O'Donnell replied, according to the witness, "Well, if he said so, it must be so."

Neither Frisco nor Leo, though both were arrested, were indicted. Nothing identifies them with the robbery.

As to Griffin, the evidence for the government is not so strong as in the case against Williams (nor in that against O'Donnell, whose defense is stated later), but there is sufficient to sustain the verdict. Griffin, there was testimony, came to the Peters' home on the evening of the storing of the automobile, and took the other respondents away in his car. He left Maine with Williams, and went with him to Massachusetts, immediately after the robbery. His manner

of living, and the way he spent his time, in that State; the belated gift to his sister-in-law; and his free spending of money, were circumstances for the jury to weigh, and from which it might draw reasonable inferences. Testifying in his own behalf, Griffin said that his business, that of a "booze runner," brought him to Massachusetts; that, when working, his earnings approximated one hundred dollars weekly. On the conflicting evidence, the question of his guilt was for the jury.

The conclusion of the jury is not disturbable.

The defense made a great effort to break the force of the evidence against Williams and O'Donnell.

Williams did not testify before the jury. That he did not, presented no evidence of his guilt. R. S., Chap. 146, Sec. 19. Griffin, testifying in behalf of Williams, says he first knew him in 1920, in Massachusetts. In 1931 Williams came to Portland, where he booked crap games, was in the liquor business, and also was a salesman for women's clothing.

Griffin asserts that he was not with Williams in Brunswick during the daytime of the Friday of the robbery, but in Portland, drinking and hanging around. He says that he and Williams were in Brunswick late that night. A State police officer testifies that he saw Griffin (who was intoxicated), with Williams, in an automobile, on that night, between 11.30 and 12 o'clock, going towards Brunswick, Williams driving. The officer states that he searched the car but found nothing. This testimony for the defense did not preclude belief in Williams' own statement that he was in Brunswick during the forenoon.

John J. O'Donnell, the remaining respondent, gave his age as twenty years. He said his people lived in Portland; that for a short time he had not been at home, but at the Royal Hotel in that city. His business, he stated, was slot-machines and booze. His story was that he and Williams were together in Brunswick, late at night, on September 16th, or September 17th (the robbery was on the morning of the 18th), "booze running." He admits that they were at the Peters girls' house, and adds they went from there to their hotel in Portland. He testifies that on Friday (that of the robbery) he was at this hotel, sleeping, until two o'clock in the afternoon; then got

up, and spent the afternoon about the streets; and the evening at a theater with a friend.

He manifests, without assigning any especial reason, a memory of events not naturally associated with that particular day.

He says that after Friday he was at home, his "folks" having asked him to come back; that he remained there until Monday, when he left for Boston to see about his attached car.

The fact that his friend was not called to corroborate him about the theater, nor his people about his being at home, nor the failure to call any of them explained, might, in the estimation of the jury, have thrown doubt upon the value of his statements, or even reduced their reliability to zero. He denied sending a telegram to Frisco and Leo; and said (this, too, at variance with testimony for the State) that Boston police attacked him, and that a Portland officer threatened him. His contradiction of the Peters girls regarding the car, and of the deputy sheriff about being on the bridge, have already been mentioned.

The jury convicted the respondents.

The Court is of the opinion that they were proven guilty, in accordance with the law, upon sufficient evidence. Their respective appeals are dismissed, and their motions for new trial denied. As to John J. O'Donnell, Phillip Williams and Gregory Griffin, judgment goes for the State.

Appeals dismissed.
Motions denied.
Judgment for State.

GILBERT E. GAY ET ALS

vs.

DAMARISCOTTA-NEWCASTLE WATER CO.

Kennebec. Opinion September 26, 1932.

PUBLIC UTILITIES. WATER RATES.

Under Revised Statutes, Chap. 62, Sec. 16, a public utility is entitled to demand and collect for any service rendered reasonable and just rates, taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk and depreciation.

It is the general rule that the enforcement of rates which are not sufficient to allow a fair return on the value of the property devoted to the public service at the time it is being used deprives a public utility of its property in violation of the Fourteenth Amendment to the Constitution of the United States.

Rates, however, may in no event be prohibitive, exorbitant or unduly burdensome to the public.

The public is entitled to demand that no more be exacted from it for the services of a public utility in the form of rates or charges than the services rendered are reasonably worth.

Findings of fact by the Commission on the issue of the reasonable worth of the hydrant service rendered by the Company, if supported by any substantial evidence, are final.

A mere difference of opinion between the Court and the Commission in deductions from the proof or inferences to be drawn from the testimony will not authorize judicial interference.

If the rates charged by a utility represent the maximum reasonable value of the service to the consumer, they can not be held, as a matter of law, unreasonable or confiscatory as to the Company, whatever may be the result upon its returns.

In the case at bar, tested by the above rules, the finding of the Public Utilities Commission that the hydrant rates paid by the Town of Damariscotta were all the service rendered by the utility was reasonably worth must be sustained.

The admission into evidence of tables containing data taken from reports on file with the Public Utilities Commission showing hydrant rentals charged by other water companies, being in the main copies of public records and proved through examined copies, was not prejudicial error.

On exceptions from a majority opinion of the Public Utilities Commission disallowing an increase of hydrant rates of the Damariscotta-Newcastle Water Company in the town of Damariscotta.

Exceptions overruled. The case fully appears in the opinion.

Ralph O. Brewster, for protestants.

McLean, Fogg & Southard, for defendants.

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

STURGIS, J. The Damariscotta-Newcastle Water Company, a public utility furnishing water in the towns of Damariscotta and Newcastle in this State, was organized in June, 1924. Its domestic service extends through both towns, but Damariscotta only takes water for fire protection. Its original rates were established and became effective August 1, 1924. Its commercial and industrial rates were reëstablished two years later and were further increased on July 28, 1927. Its hydrant rates, as originally established, remain unchanged.

On May 13, 1931, the Company filed a proposal for an increase in its hydrant rates in Damariscotta from $135 per hydrant to $185 for each of the first twenty and $100 for each additional hydrant used. Protest bearing the signatures of Gilbert E. Gay and twelve other citizens and taxpayers of Damariscotta was filed July 31, 1931, and the Commission suspended the operation of the new schedules. Further suspension was ordered and, by decree of January 28, 1932, the Commission disallowed the proposed rates. Exceptions duly alleged and allowed are certified to this Court.

The decree of the Public Utilities Commission is accompanied by comprehensive and detailed findings of fact upon which it is based. The history of the Company, as disclosed by records and reports on file, is reviewed at length. The original investment in plant and all additions thereto of record are noted, an appraisal made by the Engineering Department of the Commission as of February 15, 1928, is refigured in the light of changes in costs of labor and supplies and a Reproduction Cost Less Depreciation is produced. With a consideration of working capital and going concern value, it is found that the fair value of the Company's property devoted to the public service at the time of the inquiry was $125,000.

The revenue of 1930 of $15,247.43 was taken as the probable annual gross revenue and, using the actual operating expense for the same year of $7,608.64 as a basis, by deductions for what appeared to be unusual expenditures, an allowance of $1,000 for depreciation where none had been charged by the Company and a small amount for the sake of even figures, an annual operating expense of $7,700 is estimated, from which a probable gross income of $7,547.43, yielding an annual rate of return of 6.04 per cent, is computed.

The Company claims that the rate of return estimated by the Commission is too high. Neither the accuracy of the valuation adopted nor the use of the 1930 revenue is questioned, but complaining that the depreciation allowance is inadequate and operating expenses are under-estimated, the Company forecasts its annual return as from 5.08 to 5.68 per cent. Although the Commission, recognizing the existence of a period of falling prices and reduced costs, foresees its continuance and concludes that, without the recurrence of unusual expenditures, with proper management, operating expenses should be somewhat lower, the Company sees no opportunity for substantial retrenchment.

The inquiry by the Commission, however, was not limited to the adequacy of the return from existing rates viewed solely from the standpoint of the Company. The character and quality of the hydrant service rendered and its present cost to the municipality was examined, and a finding that the reasonable worth of this service did not exceed its cost was accepted as the controlling factor in the case rather than the probable rate of return. The legal sufficiency of the ruling below upon this issue is the crucial question on this review.

The numerous grounds assigned for the exceptions alleged may be summarized as follows: (1) the existing hydrant rates are unreasonable and confiscatory and the enforcement of their continuance denies the Company a fair return on the value of its property devoted to the public service in violation of the law of this State and the Constitution of the United States; (2) the findings of the Commission as to the reasonable worth of the hydrant service furnished was not based on any adequate evidence and disre-

garded applicable rules of law; and (3) inadmissible and prejudicial testimony was admitted.

Revised Statutes, Chap. 62, Sec. 16, provides that the rates made, exacted, demanded or collected by any public utility for any service rendered, and this includes the furnishing of water, "shall be reasonable and just, taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk and depreciation." And it is the general rule that the enforcement of rates which are not sufficient to allow a fair return on the value of the property devoted to the public service at the time it is being used deprives a public utility of its property in violation of the Fourteenth Amendment to the Constitution of the United States. *Smyth* v. *Ames*, 169 U. S., 466; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Bluefield Waterworks & I. Co.* v. *Public Service Commission*, 262 U. S., 679; *Public Utility Commissioners et al* v. *New York Telephone Co.*, 271 U. S., 23.

Rates, however, may in no event be prohibitive, exorbitant or unduly burdensome to the public. The reasonableness of rates relates both to the utility and the consumer. The public is entitled to demand that no more be exacted from it for the services of a public utility in the form of rates or charges than the services rendered are reasonably worth. *Smyth* v. *Ames*, supra; *Minnesota Rate Cases*, 230 U. S., 352, 454; Mr. Justice Brandeis, in *S. W. Telephone Co.* v. *P. S. C.*, 262 U. S., 276, 290; *Water District* v. *Waterville*, 97 Me., 185, 54 A., 6; *Water District* v. *Water Co.*, 99 Me., 371, 59 A., 537; *Hamilton* v. *Power Co.*, 121 Me., 422, 117 A., 582.

The record shows that the hydrant service which this Company furnishes to Damariscotta is reasonably adequate, but admittedly open to improvement. The location of the fire pump and standpipe several miles distant from the village impairs the pressure when more than two fire streams are demanded and disproportionately increases the capital investment and cost of maintenance properly allocated to this service. The Commission notes that "a lack of adequate plant design is indicated," and, though deficiencies in this respect may in part be properly charged to the failure of

Newcastle and Damariscotta to coöperate in the erection of a new standpipe, as claimed by the utility, it is the plant as it exists and the hydrant service as now furnished with which the Commission was concerned.

According to public statistics Damariscotta is a comparatively small country town of less than one thousand inhabitants and a valuation for tax purposes of less than three-quarters of a million dollars. It has no large industries and, outside of the village proper, is not thickly settled. It maintains altogether only twenty-one hydrants and, according to data and testimony introduced into the evidence, the rate it now pays for its fire protection service is one of the highest in the State and substantially above the average. The amount of taxes which the town annually receives from the Company is here immaterial. Rates which should be paid for municipal service can not be measured in any part by the amount of taxes assessed upon the property of the utility. In re *Caribou Water Co.*, 121 Me., 426, 431, 117 A., 579; *North Berwick* v. *Water Co.*, 125 Me., 446, 134 A., 569. Nor can the fact that the town itself does not of record object to the increase in the hydrant rate have weight. Municipal expenses in the main come from the taxpayers' pockets. Due consideration of their rights can not be prejudiced because of official non-action.

The Commission found that the hydrant rates now paid by this municipality were all the service was reasonably worth. Its findings of fact on this issue, if supported by any substantial evidence, are final. *Hamilton* v. *Power Co.*, supra; *Utilities Commission* v. *Water Commissioners*, 123 Me., 389, 123 A., 177. Nor will a mere difference of opinion between the court and commission in the deductions from the proof or inferences to be drawn from the testimony authorize judicial interference. *Gilman* v. *Telephone Co.*, 129 Me., 243, 151 A., 440. Tested by these rules, the finding must be sustained.

We are not unmindful of the desirability from the standpoint of the Company of an increase in its revenue which would permit a stricter compliance with standard rules of accounting in the matter of depreciation, provide more moneys for anticipated increases in taxes, legal expenses and miscellaneous items which it deems proper and necessary charges to operating expense and,

after payment of fixed charges, leave a larger net income available for payment of dividends or passing to surplus, for, although it is not necessary to decide the point, the contention is not entirely unsupported by evidence that the payment of reasonably necessary operating expenses out of the revenue from existing rates will bring the return of the Company on the rate base here fixed nearer the range of its own estimate of 5.08 to 5.68 per cent than the 6.04 per cent computed by the Commission. Due regard for the rights of the public, however, does not justify casting the burden of an increase in this return from the entire rate system of the Company upon a single branch of its service which is now costing its full reasonable worth.

The observations of Judge Savage, in stating the opinion of the Court in *Water District* v. *Water Co.*, supra, p. 381, apply in the case at bar:

> "The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers. It has accepted valuable franchises granted by the state, franchises ordinarily exclusive for the time being, franchises which ordinarily debar the public from serving themselves satisfactorily in any other way — and in return it must perform the duties to the public which it has voluntarily assumed, at rates not exceeding the value of the services to the public, taken as individuals, and this irrespective of the remuneration it may itself receive."

The exceptions can not be sustained on the ground that existing rates are unreasonable or confiscatory. The rule of *Hamilton* v. *Power Co.*, supra, must be followed here; "it would be quite as objectionable to take from the consumer more than the service was reasonably worth, as it would to deprive the Company of a fair return upon a fair value of its property. If the rates established represent the maximum reasonable value of the service to the consumer, it can not be said that they are confiscatory as to the Company, whatever may be the result upon its returns."

Counsel for the Company charges error in the admission into the evidence of certain tables prepared by the Chief Engineer of the Commission containing data taken from reports on file, showing hydrant rentals charged by other water companies and that the existing rate of this Company is among the highest. The exhibits were admitted for what they were worth. In the main, they are copies of public records and proved through examined copies. We find no prejudice in the consideration given them. The specific objections advanced on the brief go to the weight of this evidence, not its admissibility.

No error appearing in the decree of the Public Utilities Commission, the entry is

Exceptions overruled.

MAURICE T. LINCOLN *vs.* GEORGE H. HALL.

Penobscot. Opinion October 7, 1932.

PLEADING AND PRACTICE. EXCEPTIONS.

The right to except as to matters of law in cases submitted to reference can only be preserved by the following procedure; namely, when the Referee's report is offered at nisi prius *for acceptance, the aggrieved party must file his objections in writing for the consideration of the Presiding Justice. If the objections are overruled and the motion to accept the report granted, exceptions to the ruling will lie.*

On exceptions. An action of slander brought in the Superior Court for the County of Penobscot, and heard by a Referee, right to exceptions as to questions of law reserved. To rulings and determination of the law by the Referee, plaintiff excepted. Exceptions overruled. The case sufficiently appears in the opinion.

L. B. Waldron, for plaintiff.

P. A. Hasty,

B. W. Blanchard, for defendant.

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

PATTANGALL, C. J. On exceptions. This case was heard by a Referee appointed under authority of Sec. 94, Chap. 96, R. S. 1930. Right to except as to questions of law was reserved in accordance with the provisions of Rule of Court XLII. Plaintiff has attempted in these proceedings to avail himself of that right. He has failed to take the necessary steps to properly bring before us the question at issue.

The procedure necessarily to be followed is plainly and carefully stated in *Camp Maqua, Y. W. C. A.* v. *Inhabitants of the Town of Poland*, 130 Me., 485, 157 A., 859. That procedure is entirely disregarded in the instant case. The record here does not show that the report of the Referee has even been presented to the Court below for acceptance and it necessarily follows that it does not show that plaintiff objected to its acceptance and, in accordance with Rule of Court XXII, reduced his objections to writing or that notwithstanding such objections the Presiding Justice accepted the report.

On such a record nothing is presented for our consideration.

Exceptions overruled.

THOMAS JOHNSON *vs.* PORTLAND TERMINAL COMPANY.

Cumberland. Opinion October 14, 1932.

NEGLIGENCE. MOTOR VEHICLES. RAILROADS. PLEADING AND PRACTICE. VERDICTS.

A Presiding Justice at nisi prius *is authorized to direct a verdict for either party in any civil case when a contrary verdict could not be sustained by the evidence.*

If plaintiff's evidence, given all of the force to which it could fairly be entitled, is insufficient to make a prima facie *case, a verdict for defendant may properly be ordered.*

It is only when the case is doubtful and different conclusions might reasonably be drawn from the evidence that the facts should be submitted to the jury.

The omission of warning signals by trainmen will not relieve the driver of a motor vehicle from the imputation of negligence when he fails to look in both directions before crossing a railroad track.

In the case at bar, the proximate cause of the collision between the moving train and the plaintiff's automobile was the negligence of the plaintiff. The verdict for the defendant was properly ordered.

On exceptions by plaintiff. An action on the case to recover for personal injuries and damage to his automobile arising out of a collision between the automobile of the plaintiff and engine of the defendant, at the railroad crossing on West Commercial Street, Portland. Trial was had at the April Term, 1932, of the Superior Court for the County of Cumberland. To the direction of a verdict for the defendant, plaintiff seasonably excepted.

Exceptions overruled. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Perkins & Weeks, for defendant.

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

PATTANGALL, C. J. Exception to the direction of verdict for defendant. Action for damages arising from injuries claimed to have been sustained by reason of defendant's negligence in operating a shifting train with which plaintiff's automobile collided on a grade crossing.

A presiding justice at *nisi prius* is authorized to direct a verdict for either party in any civil case when a contrary verdict could not be sustained by the evidence. *Bank* v. *Sargent*, 85 Me., 349, 27 A., 192; *Bennett* v. *Talbot*, 90 Me., 229, 38 A., 112; *Coleman* v. *Lord*, 96 Me., 192, 52 A., 645. If plaintiff's evidence, given all of the force to which it could fairly be entitled, is insufficient to make a *prima facie* case, a verdict for defendant may properly be ordered. *Heath* v. *Jaquith*, 68 Me., 433; *Jewell* v. *Gagne*, 82 Me., 430, 19 A., 917; *Co-operative Society* v. *Thorpe*, 91 Me., 64, 39 A., 283. It is only when the case is doubtful and different

conclusions might reasonably be drawn from the evidence that the facts should be submitted to the jury. *Young* v. *Chandler*, 102 Me., 253, 66 A., 539.

Applying these recognized rules to the instant case, plaintiff's exception must be overruled. The evidence presented is insufficient to support a verdict for the plaintiff and it would be the duty of the Court to set aside such a verdict had one been rendered.

The collision occurred at a crossing with which plaintiff was thoroughly familiar. His hours of employment were such that he usually left his place of business shortly after midnight and drove to a restaurant for lunch, returning to his apartment on the second floor of the building in which his store was located. The usual course thus travelled necessitated crossing the railroad tracks at the point where the accident occurred.

These tracks, three in number, crossed the highway at an angle and constituted part of the terminal yard. No regular trains traversed them, but frequently, both by night and day, shifting engines passed over them hauling substantial trains of cars. There was no gate at the crossing and not always a flagman. A general rule laid down by the defendant company and appearing in its book of instructions to employees provided that "Shifters moving over public crossings when crossing flagman not on duty, or where none are stationed, must arrange for one member of the crew to properly flag the crossing; this rule will also apply to private crossings."

Plaintiff had noticed many times during the eighteen months prior to the accident the presence of a trainman at the crossing, walking ahead of an oncoming train, carrying a lantern. On the night in question no such precaution was taken. There was, however, no difficulty in observing a train as he approached the scene of the trouble. There was an electric street light near the crossing, and plaintiff had an unobstructed view of the track after reaching a point approximately eight hundred feet distant from it and from then on to the place of collision.

He testified that as he drove along he saw an engine standing still on the nearest track within ten or twelve feet of the highway. He did not notice any cars attached to the engine, although it is agreed that nineteen freight cars, eleven of them loaded, were so

attached. He added that there were no lights on the engine or tender, that no bell was sounded, that no employees were in sight, and that there was nothing to indicate that any risk of collision would be incurred by crossing the tracks.

The evidence is clear, although plaintiff's recollection was otherwise, that the train was on the middle track. Plaintiff admits seeing the engine from the time when he was distant about eight hundred feet and continuing to observe it until within forty or fifty feet of the crossing, when he says he turned his head to watch for approaching trains in the opposite direction. He admits that during the last second or two before the collision he increased the speed of his car to fifteen or twenty miles an hour, having previously slowed down in order to negotiate a double curve in the highway.

The travelled portion of the highway was twenty-five feet wide. According to plaintiff's testimony the engine was standing twelve feet from the edge of the way on his right as he approached. The track crossed the highway diagonally, the distance from the engine, as located by plaintiff, to the opposite end of the crossing being forty-seven feet. The collision occurred within twelve feet of the edge of the way on plaintiff's left. The engine, then, would be obliged to travel approximately thirty-five feet in order to arrive at the point of contact coincidentally with the automobile which, during the same space of time, was travelling forty or fifty feet at a speed of fifteen or twenty miles an hour. Allowing a reasonable margin of error in estimates of speed and distance, matters which it is impossible for witnesses to state exactly, it may be assumed that not more than three seconds elapsed between the time when plaintiff last observed the engine and the time when he felt the impact of the tender against his automobile. His theory is based upon the proposition that in that space of time the engine, which plaintiff had seen standing still, unlighted, apparently unattended and abandoned, had gotten under weigh and had dragged the train a distance of twenty-seven feet. The conclusion is irresistible that plaintiff was mistaken in assuming that the train was stationary when he first saw it, that it must have been in motion when he turned to look toward his left, and that had he exercised the degree of care which the situation demanded, he could not have failed to discover the fact.

Plaintiff bases his right to recover on the allegations that defendant negligently failed to give him warning of the approach of the train by means of a light on the locomotive, by sounding a bell or whistle, or by stationing a flagman at the crossing. Assuming these claims to have been sufficiently substantiated to raise questions which should have been submitted to the jury, plaintiff's case still lacked an important element. It was incumbent on him to show that he was in the exercise of ordinary care.

The law regarding the duty of travellers approaching railroad crossings has been fully discussed and plainly stated in many opinions by this Court. Among the cases to which reference may be made on this point are *Grows* v. *M. C. R. R. Co.*, 67 Me., 100; *Lesan* v. *M. C. R. R. Co.*, 77 Me., 85; *Chase* v. *M. C. R. R. Co.*, 78 Me., 346, 5 A., 771; *Garland* v. *M. C. R. R. Co.*, 85 Me., 519, 27 A., 615; *Smith* v. *M. C. R. R. Co.*, 87 Me., 339, 32 A., 967; *Giberson* v. *B. & A. R. R. Co.*, 89 Me., 337, 36 A., 400; *Day* v. *B. & M. R. R. Co.*, 96 Me., 207, 52 A., 771; *Sykes* v. *M. C. R. R. Co.*, 111 Me., 182, 88 A., 478; *McCarthy* v. *B. & A. R. R. Co.*, 112 Me., 1, 90 A., 490; *Hesseltine* v. *M. C. R. R. Co.*, 130 Me., 196, 154 A., 264.

Ordinary prudence required that he look in both directions before attempting the crossing. The omission of warning signals by the trainmen did not relieve him from the imputation of negligence when he failed to do so. Had he looked toward his right, even when he reached the first railroad track, he could not have failed to see the approaching train; and had he been proceeding at a speed consistent with safety under the existing circumstances, he could even then have stopped his car and averted the collision. His own negligence was the proximate cause of the collision and the injuries which he suffered because of it.

Exceptions overruled.

HENRY J. GAUTHIER, APPELLANT

from

DECREE OF JUDGE OF PROBATE.

Androscoggin. Opinion October 19, 1932.

PROBATE COURTS. PLEADING AND PRACTICE.

The decree of adoption duly entered in a Probate Court is a record that proof was offered of the written consent of the mother, and the recital therein controls until overthrown by evidence. The fact that such written consent is not found in the files of the court is not evidence that it was not given.

On exceptions by appellant. To the affirmance by the Supreme Court of Probate of a decree of the Judge of Probate for the County of Androscoggin, denying the petition of the appellant that a decree of adoption be declared null and void, appellant seasonably excepted. Exceptions overruled. The case sufficiently appears in the opinion.

Franklin Fisher, for appellant.

L. A. Jack, for appellee.

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

THAXTER, J. Appellant filed a petition in the Probate Court in Androscoggin County asking that a decree of adoption of one George Gauthier, Jr. be declared null and void, and that a decree of distribution, by which he was recognized as the adopted son and heir of Joseph Gauthier, be amended by striking out his name. The petition was dismissed and on appeal this decree was affirmed in the Superior Court sitting as the Supreme Court of Probate. The case is now before us on an exception to this ruling.

The basis of the petition is that there was no consent by the mother to the adoption, and hence it was invalid. On the original adoption petition the consent of the father alone appeared, but the decree of the Probate Court contained a recital that the written consent required by law had been given. This same situation was

presented to this court on a similar petition filed by appellant. *Henry J. Gauthier, Appellant from Decree of Judge of Probate*, 131 Me., 28, 159 A., 329. The Chief Justice in the opinion in that case said, pages 30-31: "Appellant alleges that the mother did not so consent. No proof in support of the allegation, however, appears in the record. The record shows that the father did consent and that the mother's signature does not appear on the paper which the father signed; but there is nothing to negative the proposition that she may have filed an independent consent, and the statement in the decree must stand until and unless it is overthrown by evidence."

In the present case it appears from the testimony that the mother did consent, but the plaintiff claims that the adoption is nevertheless void because the record of such consent does not appear. He cites in support of this contention the following language from the case of *Taber* v. *Douglass*, 101 Me., 363, 370, 64 A., 653, 655: "After decree, proof of the allegation must be shown by the records of the court." The decree itself is, however, a record that the court had such proof. To hold otherwise would mean that the mere loss of such written consent from the files of the court would invalidate a decree upon which the most sacred rights depend. The ruling of the Justice dismissing the appeal was correct.

Exception overruled.

BERT H. WINSLOW *vs.* GRACE L. TIBBETTS. No. 5466.
BERT H. WINSLOW *vs.* GRACE L. TIBBETTS. No. 5467.
CLARA L. WINSLOW *vs.* GRACE L. TIBBETTS. No. 5468.

Cumberland. Opinion October 25, 1932.

MOTOR VEHICLES. INVITED GUESTS. MASSACHUSETTS RULE. RES IPSA LOQUITUR. CONFLICT OF LAWS.

The right of a plaintiff to recover for personal injuries sustained in an automobile accident is governed by the law of the place where the injuries were received.

The law of the jurisdiction where relief is sought determines the remedy and its incidents, such as pleading, practice and evidence.

Under the law of Massachusetts, a person riding in an automobile, upon invitation of the driver, to recover for personal injuries sustained while so riding, must establish the gross negligence of the driver. The definition of gross negligence accepted in Massachusetts as the law of these cases is that stated in Altman *v.* Aronson, 231 Mass., 588.

Res ipsa loquitur *is a rule of evidence which warrants, but does not compel, an inference of negligence.*

The rule does not apply unless the unexplained accident is of a kind which does not, according to the common experience of mankind, occur if due care has been exercised.

The basis of the inference is the doctrine of probabilities. Facts proven must, in their very nature, indicate such an unusual occurrence as to carry a strong inherent probability of negligence. Mere conjecture and surmise will not suffice.

It is common knowledge that automobiles, when operated with ordinary care, do not usually leave the surface of the road wrought for their travel, ride onto the shoulder and plunge into a telephone pole nine feet away. When they do, it is the extraordinary and not the ordinary course of things and an inference, drawn therefrom, that the accident was the result of ordinary negligence would not be clearly wrong.

The same facts do not carry inherent probability of gross negligence.

In accidents in which gross negligence is involved, there is almost invariably convincing evidence, outside the unexplained accident itself, of utter forgetfulness or heedless and palpable violation of legal duty or other essential elements which characterize the greater wrong.

In the case at bar, the plaintiffs' failure to furnish factual proof of gross negligence on the part of this defendant was not cured by the doctrine of *res ipsa loquitur.*

On exceptions. Three actions on the case to recover damages for personal injuries sustained on account of alleged gross negligence of the defendant in driving her automobile off the highway and smashing into a telephone pole to the right of the main highway in the town of Phillipston, Massachusetts. Trial was had at the June Term, 1932, of the Superior Court for the County of Cumberland. At the conclusion of the evidence, on motion of the defendant, the Presiding Justice ordered a directed verdict for the defendant in each case. Plaintiffs seasonably excepted. Exceptions overruled. The cases fully appear in the opinion.

Hinckley, Hinckley & Shesong, for plaintiffs.

Verrill, Hale, Booth & Ives, for defendant.

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

STURGIS, J. These actions are brought to recover damages alleged to have resulted from the negligence of the defendant while driving an automobile in which the plaintiffs were riding as guests. At the close of the evidence, the Presiding Justice directed verdicts for the defendant. Exceptions were reserved.

There seems to be no serious controversy as to the material facts involved. In the forenoon of August 23, 1931, a Studebaker automobile driven by the defendant left the traveled part of the highway in the town of Phillipston, Massachusetts, ran along the shoulder of the road, struck a telephone pole and was wrecked. The plaintiffs, who are husband and wife and were riding in the rear seat, were both injured.

The road where the accident occurred was practically straight and slightly down grade. Its surface was macadamized for twenty-four feet and covered with coarse gravel on the shoulders. It was unobstructed and in good repair. The automobile was not old and, so far as the evidence discloses, was free from mechanical defects and equipped with sound and properly inflated tires. The shoulders of the road were seven feet wide and the telephone pole which

was struck stood two feet farther out. Driving along thirty or forty miles an hour, the defendant suddenly exclaimed, "I can't hold this car in the road." There is evidence that the automobile was then traveling on the shoulder of the road and the collision with the pole followed almost immediately.

It is elementary law that the rights of the plaintiffs to recover are controlled by the law of the place where the injuries were received and the law of the jurisdiction where relief is sought determines the remedy and its incidents, such as pleading, practice and evidence. *Frost* v. *Company*, 126 Me., 409, 139 A., 227; *Owen* v. *Roberts*, 81 Me., 439, 17 A., 403; *Levy* v. *Steiger*, 233 Mass., 600, 124 N. E., 477; *Connecticut, etc., Co.* v. *Railroad*, 78 N. H., 553, 103 A., 263; *Central Vermont R. Co.* v. *White*, 238 U. S., 507.

It is in evidence, and assented to by counsel as the law of these cases, that, under the Massachusetts rule, the burden was upon the plaintiffs to establish the gross negligence of the defendant as held in *Massaletti* v. *Fitzroy*, 228 Mass., 487, 118 N. E,. 168. The definition of that gross negligence, also accepted in these cases, as stated in *Altman* v. *Aronson*, 231 Mass., 588, 121 N. E., 505, 506, is:

> "Negligence, without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances. It is a want of diligence commensurate with the requirement of the duty at the moment imposed by the law.
>
> "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It admits to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is heedless

and palpable violation of legal duty respecting rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared to that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the willful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter, even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure."

This doctrine of gross negligence is not recognized as a part of the law of this State. *Prinn* v. *DeRice*, 129 Me., 479, 149 A., 580. It is because the locus of the causes of action is Massachusetts that the law of that Commonwealth is here made the rule of recovery.

The plaintiffs do not and can not contend that the facts in evidence account, with any reasonable degree of certainty, for the defendant's failure to hold her car on the macadam surface of the highway, retain control over it and avoid collision with the telephone pole. As is said on their brief, "The guest can not prove the exact cause of the accident." No one saw it outside the occupants of the car. The defendant, driver of the car, and absent from the trial on account of illness, did not testify. The passengers can throw no light on the occurrence. It remains unexplained.

The plaintiffs, however, invoke the application of the doctrine of *res ipsa loquitur* and cite *Chaisson* v. *Williams*, 130 Me., 342, 156 A., 154, 156, in which this Court on proof, which remained unexplained, that the defendant's automobile left the highway, ran into the woods and crashed into the stump of a tree, held that the doctrine applied and the negligence of the defendant might be inferred.

In *Chaisson* v. *Williams*, however, "gross negligence" was not an issue. The negligence to which the doctrine of *res ipsa loquitur* was applied was a breach of the duty owed by the driver of an automobile to his guest under the law of Maine and as there defined in these words:

> "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 . . . a person of ordinary intelligence and reasonable prudence and judgment — ordinarily exercises under like or similar circumstances."

Such a breach of duty is at most "ordinary negligence" and substantially and appreciably lower in magnitude than "gross negligence" as already defined in *Altman* v. *Aronson*, super.

Res ipsa loquitur is a rule of evidence which warrants, but does not compel, the inference of negligence. It 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. *Edwards v. Cumberland County, etc., Co.*, 128 Me., 207, 146 A., 700; *Chaisson* v. *Williams*, supra. The inference, however, must be warranted. The rule does not apply unless the unexplained accident is of a kind which does not, according to the common experience of mankind, occur if due care has been exercised. The basis of the inference is the doctrine of probabilities. Facts proven must, in their very nature, indicate such an unusual occurrence as to carry a strong inherent probability of negligence. Mere conjecture and surmise will not suffice. *Transportation Co.* v. *Downer*, 11 Wall., 129; *Judson* v. *Powder Co.*, 107 Cal., 549, 556, 40 P., 1020; *Ash* v. *Dining Hall Co.*, 231 Mass., 86, 120 N. E., 396; *Mathews* v. *C. & N. W. Ry. Co.*, 162 Minn., 313, 202 N. W., 896; *Byers* v. *Essex Inv. Co.*, 281 Mo., 375, 380, 219 S. W., 570; *Eaton* v. *N. Y. C. & H. R. R. Co.*, 195 N. Y., 267, 272, 88 N. E., 378; *Gas Co.* v. *Brodbeck, Adm.*, 114 Ohio State, 423, 151 N. E., 323; *Riggsby* v. *Tritton*, 143 Va., 903, 910, 129 S. E., 493; Note, L. R. A., 1917 e, 41 et seq.; 45 C. J., 1211.

It is clearly within the common knowledge of mankind that automobiles, when operated with ordinary care, do not usually leave

the surface of the road wrought for their travel, ride the shoulder and plunge into a telephone pole nine feet away. "When they do, it is the extraordinary and not the ordinary course of things." *Chaisson* v. *Williams*, supra. The inference from the few facts proven in the case at bar, that the accident involved was the result of ordinary negligence, would not be clearly wrong.

When, however, we come to consider the substantially and appreciably higher magnitude of gross negligence, the same facts do not carry inherent probability of its presence. It is our opinion that accidents in which "gross negligence" is involved in the improper operation of automobiles are the exception rather than the rule. When they occur, almost invariably there is convincing evidence, outside the unexplained accident itself, of "utter forgetfulness" or "heedless and palpable violation" of legal duty or other essential elements which characterize the greater wrong.

In Massachusetts it has been repeatedly recognized that an accident which, unexplained, bespeaks negligence does not necessarily point to gross negligence. In applying the rules of recovery of that jurisdiction in this class of cases, the conclusions of its Court as to the sufficiency of the evidence which will support a charge of gross negligence are entitled to great weight.

In *Cook* v. *Cole*, 273 Mass., 557, 174 N. E., 271, as was noted in *Chaisson* v. *Williams*, supra, it was held that, while the fact, unexplained, that a truck went off the road and struck a tree to the injury of a gratuitous passenger warranted a finding of ordinary negligence, it did not show gross negligence on the part of the defendant. The lack of proof of facts magnifying the degree of negligence is noted and cases fortified by such proof are distinguished.

In *Shriear* v. *Feigelson*, 248 Mass., 432, 143 N. E., 307, gross negligence was not inferred from the mere unexplained fact that a guest was injured while riding in an automobile which suddenly left the highway and crashed into a telephone pole.

In *Burke* v. *Cook*, 246 Mass., 518, 141 N. E., 585, 587, it was held that, while mere proof that an automobile was going at the rate of thirty-five miles an hour, the right rear wheel thumped, the car seemed to be steering to the right and, upon the defendant's turning his wheel quickly to the left, the car turned over, showed

ordinary negligence, it did not establish gross negligence. Such facts, the Court says, "do not tend to prove such 'indifference to present legal duty' and 'utter forgetfulness of legal obligations so far as other persons may be affected' as to constitute 'a heedless and palpable breach of legal duty' to the plaintiff or 'a manifestly smaller amount of watchfulness and circumspection' than the circumstances required."

In the cases cited by the plaintiff, the facts in evidence themselves show heedless and palpable violation of legal duty on the part of the defendant and proof of the requisite degree of negligence is not left to inference. These decisions are not authority for a finding of gross negligence, even by inference, from facts of no greater probative value than those appearing in the cases at bar. The citations are: *Dzura* v. *Phillips*, 275 Mass., 283, 175 N. E., 629; *Parker* v. *Moody*, 274 Mass., 100, 174 N. E., 189; *Logan* v. *Reardon*, 274 Mass., 83, 174 N. E., 264; *Kirby* v. *Keating*, 271 Mass., 390, 171 N. E., 671; *Learned* v. *Hawthorne*, 269 Mass., 554, 169 N. E., 557; *Blood* v. *Adams*, 269 Mass., 480, 169 N. E., 412; *Manning* v. *Simpson*, 261 Mass., 494, 159 N. E., 440.

Convinced as we are that the doctrine of *res ipsa loquitur* does not supply the deficiency in the plaintiffs' factual proof of gross negligence on the part of this defendant, consideration of the contributory or imputed negligence of either of the plaintiffs becomes unnecessary. The Presiding Justice committed no error in taking cases from the jury in which verdicts could not be sustained on the evidence. He was guided by the established rule of procedure in this State. *Coleman* v. *Lord*, 96 Me., 192, 52 A., 645; *Johnson* v. *Terminal Co.*, 131 Me., ——, 162 A., 518.

In each of the cases brought forward by this record, the entry is

Exceptions overruled.

JOHN GRAVEL, PRO AMI *vs.* DEMARA LEBLANC.

Oxford. Opinion October 26, 1932.

NEGLIGENCE. PARENT AND CHILD. PLEADING AND PRACTICE. MOTOR VEHICLES.

Negligence is the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situation, or under like circumstances.

The care which ordinarily prudent and careful persons take is commensurate with the necessity of care and the dangers of the situation.

Where the evidence admits of only one logical inference, the question is one of law; where reasonable men might differ as to the inferences that could be drawn, the question is one of fact.

Sounding a warning signal — where there is no apparent necessity of such warning, and the obligation to give such signal is not imposed by statute — does not in itself constitute negligence. The question is one of fact for the jury.

The parents of a child not capable of exercising care for his own safety, must exercise reasonable care for the child's protection. Failure in such regard, that is, negligence of the parents, if contributory to injury, is chargeable to the child, and constitutes a bar to recovery.

Parents are holden only to the exercise of reasonable care — and what is reasonable care depends upon the facts and circumstances, and sometimes, in part, even upon the financial condition of the family. None of the cares devolving upon the parents are to be ignored. Small children need not be constantly watched.

The law recognizes, and does not disregard, individual variations in capacity among children of the same age.

In the case at bar, the question of culpability of the mother, in permitting her four-year-old son, who is described as bright and intelligent, to be unwatched for a period which the jury could rightly have inferred, from the evidence, was but a few minutes, was not to be ruled as a matter of law, but was an open question of fact.

On exceptions and general motion for new trial by defendant. An action of tort to recover damages for personal injuries received by John Gravel, an infant aged four, when struck by an automobile

owned and operated by the defendant on the main highway between Mexico and Dixfield, Maine. Trial was had at the May Term, 1932, of the Superior Court for the County of Oxford. To the refusal of the presiding Justice to direct a verdict for the defendant, exception was taken, and after the jury had rendered a verdict for the plaintiff in the sum of $7,525.00, a general motion for new trial was filed by the defendant. Exception overruled. Motion overruled. The case fully appears in the opinion.

Albert Beliveau, for plaintiff.

Locke, Perkins & Williamson, for defendant.

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

DUNN, J. This is an action of tort for personal injuries. At the close of the evidence, defendant's counsel made a motion for a directed verdict, upon the ground that a verdict for the plaintiff would be contrary to the evidence. *Jewell* v. *Gagne*, 82 Me., 430, 19 A., 917; *Moore* v. *McKenney*, 83 Me., 80, 21 A., 749; *Royal* v. *Bar Harbor, etc., Co.*, 114 Me., 220, 95 A., 945; *Weed* v. *Clark*, 118 Me., 466, 109 A., 8. Upon denial of the motion, exception was taken.

After the jury had reported a verdict for the plaintiff, counsel for defendant filed a general motion for a new trial. As argued, the questions in the case are raised alike upon the exception and the motion. The case will be considered on the bill of exceptions. As decision shall go on that, so will decision go on the motion for a new trial.

On Sunday evening, May 17, 1931 (around six o'clock, Standard Time, and before it was dark), defendant was driving his automobile, a Pontiac of the coach type, upon the main highway in Mexico, Maine. This highway is a State road, with a tarred surface twenty feet wide. Its general direction is north and south.

The automobile, running southward, struck and injured the plaintiff, a boy four years old (lacking eight days), who came into the road from the west side. The child sued through his next friend, to recover the damages to which he claimed to be entitled by reason of the accident. The trial court admitted the mother to prosecute in substitution for the original prochein ami.

The declaration, as amended, contained two counts charging actionable negligence on the part of the defendant.

The complaint of the first count is that defendant drove his automobile at an excessive and unreasonable rate of speed; of the second, that he operated the machine recklessly and in such a manner as to endanger the person of the plaintiff. The plea was the general issue. Specifications were not required.

Evidence on behalf of the plaintiff was to the effect that defendant admitted, shortly after the accident, that when he was at a point which measures farther than two hundred feet (straight as indicated on a plan) from the scene of the collision, he saw the plaintiff, whom he identified as a child, standing on the street side running board of a parked Ford car. How the boy was facing is not in evidence. Apparently no person was in the car.

The person who had parked the Ford testified to having left it on the right-hand side of the road, parallel thereto, two feet off the black portion, and headed toward Dixfield. Defendant was proceeding in the direction of that town.

The child (to recur to the evidence of the attributed admission) remained on the running board until he unexpectedly appeared in the road, in front of defendant's car.

Further tendency of plaintiff's evidence was that defendant said an automobile approaching on his left precluded turning his machine to that side of the road, and that he could not stop "because he was going too fast."

There was evidence that after knocking plaintiff down, defendant's automobile dragged the child one hundred and thirty feet, and that, upon his becoming disentangled and left in a heap in the road, it ran one hundred and seventeen feet farther before being brought to a stop. One of the witnesses testified to measuring from a point opposite the parked Ford, to where he saw the child's mother pick him up; and thence to where defendant's car was stopped.

Defendant, testifying in his own behalf, denied making any admission. He witnessed that he was not driving faster than thirty-five miles an hour, on an open country road (a rate of speed at which the statutes do not presume negligence); that noticing the Ford, parked, partly in the highway, he blew his horn—as was his

custom on nearing a parked car — the horn being sounded, in this instance, some fifteen feet away; that plaintiff darted in front of defendant's automobile, two feet ahead, so suddenly that it was impossible to avoid hitting him. Defendant stated that immediately upon impact he applied his foot brake and stopped his car within thirty feet. His father-in-law, who had been riding in the seat beside him, said while on the witness stand, that he had paced the distance, thinking it might be useful, and that it was ten paces. Both attested that the plaintiff was struck and knocked down, but not dragged, or carried beyond two or three feet.

Further testimony for the defense is that after stopping his car, defendant went back and picked up plaintiff; that he was joined at the car by the boy's mother, who got into it, defendant thereupon driving to where plaintiff's witnesses place his car, for the purpose of turning, to go to the hospital.

The defense insists that plaintiff did not make out a case. Counsel argue that the tendency of the evidence does not show that defendant fell short of the exercise of the care and prudence that the law required, or that was demanded for the safety of the public.

Negligence has been defined to be the want of ordinary care, that is, the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situation, or under like circumstances. The terms "ordinary care" and "reasonable prudence," as applied to the actions and affairs of men, have only a relative significance, depending upon the incidents and surroundings of the particular case. They defy arbitrary definition. What might be reasonable care under one condition of things might be negligence under another. In other words, the care which ordinarily prudent and careful persons take is commensurate with the necessity for care and the dangers of the situation.

In the instant case, there was conflict in the testimony; yet there was evidence, direct and indirect, sufficient to create, in the estimation of the jury, reasonable probabilities favorable to the plaintiff. Where the evidence admits of only one logical inference, the question is one of law; where reasonable men might differ as to the inferences that could be drawn, the question is one of fact.

Young v. *Chandler*, 102 Me., 251, 66 A., 539; *Hartford Fire Insurance Co.* v. *Stevens*, 123 Me., 368, 123 A., 38; *Savage* v. *North Anson, etc., Co.*, 124 Me., 1, 124 A., 721; *Collins* v. *Wellman*, 129 Me., 263, 151 A., 422.

The jury could have found from the evidence (some introduced by plaintiff and some by defendant) that defendant saw the plaintiff on the running board of the Ford, two hundred feet away, and recognized him to be a child; that the near wheels of the Ford were at the edge of the road; and that when within fifteen feet of the parked automobile, defendant sounded his horn. Sounding a warning signal — where there is no apparent necessity for such warning, and the obligation to give such signal is not imposed by statute — does not constitute negligence. This, however, might present a jury question, in view of the claimed admission by defendant, of knowledge of the presence of the plaintiff on the running board. Defendant, it was in evidence, after "tooting his horn," continued at unslackened speed, in the center, or to the right of the center of the highway. Defendant's express statement, on the stand, was that plaintiff suddenly and unexpectedly appeared in the road, two feet in front of defendant's right mud guard, by jumping from the running board of the stationary vehicle, or passing in front of it; that no other car than defendant's was occupying the road; that defendant did not, when plaintiff was first seen, nor afterward to the time of the accident, change the course of his car.

The jury could validly deduce from the evidence, that though plaintiff, when defendant first saw him, was in the road, and though defendant might not have had space to stop his machine, still he might have swerved it to the left, so as to avoid collision. Unlike a street car, the automobile was not moving on a fixed track.

The trial judge ruled, as a matter of law, that plaintiff was *non sui juris*. The ruling was not prejudicial to the plaintiff, and defendant did not except. Such was the stage of the evidence when defendant moved the direction of a verdict. The question then was whether, on the disputed issues, as the record stood, the case was one for the jury. The issue on the bill of exceptions to the ruling refusing to direct a verdict is not inclusive of the capacity of the

plaintiff to be contributorily negligent. Consideration of the bill must be upon the hypothesis that the plaintiff, being incapable of observing and avoiding danger, was non-negligent.

The plaintiff having been, as the case was tried, too young to care for himself, he can recover only by showing the due care of the custodian. *Gibbons* v. *Williams*, 135 Mass., 333; *Casey* v. *Smith*, 152 Mass., 294, 25 N. E., 734; *Garabedian* v. *Worcester, etc., Co.*, 225 Mass., 65, 113 N. E., 780. See, to the same effect, *Grant* v. *Bangor, etc., Co.*, 109 Me., 133, 83 A., 121; *Morgan* v. *Aroostook Valley, etc., Co.*, 115 Me., 171, 98 A., 628.

The parents of a child not capable of exercising care for his own safety, must exercise reasonable care for the child's protection. Failure in such regard, that is, negligence of the parents, if contributory to injury, is chargeable to the child, and constitutes a bar to recovery. *Brown* v. *European, etc., Co.*, 58 Me., 384; *Leslie* v. *Lewiston*, 62 Me., 468; *O'Brien* v. *McGlinchy*, 68 Me., 552; *Hasty* v. *Cumberland County, etc., Co.*, 125 Me., 229, 132 A., 521. See, also, *Grant* v. *Bangor, etc., Co.*, supra; *Morgan* v. *Aroostook Valley, etc., Co.*, supra.

On the issue of imputability, the question is not whether, in consequence of the incapacity of the plaintiff, a collision occurred which the defendant, as a reasonably prudent driver, exercising ordinary care, could not avoid. The question is whether the jury could consistently have been permitted to find plaintiff's custodian free from any negligence which, in a legal sense, contributed to his injury.

In other days, before the public ways were subjected to the widespread use of motors of every sort, the question was held of fact, and not of law, whether it was negligence on the part of parents, to let their child, three and a half years old, be upon a street unattended. *O'Brien* v. *McGlinchy*, supra.

The defendant contends that this court should decide, as a matter of law, on the exception to the refusal for the direction of a verdict, that, as a matter of fact, in view of all the testimony, the plaintiff's mother negligently left him without surveillance; and that such negligence contributed, in legal contemplation, to the unfortunate disaster.

The evidence was, briefly, this:

Plaintiff's father was ill in a hospital. His family consisted of his wife, and three children, aged eight, five, and four years, respectively (plaintiff being the youngest). They had always lived with the paternal grandparents, whose house was on the east side of the road, the front piazza being more than twenty-five feet back from the traveled part.

The usual employment of the father is stated in the brief for the defendant to have been that of a mill operative. Inference would be warranted, from the evidence, that the family was in comparatively moderate circumstances; and that the mother, aside from caring for her children, had much to do about the home.

In the afternoon of the day of the accident, the uncle of the children, and his wife (she who had parked the Ford machine) came to the house, staying to supper. The meal was served about half past five o'clock (Standard Time). On completing their meal, the two older children left the table, and went out of doors. These children were accustomed to play, with other children, in a tent across the road.

Next, plaintiff left the table, going out of the back door (sixty feet, at least, from the nearest street line)—his mother did not see where.

The mother and aunt testify that the next they knew, one of the older children shrieked: "Little Johnny (plaintiff) has been killed."

The mere fact that a child, *non sui juris*, is unattended in a street, frequently traversed as was this road, by motor vehicles, might be said to be prima facie evidence of neglect on the part of the parents. Prima facie evidence, as the expression itself connotes, is not conclusive, but explainable and rebuttable, however young the child might be. *Grant* v. *Bangor, etc., Co.*, supra; *Creed* v. *Kendall*, 156 Mass., 291, 31 N. E., 6.

Conceding, without deciding, negligence on the mother's part, had she known, or if she ought to have known, that her son was at the automobile, or had gone to the tent, yet the evidence does not sustain such conclusion. She testified that the child never had been allowed to go to the tent, and that he had never played there.

She denied testimony by the defense that she had said the child was always playing in the street. This is practically the extent of her examination upon the point.

Parents are holden only to the exercise of reasonable care — and what is reasonable care depends upon the facts and circumstances, and sometimes, in part, even upon the financial condition of the family. *Morgan* v. *Aroostook Valley, etc., Co.*, supra. None of the cares devolving upon the parents are to be ignored. *Grant* v. *Bangor, etc., Co.*, supra. Small children need not be constantly watched. 1 Thompson on Negligence, 306.

The law recognizes, and does not disregard, individual variations in capacity among children of the same age. There must always be some border line where distinctions become illusory. *Camardo* v. *New York State Railways*, 247 N. Y., 111, 159 N. E., 879.

In the case at bar, the question of culpability of the mother, in permitting her four-year-old son, who is described as bright and intelligent, to be unwatched for a period which the jury could rightly have inferred, from the evidence, was but a few minutes, was not to be ruled as a matter of law, but was an open question of fact.

The test comes to this: Accepting the most favorable evidence for the plaintiff as true, and giving such evidence the most partial interpretation to him which it will bear, did the mother, as custodian of the plaintiff, exercise that degree of care which an ordinarily prudent person would have exercised in a like situation? *McGeary* v. *Eastern Railroad Co.*, 135 Mass., 363; *Coughlin* v. *Bradbury*, 109 Me., 571, 85 A., 294.

Exception overruled.
Motion overruled.

McKAY RADIO & TELEGRAPH COMPANY

vs.

INHABITANTS OF THE TOWN OF CUSHING.

Knox. Opinion November 2, 1932.

TAXATION. R. S., CHAP. 13, SEC. 76. ASSESSORS. PLEADING AND PRACTICE.

Assessors of taxes are public officers; when acting as assessors they are not agents of the town of which they are inhabitants.

Over the assessors, when acting officially, and over their acts, the inhabitants of a town have no control.

Service of legal process on the clerk of a town, or on the chairman of the board of its selectmen, is not service on the assessors, and is not notice to the assessors, of pending litigation.

In the case at bar, defendant's motions for dismissal should have been granted. The document served and entered in court was fatally defective as an appeal from the decision of the assessors of Cushing not to abate plaintiff's tax. It bore no indicia of legal process. It lacked parties defendant to a claim for abatement of a tax.

On exceptions by defendant. An appeal under the provisions of R. S., Chap. 13, Sec. 76, from the refusal of the assessors of the Town of Cushing, to abate the tax for the year 1931 on property of the petitioner, a non-resident in said town. Motions were filed by the defendant to dismiss the petition on the ground that it was improperly filed, and that service was not made properly upon the inhabitants of the town, or the assessors. To the denial of these motions, defendant seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Alan L. Bird, for plaintiff.

Rodney I. Thompson, for defendant.

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

BARNES, J. Aggrieved at the refusal of the assessors of defendant town to abate in part the tax by them assessed upon plaintiff for the municipal year 1931, plaintiff elected to appeal to the Superior Court for the County of Knox, as privileged by R. S., Chap. 13, Sec. 76.

In furtherance of this purpose plaintiff perfected a petition or application for appeal and entered it at the term then next to be held in Rockland on the first Tuesday of November, 1931, as required by statute.

Plaintiff is a foreign corporation, "having an office and principal place of business at No. 67 Broad Street, in the Borough of Manhattan, City, County, and State of New York."

On its face, and by several exhibits with it submitted the petition gives evidence that on October 15, 1931, it was in New York City.

When first presented to any officer or official of defendant it bore an endorsement, as follows:

"STATE OF MAINE

Knox, ss. Superior Court

On the foregoing petition, it is ordered:

That the inhabitants of the Town of Cushing and the assessors of said Town be notified by service of an attested copy of this petition and order thereon on the Town Clerk and on the Chairman of the Board of Selectmen of said Town, made at least fourteen (14) days prior to the first Tuesday of November, A.D. 1931; that the inhabitants of said Town and the Board of Selectmen thereof may on said first Tuesday of November, A.D. 1931, appear and show cause, if any there be, why the prayer of said petition should not be granted; service to be made by any officer qualified to serve civil processes. Dated at Augusta, Maine, October 15, 1931.

Wm. H. Fisher
Justice, Superior Court."

The document bore no imprint of Court seal, and no indorsement of filing, nor any minute thereof.

The inhabitants of Cushing, rendered alert by the portent of a document that had been in New York City and Augusta, Maine, during office hours of one day, were quick to note absence of either seal or record of filing, and at the term of court named appeared by their attorney for the special purpose of filing a motion to dismiss the petition.

The same attorney likewise specially appeared for the assessors of Cushing, and filed such motions for both, alleging for the assessors that they are not in any sense in court, because no service was ever made upon them of an appeal from their assessment, and for the inhabitants showing that no proper order of service was obtained; that such service as was made was not in compliance with the order; that the document so served was not legal process emanating from any court, and generally that the assessors are not subject to the direction or control of the town, with other reasons.

No ruling on either motion was made at the term of filing, but at the next term both motions were overruled and exceptions taken by defendant.

At the second term also plaintiff filed a motion for further service on the inhabitants of the town on its assessors. There is no record of order of second service, but the last docket reads, "New service made Feb. 12, 1932."

On either motion dismissal should have been granted, for the document served and entered in court was fatally defective as an appeal from the decision of the assessors of Cushing not to abate plaintiff's tax. It bore no indicia of legal process. It may have had the signature of a Justice of the Superior Court, but that possibility is not enough to require residents of Maine to present themselves before the court.

It lacked parties defendant to a claim for abatement of a tax. Assessors of taxes are public officers; when acting as assessors they are not agents of the town of which they are inhabitants. *Rockland* v. *Farnsworth*, 93 Me., 178, 44 A., 681; *Brownville* v. *Shank Co.*, 123 Me., 379, 123 A., 170. The selectmen and the assessors of a town may be the same individuals; they may be different individuals.

Over the assessors, when acting officially, and over their acts, the inhabitants of a town have no control.

Service of legal process on the clerk of a town, or on the chairman of the board of its selectmen, is not service on the assessors, and is not notice to the assessors of pending litigation.

Exceptions sustained.

SAMUEL H. DOBSON *vs.* GEORGE S. CHAPMAN.

Cumberland. Opinion, November 3, 1932.

PLEADING AND PRACTICE. REVIEW.

Exceptions lie to the refusal of a single Justice to grant a petition of review when the decision involves a ruling of law.

Review may be granted when a judgment has been rendered on a report of Referees in an action referred by rule of court.

On exceptions. An action of review. To the refusal of the presiding Justice to grant a petition for review and to his ruling, that as a matter of law, a petition for review would not lie, exceptions were seasonably taken. Exceptions sustained. The case sufficiently appears in the opinion.

Howard Davies, for petitioner.

Bradley, Linnell & Jones, for respondent.

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

PATTANGALL, C. J. Exceptions. Petition for review. Plaintiff in review was plaintiff in an action of tort between the same parties, referred under Sec. 94, Chap. 96, R. S. 1930. Referee found in defendant's favor. When the report was offered for acceptance,

plaintiff filed objections in writing and hearing was had thereon. The presiding Justice overruled the objections and plaintiff, as he alleges, by accident, mistake or misfortune failed to file his exceptions to the ruling. Judgment followed and review was prayed for. The Justice below dismissed the petition on the ground that as a matter of law it would not lie.

Exceptions lie to the refusal of a single Justice to grant a petition of review when the decision involves an erroneous ruling of law. *Thomaston* v. *Starrett*, 128 Me., 328, 147 A., 427.

By authority of Paragraph IV, Sec. 1, Chap. 103, R. S. 1930, any Justice of the Superior Court may grant a review when a judgment has been rendered on the report of Referees in an action referred by rule of court, if other matters in dispute were included in the rule of reference.

This Court held in *Gooding* v. *Baker*, 60 Me., 53, that review might be granted in such cases although no other matters in dispute between the parties were included in the rule, holding that the statute was not one of limitation but in enlargement of a general rule already existing.

The Court below erred in ruling as a matter of law that the petition would not lie.

Exceptions sustained.

HELEN COLLINS *vs.* ANNE DUNBAR.

CONSTANCE M. POLAND *vs.* ANNE DUNBAR.

FRANCES POLAND *vs.* ANNE DUNBAR.

Oxford. Opinion, November 3, 1932.

PLEADING AND PRACTICE. MISTRIAL. MARRIED WOMEN. DAMAGES.

The granting or refusal of a motion to direct a mistrial is within the properly exercised discretion of the presiding Justice.

A married woman is only entitled to recover for loss of wages or diminution of earning capacity when there is an allegation in the declaration covering such claim.

In the case at bar, the evidence on the issue of the defendant's negligence and the due care of the plaintiffs was sufficient to submit to the jury for its determination.

Certain testimony objected to by the defendant on the ground that it indicated that the defendant was insured, was properly admitted because the testimony had no tendency to show such fact.

The ruling of the presiding Justice refusing to order a mistrial because of prejudicial accounts of the testimony appearing in newspapers and because of comments of a previous trial, was a matter of discretion which was properly exercised.

The exception of the defendant to that portion of charge of the presiding Justice submitting the issue as to recovery for loss of wages or diminution of earning capacity on the part of Frances Poland, a married woman, must be sustained because there was no allegation in the declaration covering such claim.

On exceptions and general motions for new trials by defendant. Three cases tried together were brought to recover damages from the defendant for personal injuries received in an automobile accident on the highway between Pittsfield and Newport. Plaintiffs were the guests of the defendant. Trial was had at the February Term, 1932, of the Superior Court for the County of Oxford. To the admission of certain testimony and to certain rulings and portions of the charge of the presiding Justice, the defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff, in each case, filed general motions for new trials. Motion overruled in each case. Exceptions overruled in the cases of Helen Collins and Constance M. Poland. Exception to charge sustained in case of Frances Poland. New trial granted only on issue of damages. The cases fully appear in the opinion.

Arthur J. Henry,
Peter MacDonald,
George A. Hutchins, for plaintiffs.
Fred H. Lancaster, for defendant.

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

THAXTER, J. These three cases were tried together. The plaintiff in each was a guest of the defendant, who owned a Hudson

sedan, which she was driving on the road between Skowhegan and Bangor. In attempting to make a turn she drove the car off the road into a bank along the border, and the plaintiffs suffered injuries. After a verdict for each of them the cases are before us on the defendant's motions for new trials and on exceptions.

The motions must be overruled. The evidence presented a question for the jury both as to the negligence of the defendant and the due care of the passengers. It is not seriously argued by the defendant that the damages awarded are excessive, and there is no basis for granting a new trial on this ground.

The first exception is to the admission of certain testimony. A Mr. Lohnes after the accident took the statement of Frances Poland. Questions were asked different witnesses about his coming to the house. Over objection they testified to his name, and one of them stated that she thought he was an officer. Defendant's counsel claims that the purport of the whole testimony indicated to the jury that he was a representative of an insurance company and that its admission was prejudicial. The evidence does not justify any such assumption, and was properly admitted.

Another exception is to the refusal of the presiding Justice to direct a mistrial. On the third day of the trial certain newspaper articles appeared which commented on the fact that there had been verdicts in favor of the plaintiffs in a previous trial, and contained, according to the defendant's contention, inaccurate recitals of the evidence being taken out in the trial then under way. The presiding Justice examined the jurors in regard to the newspaper articles. Four of them had read them, one of whom said that he read the articles to review the evidence. Each of the jurors, however, claimed that he was in no way influenced by what he had read. The Court gave an appropriate warning to the jurors that they must not read newspaper accounts of the trial, and impressed on them the importance of keeping their minds absolutely open on the questions at issue. The Court refused at the same time to grant the defendant's motion for a mistrial. Such ruling was a matter of discretion, which seems to have been properly exercised in this instance.

The remaining exceptions relate only to the case of Frances Poland. They are to the introduction of evidence bearing on her ability to work both before and after the accident, and to a charge

of the presiding Justice that if she had been accustomed to work and earn money before and up to the time of the accident, she was entitled to recover for any loss of earning capacity figured on the time that her disability due to the accident would continue. The defendant objected both to the admission of the evidence and to the charge on the ground that there was no allegation of loss of wages or of decreased earning capacity in the declaration. The evidence may have been admissible to show her different physical condition before and after the accident; but we think that the objection to the charge is well taken.

If the plaintiff seeks to recover for any special damage, the defendant should be given warning of such claim by an allegation in the declaration. A claim by a married woman for diminution of earning capacity or for loss of wages is regarded as such special damage. Enc. Pleading & Practice, Vol. 5, Page 757; *Uransky* v. *Dry Dock, East Broadway & Battery R'd Co.*, 118 N. Y., 304, 23 N. E., 451.

As there was no allegation in the declaration covering this point it was error to have submitted this issue to the jury.

The question of liability has been tried before two juries. Both have found in favor of the plaintiffs. It appearing to this Court that the verdicts are sound on that issue, a new trial in the case of Frances Poland will be granted only on the question of damages.

Motion overruled in each case. Exceptions overruled in cases of Helen Collins and Constance M. Poland.
Exception to charge sustained in case of Frances Poland. New trial granted only on issue of damages.

STATE OF MAINE *vs.* GEORGE CRABB.

Aroostook. Opinion, November 8, 1932.

CRIMINAL LAW. PERJURY.

The false testimony on which a charge of perjury is based must be material to the issue. Previous conviction of a witness of crime could be shown to affect his credibility as a witness, and such evidence is material.

In the case at bar, the remoteness of the conviction of the witness could have been properly considered by the jury on this question whether the respondent's denial was wilfully false or due to a defective memory. Their finding against him on this point can not be held to be manifestly wrong.

On appeal. Respondent having been convicted of perjury filed a motion for a new trial. This was denied by the presiding Justice. Appeal was thereupon filed by the respondent. Appeal dismissed. Judgment for the State. The case fully appears in the opinion.

J. Frederic Burns, for the State.

R. W. Shaw,

H. M. Briggs, for respondent.

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

THAXTER, J. The respondent has been indicted and tried for perjury. After his conviction a motion for a new trial was addressed to the presiding Justice and denied. The case is before this Court on an appeal from such ruling.

The perjury was alleged to have been committed while he was testifying in his own behalf in a criminal proceeding. The record of a conviction in 1911 of a George Crabb as a common seller of intoxicating liquors was introduced in evidence. The respondent was asked if he was not the man. He denied that he was. The evidence shows and it is conceded in argument that the respondent is the same George Crabb who had been perviously convicted.

The false testimony on which a charge of perjury is based must be material to the issue, Rev. Stat. 1930, Chap. 133, Sec. 1. The

fact that this respondent had been previously convicted of a crime could have been shown to affect his credibility as a witness, R. S. 1930, Chap. 96, Sec. 126, and such evidence was therefore material.

The remoteness of the conviction could properly have been considered by the jury on the question whether the respondent's denial was wilfully false or due to a defective memory. On this issue they have found against him. We can not hold that the verdict is manifestly wrong.

Appeal dismissed.
Judgment for the State.

SPIEGEL, MAY, STERN COMPANY *vs.* VERNON W. WATERMAN.

Androscoggin. Opinion, November 12, 1932.

EVIDENCE. POSTMASTERS. CONSTITUTIONAL LAW.

By virtue of the Federal Constitution, Article One, Section Eight, full power to establish Post Offices is in the Congress. Delegation by Congress to the head of a governmental department of powers which the Congress may itself rightfully exercise gives to proper regulations regularly issued by a head of a department the force of law.

In the case at bar, it was in the power of the Court in the exercise of wise judicial discretion to permit or deny the right of examination of the witness, the Postmaster of Norway.

Inasmuch, however, as no interest of the Federal Government or the general public was prejudiced by inquiry as to the identity of the signer of the application for a money order at the post office window, it would seem that the question should have been answered.

So far as the rights of defendant were concerned, in the state of the case as expressed in the bill of exceptions, he could not properly suppress the information sought.

On exceptions by plaintiff. The case involved the question of the propriety of testimony by the Postmaster of Norway as to a signature to an application for a money order under the provisions of Post Office Regulations, section 508. To the refusal of the presiding Justice to allow such testimony, plaintiff seasonably excepted. Exceptions sustained. The case sufficiently appears in the opinion.

Tascus Atwood, for plaintiff.

John G. Marshall,

Frank W. Linnell, for defendant.

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

BARNES, J. This case comes up on exception to a ruling of the Court. At trial of an action in assumpsit for balance after partial payment of a store account plaintiff made out a prima facie case. Proceeding to further present its case it offered an order in writing for the articles specified in the account annexed to the writ. Defendant denied that the signature to the written order was his signature, as well as that he had made a payment on the account, with other pleas.

Plaintiff then called to the witness stand the Postmaster of Norway, Maine, and asked this question: "Have you with you what purports to be an application for a money order purporting to be signed by Vernon Waterman payable to the order of Spiegel, May, Stern Company?"

The Postmaster answered as follows: "Before I answer that question I would like to read to you an excerpt from our laws and then I will abide by what you say." The Court then said, "I have just seen that, let me see, under the Regulations of the Post Office Department I shall not require the Postmaster to testify."

To this ruling plaintiff took an exception.

According to the bill of exceptions, the case then showed three admittedly genuine signatures of defendant, and counsel for plaintiff sought to show by the excluded testimony that the signature to application for a post office money order in Norway was in the same handwriting as the signatures admittedly genuine.

Portions of Postal Regulations in effect at the time of trial, parts of Chapter 1, Section Five of Title Five of the Post Office Regulations issued under Act of the United States Congress, effective July 1, 1924, are pertinent to decision of the point raised by the exceptions. They follow:

"Section 508

Postmasters and others in the Postal service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post-office inspectors, and may furnish it also to the sender, the addressee or the authorized representative of either, and they may give to officers of the law to aid in the apprehension of fugitives from justice information regarding the addresses, return cards, or postmarks on mail matter, but must not withhold such mail from delivery to the addressees. Information concerning money orders shall not be given to any person except the remitter or payee or the agent of either or to a representative of the Post Office Department, or under special instructions from the department.

* * *

5. A postmaster or other postal employee summoned as a witness shall obey the summons and go into court, but shall refuse to testify in regard to mail matter or money orders, at the same time exhibiting this regulation. He shall then testify if so directed by the Court."

By virtue of the Federal Constitution, Article One, Section Eight, full power to establish Post Offices is in the Congress. Delegation by Congress to the head of a governmental department of powers which the Congress may itself rightfully exercise gives to proper regulations regularly issued by a head of a department the force of law. *Wayman* v. *Southard*, 10 Wheat, 1, 43; *Caha* v. *United States*, 152 U. S., 211, 220. Hence it was in the power of the Court in this case, in the exercise of wise judicial discretion to permit or deny the right of examination of the witness.

If no interest of the Federal Government or the general public would be prejudiced by inquiry as to the identity of the signer of

an application for a money order at a post office window, it would seem that the question should have been answered.

And certainly, so far as the rights of defendant were concerned, in the state of the case as expressed in the bill of exceptions, he could not properly suppress the information sought.

Exceptions sustained.

STATE OF MAINE *vs.* ROCCO NAVARRO.

Cumberland. Opinion, November 12, 1932.

CRIMINAL LAW. INDICTMENT. EXCEPTIONS.

R. S. 1930, CHAP. 133, SEC. 17.

Exception will lie, where error appears on the face of the record, notwithstanding that the question might have been sooner raised in a different way.

An indictment must define the particular wrongful act with such certainty that a presumptively innocent man, seeking to know what he must meet, may ascertain fully therefrom the matters laid against him. Every element of the offense intended to be charged should be set out in the indictment.

In a criminal statute the word "design" means "intendment" or "purpose."

The use of the word "feloniously" is not a sufficient allegation of criminal design. "Feloniously" describes the grade of the act rather than the act which constitutes the offense. It does not imply a specific design; it is not a distinct element of a crime.

Nor will the averment of contra forman statuti *aid an indictment defective in not charging with requisite precision an offense legally punishable.*

In the case at bar, the motion for a directed verdict was properly denied as there was sufficient evidence to warrant the case being determined by the jury. The motion for arrest of judgment should, however, have been allowed as there was no averment in the indictment of "design" on the part of the respondent.

On exceptions by respondent. Respondent was tried in the Superior Court for the County of Cumberland at the May Term, 1932, on the charge of aiding escape. The verdict was guilty. To certain instructions given by the presiding Justice, and to his refusal to grant a motion for a directed verdict and later to grant a motion in arrest of judgment, respondent seasonably excepted. Exceptions sustained as to the denial of a motion in arrest of judgment. All other exceptions dismissed. The case fully appears in the opinion.

Walter M. Tapley, Jr., for the State.

Berman and Berman, for the respondent.

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

DUNN, J. The respondent was tried and convicted upon an indictment under a statute which provided as follows:

"Whoever forcibly rescues a prisoner lawfully detained for any criminal offense; . . . or in any way aids him to escape, . . . or with a design to aid the prisoner in his escape, harbors; or with such design in any way assists such prisoner who has escaped, or is at large, shall be punished, . . ." R. S., Chap. 133, Sec. 17.

The indictment alleged that the respondent, at Portland, on the fifteenth day of April, A.D. 1932, "did feloniously aid and assist John J. O'Donnell and Emery Leo to escape and go at large, said John J. O'Donnell and said Emery Leo being then and there prisoners who had escaped from lawful imprisonment in the Cumberland County Jail, said O'Donnell and Leo being lawfully detained upon an appeal to the Law Court, from the sentence of Arthur Chapman, Judge of the Superior Court, for the offense of robbery, which offense was within the jurisdiction of said Superior Court," (with conclusion in usual form).

The case is up on exceptions. These go (1) to certain portions of the judge's charge to the jury; (2) to the refusal of requests to charge the jury; (3) to the overruling of a motion made at the close of the evidence; for the direction of a verdict, (4) to the denial, after verdict, of a motion in arrest of judgment.

For the sake of convenience, the question of law which the ex-

ception to the refusal to direct raises, will be considered first. The motion apparently was made upon the ground that a verdict for the government would be unsupported by sufficient evidence. Assuming the integrity of the premise, contention that the motion ought to have been granted is sound. There is, however, a fault in the premise. The record — a jury could have found — demonstrated beyond a reasonable doubt, that around six o'clock in the afternoon of April 15, 1932, the respondent, having been told that some prisoners had just escaped, drove to the jail in an automobile; and, about four hours later, the presence of the respondent with the two prisoners mentioned in the indictment, on a side road, some seven or eight miles away, the three being engaged in assisting the owner of an automobile mired in the road in extricating it,— the car being ahead of that of the respondent, which also was mired.

The essence of the indictment, at this state, is compressed into feloniously aiding and assisting prisoners who had escaped, to escape and go at large.

"Aiding an escape is any overt act which is intended to assist, and which is useful to assist, an attempted or completed departure of a prisoner from lawful custody before he is discharged by due process of law." 21 C. J., 827.

The case against the respondent, with reference to the factual situation, was entirely one for the determination of the jury. The respondent takes nothing by this exception.

Exception to the overruling of the motion in arrest shall have attention next. Exception will lie, where error appears on the face of the record, notwithstanding that the question might have been sooner raised in a different way. *State* v. *McCormick*, 84 Me., 566, 24 A., 938; *State* v. *Crouse*, 117 Me., 363, 104 A., 525; *State* v. *Beattie*, 129 Me., 229, 151 A., 427; *State* v. *Kopelow*, 126 Me., 384, 138 A. 625; *State* v. *Berry*, 112 Me., 501, 92 A., 619. The motion contained seven objections to the indictment, each insisted as founded upon a defect; in some instances, two objections made a similar point.

The first and second objections, in substance and in necessary effect, are that, though the indictment alleges that prisoners who had escaped from lawful imprisonment were feloniously aided and assisted to escape and go at large, yet there is absence of averment

of the ingredient of design, on the part of the respondent, to aid and assist such prisoners. It is argued with emphasis that as the statute used the term, "design" means "intent," or "of purpose," and that all these words essentially imply premeditation.

"If the intention with which an act is done be material to constitute the offense charged, such intention must be truly laid in the indictment; and it must be laid positively; and the want of a direct allegation of anything material, in the description of the substance, nature, or manner of the offense, cannot be supplied by any intendment or implication whatsoever." *Com.* v. *Shaw*, 7 Met., 52, 57. Every element of the offense intended to be charged should be set out in the indictment. *State* v. *Paul*, 69 Me., 215; *State* v. *Perley*, 86 Me., 427, 30 A., 74; *State* v. *Beattie*, supra. An indictment, it has been said, must define the particular wrongful act with such certainty that a presumptively innocent man, seeking to know what he must meet, may ascertain fully therefrom the matter laid against him. *Harden* v. *State* (Texas), 211 S. W., 233, 4 A. L. R., 1308.

Indictments should be drawn with care and exactness. For instance, an indictment for bribing a public officer should sufficiently show that the person bribed was acting as an officer, and the fact that the bribing one knew he was dealing with an officer; otherwise, the necessary intent would not sufficiently appear. *State* v. *Beattie*, supra.

The prosecutor recognizes the existence of rules of criminal pleading; not in the spirit of formal concession to an archaic procedure, but in the attitude that the State, when its power is concentrated against an individual, can afford to stand by a system — not, as modified by statute, overly technical — which in the long run has served organized society fairly well.

He frankly concedes that in a criminal statute the word "design" means "intendment" or "purpose." He urges that want of incorporation of that word, in laying accusation, is not fatal if there are other words, or group of words, which are synonymous or can be substituted for the lacking word.

So far, so good; the trouble is that the indictment has no other words expressing the same idea.

The use of the word "feloniously" is not a sufficient allegation of

criminal design. "Feloniously" describes the grade of the act rather than the act which constitutes the offense. It does not imply a specific design; it is not a distinct element of a crime. *State* v. *Doran*, 99 Me., 329, 333.

Nor will the averment of *contra forman statuti* aid an indictment defective in not charging with requisite precision an offense legally punishable. *Com.* v. *Morse*, 2 Mass., 128.

Upon the point of the first objection, and that of the second objection — (the two involving one legal proposition,) — in the exception to the refusal to direct, objection was tenable. Whether any other point this exception makes, or, for that matter, whether any of the other exceptions, be well founded or ill, is of no practical concern. These, at best, now present but academic questions.

This is the decision of this Court. The exception to the refusal to direct is overruled; the exception to the denial of motion in arrest is sustained, for the reason stated earlier in this opinion. In such connection, judgment of conviction and sentence on the verdict of the jury is arrested; any other point in this exception is dismissed without consideration. The exceptions to the charge, and to the refusal of requests to charge, are likewise dismissed.

Let there be mandate accordingly.

So ordered.

STATE OF MAINE *vs.* FRED P. MORIN.

Aroostook. Opinion, November 15, 1932.

CRIMINAL LAW. EVIDENCE.

When a bailee sells his bailor's property under an honest and well-founded belief that he has the right to do so, the necessary felonious intent is lacking to sustain an indictment for statutory larceny, and a verdict of guilty in such instance is not warranted.

In prosecutions for embezzlement against a party to a written contract, parol evidence is admissible to show the belief under which the accused acted, although it tends to alter or contradict the terms of the instrument.

In the case at bar, the respondent was entitled to introduce evidence tending to show that he acted in good faith and had no intention to convert. The parol evidence rule did not apply.

The respondent was unduly restricted in his defense. The exclusions of the evidence he offered, on the ground that no conversations which contradicted the trust receipts were admissible, were error.

On exceptions and appeal. The respondent was convicted in the Trial Court of larceny by fraudulently converting to his own use two automobiles which he held as bailee under trust agreements with the Atlantic National Bank of Boston. To the exclusion of certain testimony offered by the respondent to show good faith, exceptions were seasonably taken. Exceptions sustained. The case fully appears in the opinion.

J. Frederic Burns, for the State.

George J. Keegan,

Bernard Archibald, for respondent.

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

STURGIS, J. The respondent was convicted in the Trial Court of larceny by fraudulently converting to his own use two automobiles which he held as bailee under trust agreements with the Atlantic National Bank of Boston. The case is here on exceptions and appeal.

The evidence introduced by the State tends to prove that some time prior to July, 1930, the respondent, a dealer in Peerless automobiles in Van Buren, Maine, ordered three cars from J. C. Harvey of Boston, who was New England distributor. The cars were shipped direct to the respondent from the factory, but the bill of lading, with draft attached, was sent to the distributor.

The Atlantic National Bank financed the sale. It paid J. C. Harvey the amount of the draft and, having obtained his indorsement on three unsigned notes aggregating $3,471, sent them, together with corresponding trust receipts evidencing its title in the cars, the bill of lading, and a sight draft for $1,000 to the First National Bank of Van Buren, where the respondent paid the draft

and signed the several notes and receipts. Two days later, the cars were unloaded.

By the terms of each of the trust receipts, the respondent acknowledged that the automobile therein described was the property of the Atlantic National Bank, taken and held by him solely for storage, and agreed that the car was not to be operated, sold, loaned or encumbered until the amount stated in the receipt was paid. The sale of two of the cars before payment of the amounts due thereon is the basis of this prosecution.

The respondent, on his trial, insisted that he disposed of the cars in good faith and under a bona fide claim of right growing out of previous arrangements made with those with whom he understood he was dealing. He says he ordered the cars from one Dewey Christmas of Bangor, a sub-distributor, and asserts that, so far as he knew, the notes and receipts he signed at the Van Buren bank were to and for J. C. Harvey. His statement that he is an illiterate man who can not read and that the papers were not read or explained to him is not refuted.

Frankly admitting that he sold two of the cars in the usual course of trade, receiving some money and used cars in payment, the respondent testifies that he remitted a substantial part of the money to J. C. Harvey on account of a car shipped on a prior order and used practically the entire balance in repaying money borrowed to meet freight charges and the sight draft from the Atlantic National Bank. One of the used cars was traded for 250 barrels of potatoes. The other brought junk value only. His claim that the third car covered by the trust receipts was taken by the sub-distributor, Dewey Christmas, is not questioned, and his surrender of it is not here involved.

In support of his denial of fraudulent intent, the respondent sought to introduce proof of authority from the distributor and sub-distributor for his sale of the cars and use of the proceeds. Testimony of this import was offered, but excluded under a general ruling that any conversations contradicting the express terms of the trust receipts were inadmissible. Barred from pursuing this line of inquiry, counsel for the respondent noted objections and reserved exceptions.

The respondent is charged in the indictment with statutory larceny as defined in Revised Statutes, Chap. 131, Sec. 10. A fraudulent intent to deprive the owner of his property and appropriate the same is the gravamen of the offense. 2 Bishop's New Crim. Law, Sec. 379. If the respondent sold his bailor's property under an honest and well-founded belief that he had the right so to do, the necessary felonious intent is lacking and a verdict of guilty was not warranted. *Com.* v. *Hurd*, 123 Mass., 438; *Com.* v. *Bennett*, 118 Mass., 443. He was entitled to introduce evidence tending to show that he acted in good faith and had no intention to convert. *Underhill's Crim. Ev.*, 644; *Lindgren* v. *U. S.*, 260 Fed., 772; *Frink* v. *State*, 56 Fla., 62; *Nesbitt* v. *State*, 65 Texas Cr., 349, 144 S. W., 944. The parol evidence rule does not apply. In prosecutions for embezzlement against a party to a written contract, parol evidence is admissible to show the belief under which the accused acted, although it tends to alter or contradict the terms of the instrument. *Walker* v. *State*, 117 Ala., 42, 23 So., 149; *State* v. *Newman*, 74 N. H., 10, 64 A., 761; 1 *Greenleaf on Evidence*, Sec. 305h; 5 *Wigmore on Evidence*, 2nd Ed., Sec. 2446.

The respondent was unduly restricted in his defense. The exclusions of the evidence he offered, on the ground that no conversations which contradicted the trust receipts were admissible, were error, and his exceptions reserved to these rulings must be sustained. Questions raised by other exceptions and the appeal need not be decided.

Exceptions sustained.

MARGARET M. DEVINE *vs.* JANE S. HUDGINS.

Cumberland. Opinion, November 17, 1932.

REAL ESTATE AGENTS. PRINCIPAL AND AGENT. CONTRACTS.

A real estate agent with whom property is listed for sale or exchange acts in a fiduciary capacity, if he accepts the proffered employment. It is his duty to obtain for his principal the largest price possible, or in case of an exchange the most advantageous trade. A secret agreement for compensation with the other party or his representative is inconsistent with such position of trust, and is a defense to an action by the agent to recover a commission from his own principal. Good faith demands a full and frank disclosure to his principal of any such arrangement.

In the case at bar, the fact that the principal and the representative of the other party arranged their own terms of the trade did not of itself put the plaintiff in the position of a middleman standing indifferent between the parties. The evidence disclosed nothing but the usual status of principal and agent. The plaintiff was not entitled to recover compensation unless she assumed the obligations which attached to such relationship.

On exceptions and general motion for new trial by plaintiff. An action of assumpsit to recover a real estate commission alleged to be due the plaintiff from the defendant. The case involved the validity of an agreement between plaintiff, the broker for the defendant, and a real estate agent for another party who had entered into an agreement with the defendant for an exchange of property. To the refusal of the presiding Justice to give certain requested instructions, 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.

John J. Devine, for plaintiff.

Frank H. Haskell, for defendant.

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

THAXTER, J. This was an action to recover the sum of $220 claimed to be due from the defendant as a real estate commission.

After a verdict for the defendant the case is brought before this court on the plaintiff's motion for a new trial and on exceptions to certain portions of the judge's charge and to his refusal to give a requested instruction. The motion is not seriously argued and it is clear that the jury's findings on the issues of fact must stand.

The plaintiff was a real estate agent, with whom the defendant had listed a piece of property for sale or exchange. Through the representative of another real estate owner an agreement for an exchange was made under the terms of which the defendant was to receive for her property $11,000 and was to pay to the other owner for his $10,250. This deal eventually fell through. It appears that the plaintiff and the agent of the other party had an agreement to pool their commissions and then to divide them.

The presiding Justice instructed the jury that such agreement, if concealed from the defendant, was illegal and a wrong to her, and that there could be no recovery unless she was fully informed of it. The plaintiff's exception to this instruction, and to the refusal to give a contrary one, is the only point in the case which we need to consider.

A real estate agent with whom property is listed for sale or exchange acts in a fiduciary capacity, if he accepts the proffered employment. It is his duty to obtain for his principal the largest price possible, or in case of an exchange the most advantageous trade. A secret agreement for compensation with the other party or his representative is inconsistent with such position of trust, and is a defense to an action by the agent to recover a commission from his own principal. The temptation is great under such circumstances for the agent to ignore the interests of his employer, and to press for the closing of such transaction as will be most advantageous to himself. Good faith demands a full and frank disclosure to his principal of any such arrangement. *Walker* v. *Osgood*, 98 Mass., 348; *Tracey* v. *Blake*, 229 Mass., 57, 118 N. E., 271; *Leno* v. *Stewart*, 89 Vt., 286, 95 A., 539; *Corder* v. *O'Neill*, 207 Mo., 632, 106 S. W., 10; *Peaden* v. *Marler*, 78 Okla., 200, 189 P., 741; Note 14 A. L. R., 464; 4 R. C. L., 327.

With this doctrine the plaintiff does not disagree but says that she was not acting in a fiduciary capacity but as a middleman who merely brought these parties together and permitted them to make

their own trade, and the case of *Rupp* v. *Sampson*, 16 Gray, 398, is cited in support of the proposition that under such circumstances a recovery may be had. In that case, however, the plaintiff stood indifferent between the parties. He merely brought them together and was entitled to receive from each compensation for such services as he rendered. The court there said, page 401: "The claim of the plaintiff would have stood on a very different ground if he had been employed as a broker to buy or sell goods."

Plaintiff's counsel calls attention to the fact that the defendant herself and the agent of the other party made their own agreement and that the plaintiff had very little to do with fixing the terms of the exchange. But such fact is entirely consistent with the relationship of principal and agent. The question is whether the plaintiff was employed in a fiduciary capacity and not the extent of her authority to act for her principal. The evidence discloses nothing but the usual status of principal and agent. The defendant listed her property with the plaintiff, who according to her own testimony accepted the employment as agent of the defendant. She sues for the usual commission allowed under such circumstances. If she seeks to recover compensation for acting in that capacity it is essential that she should assume the obligations which attach to such relationship. The charge of the presiding Justice as applied to the facts of this case was entirely correct.

Motion overruled.
Exceptions overruled.

4-One Box Machine Makers

vs.

Wirebounds Patents Company.

Cumberland. Opinion, November 18, 1932.

Patents. Contracts. Courts.

A patent license can be exclusive and not convey a monopoly.

An assignment or transfer of patent right which does not convey the exclusive right to make, use and vend the invention throughout the United States, or an undivided part of such exclusive right, or an exclusive right under the patent within and through a specific territory, is a mere license giving the licensee no title in the patent, and no right in itself to sue at law in his own name for an infringement.

In interpreting patent contracts the ordinary rules of construction apply. The primary purpose is to determine what intention or purpose is expressed by the words and phrases used. It is that meaning by which the parties are bound, even though one or the other believed the language to have a different meaning. Only if the language is ambiguous, can the surrounding circumstances be considered in an effort to determine the intent.

State courts have jurisdiction of a contract of which a patent is the subject matter when the issue does not arise under the patent laws.

In a transfer of patent rights by license no warranty of the validity of the patent will be implied.

In the case at bar, the granting clause of the license, did not purport to convey to the plaintiff a monopoly. Instead of so doing the defendant merely gave to the plaintiff permission to operate under the patents, coupled with a covenant to license no one else to do so.

The plaintiff, under the terms of the license, had no right to vend any machines itself and the title to all machines built under the patents was to vest in the licensor. Further, the licensor had not given up its right as owner of the patents to make or use the patented machines itself or to make, use and sell boxes. Such rights of the defendant were inconsistent with the claim of the plaintiff that a monopoly was granted.

The fact that the parties were dealing with a large number of patents as an entirety, the fact that the plaintiff acknowledged the validity of these patents

for all purposes, the covenants which placed on the plaintiff the expense of prosecuting infringers and made it responsible for judgments rendered against the licensor in infringement suits, likewise indicate that there was no intent to grant an exclusive monopoly in the basic patents, the absence of which would constitute a failure of consideration.

The case is not analogous to those cases which hold that there is a remedy for eviction under a lease because the licensee here was not granted an exclusive right comparable to the rights of a tenant under a lease.

The invalidity of the three patents in question gave on the facts set forth in the bill neither a defense to the claim for royalties nor a cause of action to the licensee based on a failure of consideration. The parties are bound by their contract. It is not the province of equity to modify its terms.

On report. A bill in equity brought by a licensee under letters patent against a licensor alleging the invalidity of certain basic patents, and praying for an injunction to restrain licensor from cancelling the license because of refusal to pay royalties.

Defendant filed a general demurrer, and by agreement of parties the cause is reported for final determination of all questions of law with right reserved to defendant to answer should the demurrer be overruled. Demurrer sustained. Case remanded to sitting Justice. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives,
Douglass, Armitage & McCann,
Janney, Blair & Curtis, for plaintiffs.
Woodward, Skelton & Thompson, for defendant.

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

THAXTER, J. The plaintiff in this case, a licensee under letters patent, has brought a bill in equity against the licensor alleging the invalidity of three of the basic patents, and prays for an injunction against the defendant's cancelling the license because of the plaintiff's refusal to pay royalties and for damages in consequence of the plaintiff's loss of the monopoly, which resulted from the finding that the patents were void. To this bill the defendant has filed a general demurrer, and by agreement of the parties the cause is reported to this court for final determination of all questions of

law with a right reserved to the defendant to answer should the demurrer be overruled.

The facts set forth in the bill in brief are as follows. The plaintiff as licensee under the original name of "Wirebounds Corporation" entered into an agreement with the defendant as licensor. The first clause of this reads as follows:

> "1. The Licensor hereby licenses the Licensee to make and use machines, and to make, use and sell boxes, and to use methods, and to license sub-licensees so to do, under any patents of the United States and of the Dominion of Canada (and under any license or other patent right) now or hereafter owned or controlled by the Licensor.
>
> "The Licensor covenants that it will not during the life of this license grant any license or other right to any other person under any patent or patent right covered hereby."

A royalty was to be paid to the defendant, the essential part of which was 1% of the gross sales of all boxes made and sold under the license by the licensee and its sub-licensees, with a guaranteed minimum payment of $25,000 per year. The licensee was required to assign to the licensor without compensation all patents, and applications therefor, licenses and inventions in respect of such machines, boxes or methods now or hereafter owned by the licensee which would in turn under the provisions of clause 1 become subject to the license. The license was to continue during the life of any patent or patent right subject to its terms. A list of patents as of May 1, 1916, numbering forty-five is made a part of the agreement. It also provided that certain licenses dated April 11, 1911, from William P. Healy to the plaintiff and assigned by Healy to the defendant should remain in force as modified by the license agreement. There was also a provision for termination of the license by the licensor on default by the licensee. The licensor further agreed to give the plaintiff the first opportunity to purchase if the licensor should desire to sell its interest. The plaintiff agreed that it would be diligent in introducing the machines into public use in the United States and Canada.

Sections 10, 11 and 12 of the license read as follows:

"10. The Licensee admits the validity, for the full terms expressed in the grants thereof, of all the patents, respectively, now or hereafter covered by this license.

"The Licensee agrees that it will not at any time hereafter directly or indirectly infringe such patents, nor dispute, nor contest, the validity of any such patents, or the novelty or utility or patentability of any subject matter of any such patents, or the title thereto or the interest therein of the Licensor; nor directly nor indirectly assist any other person in contesting the same; and that such patents shall throughout their respective terms, and for all purposes, be deemed to be in force and valid.

"The Licensee agrees that the expiration of this license, or its termination, shall not in any way affect the operation of this section, nor release, nor discharge, the Licensee from its obligations, or its admissions or estoppels herein contained.

"11. During the life of this license, the Licensee shall prosecute at its own expense infringers of the patents covered hereby. The Licensee may join the Licensor as complainant in such suits, but without expense to the Licensor, and the Licensee shall pay any final judgment or decree that may be rendered against the Licensor in any such suit, and if not so paid, the same shall become a debt due from the Licensee to the Licensor under this license; provided, that if the Licensee refuse for three months to prosecute any such infringer, after written demand, then the Licensor may thereafter prosecute such infringer, and if the defendant in such suit is adjudged in the trial court or in the court of final jurisdiction to be an infringer, as charged in the complaint or declaration, then the Licensee shall immediately thereafter owe to and reimburse the Licensor for all its expenses of every kind and nature incurred in the matter of such suit; provided further that the Licensor hereby agrees to pay to the Licensee 70% of the net damages and profits, or either, received by the Licensor from such infringer in such suit.

"12. If any person shall hereafter bring any action or suit against the Licensor for alleged infringement by the Licensee, or by any sub-licensee, of any patent or patent right of such

person, the Licensee shall pay all costs and expenses of every kind and nature of such action or suit, and shall pay all final judgments and decrees that may be rendered against the Licensor in such action or suit.

"Any final judgment or decree rendered in any action or suit mentioned hereinbefore in this section and in Section 11 hereof shall be a debt, due and payable forthwith from the Licensee to the Licensor under this license, for a sum of money equal to the amount of such judgment or decree, including taxed and other costs and expenses.

"The Licensee shall also pay such costs, expenses and final judgments and decrees, in infringement or other suits, when the action or suit is against the Licensee, or any sub-licensee.

"Any such judgment or decree mentioned in this section and in Section 11 hereof which shall have been superseded by appeal, writ of error, or otherwise, shall not for the purpose of this instrument be considered final."

Operating under this license the plaintiff invested a large amount of capital in the box business, did extensive development work, granted sub-licenses, built up a thriving business which was profitable both to itself and its licensor, and patented new inventions which it assigned to the defendant in accordance with the provisions of its agreement. In the thirteen year period from 1916 to 1928 the defendant received in royalties from the plaintiff $1,181,326.39. The plaintiff prosecuted successfully various infringement suits.

It is set forth in the bill that there were four basic patents, No. 12,725 reissue dated November 26, 1907, and No. 1,128,144, No. 1,128,145 and No. 1,128,252 each dated February 9, 1915, and that the other patents owned by the defendant on May 16, 1916, and subject to the agreement were subordinate to these and alone were of very little value. No. 12,725 expired September 19, 1922, the others ran till February 9, 1932. About the time of the expiration of the first, the Saranac Automatic Machine Corporation started building and selling machines which were covered by the claims of the other three patents. One of these machines was sold to the Gibbons Box Company against whom an infringement suit

was started by the plaintiff in the United States Court in Illinois. In the District Court this suit was dismissed on April 11, 1925. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, which in a decision rendered February 6, 1928 found patent No. 12,725 valid and the others invalid. A second suit was started against the Saranac Automatic Machine Corporation in the District Court in Michigan charging the infringement of patents No. 1,128,144, No. 1, 128,145 and No. 1,128,252. On July 6, 1927, the court found all of these patents invalid, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, which announced a decision January 25, 1930, holding patent No. 1,128,145 valid and infringed. On February 24, 1931, the Supreme Court of the United States reversed this ruling of the Circuit Court of Appeals in so far as it involved No. 1,128,145. As a result of this litigation the invalidity of the three remaining so called basic patents has been definitely established.

Owing to the competition which followed the announcement of the District Court decisions, the plaintiff reduced the royalties charged by it to its sub-licensees and its own business was likewise adversely affected. The defendant on its part by letter dated March 7, 1928, reduced the royalty to be paid by the plaintiff to 3/10 of 1%. On May 20, 1929, the defendant by letter attempted to rescind this action, and its right so to do was the basis of previous litigation between these same parties which resulted in the decision reported in 131 Me., 70, 159 A., 496. By stipulation of the parties in that case the question of partial eviction, which is the foundation of the plaintiff's present claim, was left open and was not decided by this court.

The plaintiff contends that the license granted to it was exclusive, that the defendant purported to convey a monopoly in the making, using and selling of the patented invention, and that when that monopoly failed by reason of the basic patents being declared invalid and by the consequent competition by outsiders, there was an eviction pro tanto from the benefits sought to be conferred, for which the defendant must answer in damages. An injunction is sought against the collection of further royalties by the defendant until the damages due the plaintiff shall have been determined and paid.

The defendant claims that the license purports to give to the plaintiff a mere permission to do certain things, which, by reason of the grant of the letters patent, the licensor could have prevented the licensee from doing, and that this permission is coupled with a covenant that the defendant will not convey similar rights to anyone else. As a consequence the defendant contends that the finding of invalidity of the basic patents neither gave the plaintiff any claim for damages nor affected its obligation to pay the designated royalty.

The plaintiff's argument seems to be predicated on the assumption that an exclusive license is equivalent to a transfer of the right in the monopoly, which the licensor purports to own. But a license can be exclusive and not convey such right, as for example where there is the grant of an exclusive right to make, use and sell the invention for certain limited purposes, or the right to make, use and sell it for all purposes to the exclusion of all except the licensor. There is an interesting discussion of this general subject in Robinson on Patents, Vol. II, Secs. 806-808. The learned author in commenting on the difference between a license, which does not convey the monopoly, and an assignment, which does, points out that the monopoly is indivisible and remains in the patentee until he transfers all rights to it or makes someone else a joint owner with himself. He says, Sec. 807: "The only alienation which can carry the monopoly is that of the exclusive right, or of an undivided interest in the exclusive right, to practise the invention, including the exclusive right to make, the exclusive right to use, and the exclusive right to sell the patented invention." Such a grant he holds is in effect an assignment and not a license. In contradistinction he says, Sec. 808: "All alienations of the right to make, or the right to use, or the right to sell, or of the right to make and use, or of the right to make and use and sell, are merely licenses." To the same effect is the language of Chief Justice Taft in *United States* v. *General Electric Co.*, 272 U. S., 476, 489: "The owner of a patent may assign it to another and convey (1) the exclusive right to make, use and vend the invention throughout the United States or (2) an undivided part or share of that exclusive right or (3) the exclusive right under the patent within and through a specific part

of the United States. But any assignment or transfer short of one of these is a license giving the licensee no title in the patent and no right to sue at law in his own name for an infringement."

The plaintiff calls attention to the language of this court in the opinion in 131 Me., 70, 72, 159 A., 496, in which it is stated that this license is exclusive, and counsel, then placing on the phrase "exclusive license" their own interpretation, argue that the question is *res adjudicata*. If as is stated by them this issue has been decided, and if it follows necessarily as they say that an eviction under an exclusive license occurs on a declaration of invalidity of the patent with a consequent inability of the licensee to prevent an unauthorized use, the question of eviction which is now being argued would likewise seem to be closed. Yet counsel have stipulated in the previous case and the court there found that the question of eviction was open. It is obvious therefore that we did not hold that this license is exclusive in the sense in which the defendant uses that term, namely, that it purports to grant an exclusive right or a monopoly on the failure of which a right of action would accrue.

The real point at issue is the proper construction of the license agreement. It is not so much a question whether the license is exclusive or non-exclusive, as one or the other party uses those terms, but what was the contract which these parties made, what rights did they intend to create, and what liabilities did they expect to assume.

In interpreting such contract the ordinary rules of construction apply. Walker on Patents (6 ed.) Sec. 354, 48 C. J., 266. The primary purpose is to determine "what intention or purpose is expressed by the words and phrases used. It is that meaning by which the parties are bound, even though one or the other honestly believed the language to have a different meaning." *Union Water Power Co.* v. *Lewiston*, 101 Me., 564, 569, 65 A., 67, 69. Only if the language is ambiguous can the surrounding circumstances be considered in an effort to determine the intent. *Ames* v. *Hilton*, 70 Me., 36; *Snow* v. *Pressey*, 85 Me., 408, 27 A., 272; *Strong* v. *Carver Cotton Gin Co.*, 197 Mass., 53-59, 83 N. E., 328.

This is a case of which this court has jurisdiction. It involves a

contract of which a patent is the subject-matter, but it does not arise under the patent laws. *Wade* v. *Lawder*, 165 U. S., 624; *Marsh* v. *Nichols, Shepard & Co.*, 140 U. S., 344.

The license agreements on their face appear to have been drawn with the very greatest care, not by novices, but by those experienced in the art of exact phrasing, who had a full knowledge of the special branch of the law with which they were dealing.

At the outset it may be well to point out that here there is no express warranty of the validity of any of the patents, and that in the transfer of patent rights by license no such warranty will be implied. *Standard Button Fastening Co.* v. *Ellis*, 159 Mass., 448, 34 N. E., 682; *McKay* v. *Smith*, 39 Fed., 556; *Victory Bottle Capping Machine Co.* v. *O. & J. Machine Co.*, 280 Fed., 753, 757; Robinson on Patents, Vol. II, Sec. 783, Note 4; Walker on Patents, Vol. I, Sec. 355. Had the granting clause of this license contained language showing an intent to convey a monopoly in the making, using and selling of boxes under the patents in question, we might well hold that the licensee would not be without remedy should it receive something less than that for which it bargained. *Judkins* v. *Earl*, 7 Me., 9. As is pointed out by the plaintiff a failure of consideration is a defense pro tanto against a claim for payment in a contract, or it may give to the party injured a separate cause of action. Clause 1 of the license in question does not, however, by its terms convey a monopoly. It distinctly refrains from so doing. The defendant licenses the plaintiff to make and use machines, and to make, use and sell boxes and to license sub-licensees so to do under certain patents. Then follows a covenant that the defendant will not license others to do the same thing. Instead of the grant of a monopoly, the defendant has merely given to the plaintiff permission to operate under the patents coupled with a covenant to license no one else to do so. In short the language used at the outset shows an intent not to do that which the plaintiff claims was done. The phrasing was appropriate if the patents were valid to create in practical effect a monopoly in the use of the invention in the plaintiff, subject to the rights of the licensor; and it may well be that it was the expectation of the parties that such would be the result. This outcome would, however, be reached not because the defendant made an exclusive grant, but by reason of

the fact that it had estopped itself from giving a similar permission to anyone else. This is a distinction which has a real effect on the rights and remedies of the parties, for if there were the grant of an exclusive right, there might well be a failure of consideration, if the licensee did not receive it. On the other hand if there is a grant of a right to operate under the patents with a covenant by the licensor such as we have here, the only liability which the licensor intends to assume is in case he shall breach that covenant by granting licenses to others. In other words the prohibitory covenant does not enlarge the scope of the right previously granted.

The plaintiff contends, however, that in the sub-licenses which are appended to the main agreement the parties have referred to the grant in the plaintiff's license as exclusive. This recital reads as follows: "Wirebounds Patents Company has, by written license, granted to the licensor exclusively the right, etc." We think that this aptly describes just what appears to us to have been given by clause 1 of the license. We concede that the meaning might be different if this recital had read "has granted to the licensor the exclusive right," for in such case the word "exclusive" would define or characterize the extent of the right granted. The language actually used means only that the defendant has granted to the plaintiff rights under the patent with no implied covenant of their validity and that in the future the licensor will not give similar rights to anyone else.

The plaintiff, moreover, under the terms of the license has no right to vend any machines itself and in fact the title to all machines built under the patents is to vest in the licensor. Such right of the defendant is inconsistent with the claim of the plaintiff that a monopoly was granted. Furthermore it nowhere appears in the pleadings set forth in the record that the licensor has given up its right as owner of the patents to make or use the patented machine itself, or to make, use and sell boxes. All that it agrees to do is not to license anyone else to do so. The rights which the licensor retained it can sell.

In this respect this license is very similar to that construed in *Mayer* v. *Hardy*, 127 N. Y., 125, 27 N. E., 837. In this case the owner of a patent for an improvement in corset clamps granted to the plaintiffs a license to make, use and sell them for the term of

the patent. She covenanted not to license more than one other person to do the same thing. This second license was subsequently granted. Thereafter the patentee assigned all of her right, title and interest in the invention to the defendant who proceeded to manufacture and sell the patented article. An injunction was sought against his doing so, but the court held that this was a right retained by the patentee which she could assign to the defendant. The language of the court at pages 132-133 is significant: "The plaintiffs insist that they took by the license, except as against one other licensee, the exclusive right to the use of the patent. Although such may have been the understanding of the plaintiffs, the patentee was not by the terms of the agreement denied the right to manufacture and sell the patented article, nor was she by any express provision of it required to retain the title in herself. Her covenant was that she would grant a license to one other person, firm or corporation only. She held the title to the patent and did not grant the exclusive right to its use to the licensees, but made the covenant before mentioned with a view to the protection, to that extent and in that manner, of the privileges granted to them. The assignment of the patent apparently carried with it to the assignee all the rights which remained in her in respect to it."

In seeking the intention of the parties we are not, however, to consider the language of any part of the instrument by itself. We must look at the agreement as a whole to see "how far one clause is explained, modified, limited, or controlled by others." *Ames* v. *Hilton, supra,* 43. In so doing we find a significant explanation of the phrasing of the granting clause, and evidence that the meaning of the words as used was just what the parties intended.

In the first place the license covered a large number of patents in addition to the three basic patents which have been declared invalid. The royalty to be paid was an entirety. It was paid not only for such rights as were transferred but for rights that were to be assigned to other patents in the future. It was clear, moreover, that the license was to continue, with the obligation on the plaintiff's part to pay royalties at the same rate including the minimum payment of $25,000 a year, long after any rights under the basic patents had expired, and when the plaintiff would have to meet the very competition for which it now seeks compensation from the

defendant. The plaintiff in its bill does claim that the other patents were worthless except as supplementary to the basic patents, but its willingness to continue to pay for them after the expiration of the three here involved refutes this allegation. In fact the plaintiff admits that it is only asking for damages up to the time when these patent rights would expire in February, 1932; and thereafter presumably it stands ready to pay at the old rate. The truth would seem to be that the plaintiff agreed to pay compensation for such rights as it obtained from the defendant under a large number of patents considered as a whole.

Furthermore if as the plaintiff contends the defendant purported to convey to the plaintiff a monopoly, it is strange that an exception was not made of such rights as admittedly had been given to certain others prior to the execution of the license agreement. Such omission is only consistent with a grant of rights subject to any prior transfers and subject to any defects.

But in addition to these observations on the agreement the specific provisions of sections 10, 11 and 12 would seem to negative any claim that there was here as the plaintiff claims a conveyance of an exclusive right with an implied covenant analogous to one of quiet enjoyment.

Section 10 is in effect an admission by the licensee of the validity of every patent and contains an agreement not to dispute such validity. The plaintiff contends that this is the usual covenant contained in such agreement, that its purpose is to prevent the licensee from actively seeking to overthrow the patent, and that there is no estoppel against setting up the fact of invalidity established by judicial decree. The case of *Schutte & Koerting Co.* v. *Wheeler Condenser & Engineering Co.*, 295 Fed., 158, is cited in support of such proposition. The license involved in this cited case, however, purported to convey "the sole and exclusive right" to the patent in question, language which is quite different from that with which we are dealing. There is, moreover, a further clause in section 10 which was not present in the agreement construed in the case cited which reads "that such patents shall throughout their respective terms, and for all purposes, be deemed to be in force and valid." It would be difficult to conceive of much broader language; and one obvious purpose, for which the plaintiff agreed that the patent

should be deemed valid, was to assure the payment of the agreed royalty.

In *Pope Manufacturing Co.* v. *Owsley*, 27 Fed., 100, the language of the granting clause was substantially the same as in clause 1 of this license except that the licensor did not covenant not to grant similar rights to others. The licensee agreed that it would not dispute or contest the validity of the patents. The court held that a finding that the patents were invalid did not relieve the licensee of the obligation to pay the royalties. The court said, page 108: "By taking the licenses, these defendants waived and abandoned their right to contest the validity of these patents, or any of them, and agreed to pay the stipulated license fees; and merely because some one else has successfully contested the validity of one or more of these patents the defendants are not relieved from their obligations."

In *United Shoe Machinery Co.* v. *Caunt*, 134 Fed., 239, there was a lease of a patented machine with a license to use the patent right. This was to run for seventeen years, which was assumed to be the time when the patents would expire. A British patent had been previously granted for the same improvements, and in accordance with the provisions of our patent statutes, the American patent expired at the time of the expiration of the British one. This was several years earlier than the parties had figured on in their agreement, which contained the usual clause that the licensee admitted and would not contest the validity of the patent. The court held that this covenant estopped the defendant from questioning the validity of the patent before the end of the seventeen years in spite of its previous expiration. Plaintiff's counsel dismisses this case with the simple statement that this involved a non-exclusive license and that the patent had never been declared invalid by any court. Plaintiff's observation, however, is hardly in point as to the effect of the estoppel in view of the court's assumption that the limitation set by the terms of the foreign patent worked "in derogation of the grant."

To the same effect as the above cases is *Thomson Spot Welder Co.* v. *Fairbanks Co.*, 37 Ga. App., 774, 141 S. E., 923.

In none of these cases is the additional language present which is a part of the license with which we are dealing that the "patents

shall throughout their respective terms, and for all purposes, be deemed to be in force and valid."

Section 11 provides that the licensee shall prosecute infringers at its own expense and that it shall be responsible for judgments against the licensor in unsuccessful suits. Such provisions are indicative that there is here no covenant analogous to one of quiet enjoyment as claimed by the plaintiff, although they are not necessarily inconsistent with it. The authority given to the plaintiff in this same section to join the defendant as a complainant in infringement suits warrants the conclusion that the parties to this agreement were treating it as a license rather than as "an assignment or conveyance of a monopoly within the meaning of Chief Justice Taft's opinion," as contended by the plaintiff. As the Chief Justice points out it is the licensee and not the assignee of the exclusive right who must sue in the name of the licensor.

Section 12 provides that the licensee must bear the expense of defending any infringement suit brought against the licensor because of infringement by the licensee or any sub-licensee, and must in addition pay any judgment which may be rendered either against the licensor or itself in such suit. In effect this means that the plaintiff agrees to assume all risks of operating under the patents, if it transpires that others holding superior rights under other patents have a cause of action against the parties to the agreement. The assumption of such a liability by the plaintiff is utterly inconsistent with the idea of a warranty by the defendant of the validity of the patents or of a covenant analogous to one of quiet enjoyment. Furthermore it indicates that the plaintiff accepted the rights under the various patents subject to all their defects. It would be most unlikely that the parties intended to impose a liability on the plaintiff to pay any judgment against either one of them, which would necessitate an adjudication of the invalidity of the patents, and at the same time to reserve to the plaintiff a cause of action against the defendant founded on such invalidity. From the provisions of this section it is apparent that these parties contracted with their eyes open to the possibilities of trouble.

Counsel for the defendant appear to recognize the implications attached to this language, but say that it was only intended to cover the case where the plaintiff in building machines, to which in

accordance with the terms of the agreement would be attached the defendant's name, should incorporate into such machines the inventions of others not covered by the patents in the license. Whether liability would attach to the licensor, if the licensee should go beyond the authority purported to be given under the license, is unnecessary for us to decide, for we must accept in its ordinary meaning the language which the parties themselves have adopted and not read into it a limitation which could have been readily inserted if they had so desired.

The authorities seem to hold that under a license such as this and under the circumstances set forth in the plaintiff's bill there can be no recovery by the licensee, if it turns out that the patent is invalid, and that the licensee must exercise his right in competition with others.

In *Jones* v. *Burnham*, 67 Me., 93, 99, the plaintiff granted to the defendant a license to manufacture a patented article within the State of Maine. The patent was adjudged invalid, but in a suit to recover royalties this fact was held to constitute no defense. The court cited with approval the following language from *Smith* v. *Neale*, 89 E. C. L., 67, 89: "In short, the defendant in this case contracted for the plaintiff's right, such as it was, without regard to whether it could be sustained upon litigation or not; and there is nothing unreasonable or uncommon in such a bargain." The Court said further, page 99: "It is well settled, that a note given in consideration of a sale of a patent, or of an interest in the same, where the patent has been adjudged void for want of novelty, cannot be enforced. In that the grantor grants a monopoly of the use of the patent; but if he has none he grants nothing. In the case of a license, the licenser grants the use of what he has and nothing more, and that without warrant. In the one case he grants a right which does not exist — in the other he grants whatever right he may have, be the same more or less."

In *Standard Button Fastening Co.* v. *Ellis*, *supra*, it was held that no covenant for quiet enjoyment is implied in a license to use a patented invention.

In *McKay* v. *Smith*, *supra*, the court said, page 558: "A license is the grant of a right to manufacture, use, or sell the thing pat-

ented, but, outside of the terms of the contract, I do not see that there is any implied covenant that the licensor will protect the licensee in the full enjoyment of the monopoly."

We have been over the cases cited in the plaintiff's briefs with great care. The industry of counsel has failed to find a single authority as a precedent to justify us in sustaining the claim of the plaintiff's bill. Many of the cases are not in point because counsel have assumed an altogether different construction of the license agreement from that which we adopt. All cases for example holding that there is a remedy for eviction under a lease are in point only on the assumption that the licensee here was granted an exclusive right amounting to a monopoly.

We are quite willing to concede that if there is the intention to transfer an exclusive right operating on the monopoly as well as on the invention, there is in effect a purported assignment of the patent right, Robinson on Patents, Vol. II, Sec. 814, and in the absence of an estoppel, a cause of action would accrue to the licensee as soon as there should be a determination that such right did not exist. *Judkins* v. *Earl, supra; Jones* v. *Burnham, supra; Dickinson* v. *Hall*, 14 Pick., 217.

Likewise if the agreement is something less than an assignment as those words are defined by Chief Justice Taft in *United States* v. *General Electric Co., supra*, but does transfer certain exclusive rights in the invention, a right of action, in the absence of an estoppel, would accrue on the patent being held invalid, *Schutte & Koerting Co.* v. *Wheeler Condenser & Engineering Co., supra*, or perhaps as is more accurately stated on the patent being held invalid accompanied by an ouster of the licensee from such exclusive right by the lawful competition of third parties. See the language of the court in *White* v. *Lee*, 14 Fed., 789, 791; Robinson on Patents, Vol. III, Sec. 1252.

That such rights do not arise under such circumstances merely because of the exclusiveness of the grant is indicated by the fact that there may be a similar cause of action in the case of the so-called non-exclusive license where the only right given is a mere permission, if the licensee is prohibited from exercising the right attempted to be granted, because for example others hold superior

patents, which would be infringed by his doing so. Robinson on Patents, Vol. III, Sec. 1252; Walker on Patents (6 ed.) Vol. I, page 433; *McKay* v. *Smith, supra*, page 557.

In each of the above instances a recovery is allowed simply because the licensee does not receive that for which he bargained, but none of these is the case with which we are concerned.

The fact that the parties to this license were dealing with a large number of patents as an entirety, the covenants which show an intent to impose on the plaintiff all of the risks of operating under the patents, the plaintiff's agreement to regard them as valid for all purposes, and the fact that it nowhere appears in the license that the defendant has not the lawful right to use the patents itself, indicate that the words used in clause 1 which omit to grant an exclusive right were used advisedly and not inadvertently. Under such circumstances we must hold that the invalidity of the three patents in question gives on the facts set forth in the bill neither a defense to the claim for royalties nor a cause of action to the licensee based on a failure of consideration. The parties are bound by their contract. It is not the province of equity to modify its terms.

Demurrer sustained. Case remanded to sitting Justice.

INHABITANTS OF THE TOWN OF MILO *vs.* MILO WATER COMPANY.

Piscataquis. Opinion December 8, 1932.

MUNICIPAL CORPORATIONS. ASSESSORS. TAXATION.

SET-OFF AND COUNTER CLAIM.

Much greater particularity and precision of description and statements are required in an action to enforce a forfeiture of property for non-payment of a tax than in a suit at law for the recovery of unpaid taxes.

Assessors are not subject to the direction and control of the municipality; their duties and authority are imposed by law. A town has no power to abate a tax.

While it is a general rule that in cases when the State or a municipality makes itself a party to a contract or to a grant in a business or proprietary capacity it is, in matters relating thereto, subject to the same law of estoppel as when other contracting persons who may be parties litigant, yet it is likewise held that in the strict scope of governmental or public capacity there can be no estoppel.

Taxation is a function of government and a basic sovereign right.

Since local, county and state taxes are all included in one tax, the town is the State for the purpose of collecting such taxes.

Equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily includes the power of collecting taxes lawfully assessed.

Recoupment, counter claim or set-off are not available to a party sued by a town for taxes.

Based on the ground of public policy, no set-off or counter claim is admissible against demands for taxes levied for local governmental purposes.

In the case at bar, the town had no power to exempt the defendant from taxes. In its contract it did not attempt to exempt the company, but undertook only to make annual payment for service of an amount which might be assessed for taxes each year. The findings of the Public Utilities Commission could not change the duty of the assessors. The taxes were properly assessed and judgment should be for the plaintiff.

On report. An action of debt to collect taxes. Judgment for the plaintiff for the amount of taxes and interest. The case fully appears in the opinion.

Hiram Gerrish,
C. W. & H. M. Hayes,
Ryder & Simpson, for plaintiff.
McLean, Fogg and Southard,
John S. Williams, for defendant.

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

BARNES, J. On report this action of debt for taxes for the year 1928 comes to this court for final judgment, on so much of the evidence as is legally admissible.

No question of the validity of assessment is in issue.

The plea is the general issue, with brief statement.

On May 1, 1909, defendant entered into a contract with the town of Milo to supply the town with pure water for domestic uses, and for protection against fire for the term of twenty years.

By item seven of its contract with the town the defendant company agreed, "to furnish water at the mains so laid for the following purposes, to wit; for filling reservoirs, for flushing sewers, for filling street sprinklers, for the reasonable practice of hose companies at such times and in such amount as shall be deemed necessary by the officers of said town, for the use of all school houses on or adjacent to streets in which pipe is laid or that may hereafter be built along the line of pipe or any extension thereof or adjacent thereto, for the town hall whenever such shall be built, for all other buildings or rooms used by the said town for town purposes exclusively, for all churches and cemeteries situated on or adjacent to streets in which mains may be laid. The supply of water at school houses, town buildings or rooms, churches, and cemeteries to be in each case sufficient for all purposes for which water may there be needed. To furnish, maintain, and supply with water one drinking fountain of modern and approved pattern for the use of man and beast, said fountain to be located by said water committee, and shall be so used as not to cause an unnecessary waste of water at the same, and shall not be regularly used as watering places connected with or incident to barns or stables. The said company will further furnish water for such other drinking fountains as the said town may furnish and erect on its said lines, under the same conditions as the one described to be furnished by the company. The said company further agrees to furnish and erect one stand-pipe or hydrant for the purpose of filling watering carts, and to supply the same with a constant and sufficient supply of water for said purpose."

It was further specified, as part of item fifteen of the contract, "In consideration of the construction and maintenance of said system of water works in accordance with the foregoing agreements, said town hereby agrees to pay to said company, its successors, and assigns, the sum of fifteen hundred dollars per year during said period of twenty years for the use of said forty hydrants as more particularly set out in this contract and for water for the same; *and for water for the purposes specified in Item seven*

of this contract such further sum each year as shall equal the amount of tax, if any, assessed against said Company by said town of Milo during said year."

On complaint of defendant Company dated February 23, 1920, and referred to as F. C. ♯277, asking for an increase of rates, a decree was rendered by the Public Utilities Commission on December 31, 1920, increasing rates in all classes of service, and raising each annual hydrant rental rate from $37.50 to $40.00.

On September 30, 1927, on another petition brought by the defendant Company, referred to as F. C. ♯641, a decree was issued by the Public Utilities Commission granting further increase of rates and increasing the hydrant rentals to $60.00 per hydrant. The record of the findings and statements accompanying and leading up to the formal language of the decree in F. C. ♯641, supra, is that "The petitioner presents estimates (Petr. ex. 6) showing a requirement of $12,556.00 (exclusive of taxes) for expenses of operation," and then, after stating that "We have a total requirement of $12,500.00 for operating expenses" the record goes on thus: "We shall assume that the Water Company and the town of Milo will continue to be guided by the terms of the present contract, except as modified by this and former decrees of this Commission." At the time this decree was made the contract was in force except as modified and affected by the decree in F. C. ♯277. The Commission was not considering taxes but realized, and so stated, that, if the time came when the defendant Company was called on to pay taxes, "that would be an element to be figured in the establishing of new rates." This is clearly shown by its statement that "the rates herein provided will probably yield a gross revenue somewhat in excess of the requirements and perhaps sufficient to provide the necessary revenue upon additions to the plant. If, however, the future revenue requirements are increased by reason of necessary additions to plant, municipal tax assessment or otherwise, a readjustment of rates may be made, after further petition and hearing, to meet conditions that may then exist."

The evidence shows that no taxes had been assessed by the town against the defendant Company from the date of the contract to September 30, 1927, the date of the decree in F. C. ♯641.

In 1928 the town did assess a tax against the defendant Com-

pany and, after due demand, this suit, duly ordered, to collect the tax in the name of the Inhabitants of the Town of Milo was brought.

It is argued by defendant that the suit must fail because:
First: In the record of levy of taxes the description of property of defendant is insufficient to support suit for the tax.
Second: Action of the town evidenced by a legal contract controls assessors.
Third: Estoppel is effective against the town.
Fourth: Taxes are subject to recoupment, counter claim or set-off.

As to the first objection, the description of the property taxed is not made as directed by statute. It is not incumbent upon us in this suit to decide whether the irregularities are such as would vitiate title if property taxed were sold by the collector, under the law.

The present suit is for a tax assessed, and in meeting objection to irregularities in such suit, our Court has said:

"This is not a proceeding wherein a forfeiture is sought to be enforced, but a suit at law for the recovery of unpaid taxes. Much greater particularity and precision are required in the former than in the latter; and it has been held that the stringent rules which have been applied in testing the validity of arrests, and sales of property for unpaid taxes, are not applicable where the remedy sought is by an ordinary suit at law to collect unpaid taxes. *Cressey* v. *Parks*, 76 Me., 532; *Rockland* v. *Ulmer*, 84 Me., 503, 24 A., 949; *Rockland* v. *Ulmer*, 87 Me., 357, 32 A., 972. "As was said in *Cressey* v. *Parks*, where the distinction is properly made between collecting taxes by suit and proceedings to enforce a forfeiture: 'To prevent forfeitures strict constructions are not unreasonable. But, where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally.'" *Charleston* v. *Lawry*, 89 Me., 582, 36 A., 1103.

So we hold that under proper construction and application of statutes applicable the record of assessment is sufficient.

The second objection seems to be that if a utility and the town which may tax it are operating under a contract, legal upon its face, and if the assessors of the town have not taxed the utility,

assessors, while the contract longer obtains, may not lawfully tax the utility.

The rates, tolls, and charges specified in the contract were reviewed in 1927 by the Public Utilities Commission, pronounced unreasonable, insufficient and unjustly discriminatory, and a new schedule of rates for all services ordered.

Under the new schedule of rates, certain service of the company, included in item seven of the contract, and by its terms paid for by what amounted to an irregular abatement of taxes annually, were thereafter to be paid by the town, as:

Watering trough, each	$30.00
Stand-pipes, street sprinkling purposes, each	$25.00

By thus modifying the contract in the matter of amount that the town should pay for public service, in addition to service for fire protection, the Public Utilities Commission relieved the town of obligation longer to refrain from taxing the company, if any such obligation previously existed.

In *Brownville* v. *Shank Company*, 123 Me., 379-382, 123 A., 170, 172, this Court has said, relative to a vote of the plaintiff town, with reference to property of defendant, reading as follows: "Voted to abate all taxes that may be assessed on all buildings together with all machinery that may be placed therein for manufacturing purposes and also on all buildings for storing manufactured products that may be erected on land owned by the U. S. Pegwood & Shank Co. on the West Shore of Pleasant River for a period of ten (10) years.

"If construed according to the ordinary meaning of the language used, this vote does not grant an exemption from taxation, but an abatement of taxes assessed by an independent body created by law, and charged with the duty of assessing taxes, and authorized to grant reasonable abatements. Assessors are not subject to the direction and control of the municipality; their duties and authority are imposed by law. A town has no power to abate a tax. *Thorndike* v. *Camden*, 82 Me., 39, 46, 19 A., 95; *Rockland* v. *Farnsworth*, 93 Me., 183, 44 A., 681.

"Treating the action of the town as a vote of exemption, as probably intended, it was likewise beyond the power of the town; the

law must be considered in this State as settled to that effect. *Brewer Brick Co.* v. *Brewer*, 62 Me., 62; *Thorndike* v. *Camden*, supra."

So whether action of assessors of Milo in former years be viewed as abatement or exemption, the assessors of Milo for 1928 were not precluded from assessing the tax in question. As we understand the constitutional and statutory provisions specifying the duties of assessors of taxes in like cases it was their duty to tax the company.

Regarding the third objection urged, that estoppel is effective against the assessors, this question has been dealt with in numerous well-considered cases.

Limiting our discussion to the question whether a town can be subject to estoppel in a suit for taxes, where the validity of the assessment is not questioned and no constitutional or statutory bar can be raised, there seems to be a general consensus of opinion in the cases that when the State or a municipality makes itself a party to a contract or to a grant in a business or proprietary capacity it is, in matters relating thereto, subject to the same law of estoppel as other contracting persons who may be parties litigant, but many of the cases so holding recognize the double character of municipal corporations, the one governmental or sovereign, legislative or public, and the other proprietary, business or private. Few cases are to be found bearing directly on the question of whether a municipal corporation, a State or the general government can be estopped, as between it and an individual, to assert its governmental or sovereign power, but some cases by way of dicta appear to recognize the principle that in the strict scope of governmental or public capacity there can be no estoppel. That taxation is a function of government and a basic sovereign right there can be no question. In *Philadelphia Mortgage and Trust Company* v. *City of Omaha*, 63 Neb., 280, 88 N. W., 523, it was held that the doctrine of estoppel in pais could not be invoked against the city in the collection of taxes lawfully assessed. In the case of *Chicago, St. P. M. & O. Ry. Co.* v. *Douglas Co.* (Wis.), 114 N. W., 511, the Court said, "The analogies to be deduced from the other sovereign powers necessary to the existence of the

State, such as the power of eminent domain, the police power, and the power to declare war and make peace (when such last named powers are not by written Constitution vested elsewhere), are all antagonistic to the idea that a State can be subject to an estoppel in the matter of the exercise of its taxing power. — We are constrained to hold that the complaint shows the lands to be subject to taxation, and that there can be no estoppel in pais asserted against the exercise by the State of the taxing power of the State;".

Bearing in mind that local, county and State taxes are all included in one tax, it is clear that in this State the town is the State for the purpose of collecting such taxes. In full realization of the fact that few cases can be found bearing squarely on the point, we are nevertheless of the opinion that an equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily included the power of collecting taxes lawfully assessed. To hold otherwise would, we believe, be contrary to sound public policy and destructive of a fundamental sovereign right.

Furthermore, the facts relied on to establish an equitable estoppel must be such as to have caused the party asserting them to have changed his position in reliance thereon and to his injury. *Forsyth* v. *Day et al*, 46 Me., 176, 197; *Allum* v. *Perry*, 68 Me., 232, 234; *Nichols* v. *Baker*, 75 Me., 334, 344; *Horton* v. *Wright*, 113 Me., 439, 94 A., 883.

The town had no power to exempt the defendant from taxes (*Brewer Brick Co.* v. *Brewer*, supra), and in its contract it did not attempt to so exempt but undertook only to make annual payments for certain services of an amount which might be assessed for taxes each year. But assuming that the town did or said something that led the Public Utilities Commission and the defendant to believe that the "terms" of the contract would be followed, this Court is unable to see where the defendant Company changed its position to its detriment. Its argument is based on the existence of the contract and on its claim that the plaintiff town recognized its existence and its obligation under it down to and including the time of the decree of 1927. What the town did for the first time, in 1928, when it assessed and demanded payment of a tax was a pos-

sibility under the contract from the day on which it was made, assuming that the contract was all the time in force. We are unable to see where the essential element of change of position or detriment due to that change has been shown, and failure to show that is at all times a complete answer to the claims of estoppel. As to whether or not, if in 1928, the contract was still in force, and if it is now still in force and payment for certain services as provided therein has not been made to the defendant Company and a breach of its terms can be shown, the defendant can recover in a suit for such breach, we do not feel it necessary to consider or decide at this time.

Lastly, it would seem that recoupment, counter claim or set-off is not available to defendant. Recoupment as such relates to damages arising out of breach of the same contract or transaction as that sued on. *The Ruggles Lightning Rod Co.* v. *Ayer*, 124 Me., 17, 19, 125 A., 144; *Fletcher* v. *Harmon et al*, 78 Me., 465, 469, 7 A., 271; *Gilchrist et al* v. *Partridge et al*, 73 Me., 214, 216; *Winthrop Savings Bank* v. *Jackson*, 67 Me., 570, 572; *Jones et al* v. *Vinal Haven Steamboat Co.*, 90 Me., 120, 121, 37 A., 879. There is clearly no basis for recoupment as such in a suit for taxes.

And the rule, based on the ground of public policy, seems sound that no set-off or counter claim is admissible against demands for taxes levied for local governmental purpose, 24 R. C. L., Sec. 23; 26 R. C. L., Sec. 337; *City of New Orleans* v. *Davidson*, 30 La. Ann., 541, 31 Amer. Rep., 228; *Gatling* v. *Commrs. of Carteret Co.*, 92 N. C., 536, 53 Am. Rep., 432; *Tarver* v. *Mayor, etc., City of Dalton* (Ga.), 67 S. E., 929, 56 L. R. A., 922; 33 L. R. A. (N. S.), 382.

It is argued, with persuasive force, that the company having petitioned the Public Utilities Commission for increased rates because of the alleged assessment of the tax now sued for, having been met with the contention that if, as defendant contends, the contract was still in force, the company had a remedy by suit on the contract, and having obtained from the Commission a decree imposing on the town, by increasing the rates charged the town for hydrants "the entire burden of the additional revenue made necessary by the tax assessment," and allocating "to the municipal hy-

drants . . . the entire additional revenue" required by the imposition of the tax, it is precluded by the decree of the Commission from denying the validity of the tax assessment on which such decree was founded; that having, on its own petition obtained an increase in rates with which to meet this very tax, it cannot now be heard to say that the assessment of that tax was invalid.

Judgment should be entered up for plaintiff for the amount of the tax, and interest as voted by the town.

So ordered.

THOMAS M. AYER

vs.

THE ANDROSCOGGIN AND KENNEBEC RAILWAY COMPANY.

Androscoggin. Opinion December 12, 1932.

INFANTS. FINDINGS OF FACT. COURTS.

Findings of fact by a single Justice sitting without a jury are final so long as they find support in evidence.

It is not necessary that a legal guardian or a guardian ad litem *should be appointed in order that a minor should prosecute a suit at law or in equity. In such cases, actions may be brought, entered in court, and pursued to judgment on behalf of the minor by a next friend.*

A next friend or person authorized to represent a minor has full authority to settle or discharge a right of action on his behalf and to consent to an entry of judgment, provided that such action is approved by the Court.

An attorney representing a minor plaintiff need not be directly employed or paid by the plaintiff or the next friend. In the absence of fraud, any arrangement with regard to employment of counsel, acceded to by the next friend, is sufficient. Nor is it necessary that counsel should personally investigate the case or present evidence to the Court. He may do no more than bring to the attention of the Court the settlement agreed on by the next friend and satisfy himself that the Court is sufficiently informed concerning the case to act intelligently.

In the case at bar, the parents of the minor after conferring with the attorney for the defendant and its claim agent, brought suit through the mother as next friend, and the adjustment already agreed upon was completed under the supervision and the approval of the Court. There was no suggestion of bad faith in the proceedings and no sound reason of disturbing the existing judgment.

On exceptions by plaintiff. A writ of error to reverse or set aside a judgment entered at the February Term, 1923, of the Superior Court, for the County of Androscoggin, in favor of the plaintiff, then a minor, and against the same defendant. To certain findings and rulings of the sitting Justice, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Connolly & Welch, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

PATTANGALL, C. J. On exceptions by plaintiff. Writ of error to set aside a judgment of the Superior Court for Androscoggin County, rendered at the February Term, 1923, against this defendant in favor of plaintiff, then a minor, who brought the action by his father acting as next friend.

The Justice below found the following facts:

"(1) On June 6, 1922, Thomas M. Ayer, then a minor, was injured while riding as a passenger on a motorcycle when said motorcycle was in collision with a street car of the defendant company. The defendant denied liability. Hospital and medical expenses were incurred in the sum of $515.00.

"(2) As a result of conferences between the claim agent of the defendant and the father and mother of the plaintiff, it was agreed that defendant company should pay the expenses incurred by reason of the accident and be released from all liability. The mother of the plaintiff was informed that a suit should be brought in behalf of the plaintiff and the terms of the settlement presented to the Court for approval.

"(3) Previous to this the father had referred the entire matter of settlement to the mother and authorized her to do all things which might be necessary in connection with the same. By her authority the firm of Belleau & Belleau was engaged to represent the plaintiff as attorneys in the action which was brought, and it is the judgment in that action which is now sought to be annulled.

"(4) I find the terms of the settlement were presented to the Justice of the Superior Court; that he was made acquainted with the facts of the case; and that his approval was secured after receiving such information.

"(5) I find that settlement of the action was agreed upon for the sum of $515.00, and that it was definitely understood by the father and mother of the plaintiff that a release of all causes of action was the basis and consideration for the settlement. I find that the defendant company paid out the sum of $515.00 at the time of the settlement and later paid additional medical expenses so that the total amount paid by the defendant company was $735.00."

He also made the following rulings of law:

"(1) The writ of error was the appropriate process to use.

"(2) The plaintiff, being a minor, was not bound by the six year limitation prescribed by Section 10 of Chapter 116 of the Revised Statutes and did sue out his writ within five years after the removal of the disability of infancy and, accordingly, complied with the provisions of said Section 10.

"(3) No errors of fact or law appear in the transcript of the record of the former suit, and under the evidence no legal cause exists to reverse, recall or correct the judgment in the former action entered at the February Term, A.D. 1923, of the Superior Court for Androscoggin County."

To all but the first of these findings of fact plaintiff excepted on the ground that they were not supported by evidence, and also excepted to the third ruling of law.

The first five exceptions may be disposed of somewhat summarily. The findings of fact by a Justice sitting without a jury are final so long as they find support in evidence. *Starbird* v. *Henderson*, 64 Me., 570; *Haskell* v. *Hervey*, 74 Me., 195; *Thompson* v. *Thompson*, 79 Me., 286, 9 A., 888; *Sheffield* v. *Otis*, 107 Mass., 282; *Backus* v. *Chapman*, 111 Mass., 386; *Edmundson* v. *Bric*, 136 Mass., 191. The present record satisfies the requirements of the rule.

The sixth exception requires more extended notice. It is based upon the following grounds:

"1. That by the record and the evidence it clearly appears that neither at the time of the bringing of nor the entry of said action on the case nor at the entry of judgment thereon, had a legal guardian or guardian *ad litem* been appointed for the minor, Thomas M. Ayer, and that therefore there was nobody legally authorized to settle or discharge his said right of action or to consent for the plaintiff to the entry of said judgment.

"2. That it clearly appears by the record and the evidence that Marcellus Ayer, the father of the plaintiff, although the action upon which said judgment was based was brought in his name, as the next friend of Thomas M. Ayer, did not bring said action nor consent to the settlement nor discharge thereof nor to the entry of said judgment.

"3. That neither Marcellus Ayer, as the father and next friend of the minor plaintiff, nor his mother Emma Ayer had any authority at law to settle or discharge said right of action of Thomas M. Ayer or to consent to the entry of said judgment.

"4. That it clearly appears by the record and the evidence that the attorneys appearing for the plaintiff in said action were not directly employed by nor paid for by the plaintiff nor by his next friend; that said attorneys did not in fact bring said action; made no investigation as to the merits thereof, and presented no evidence before the Court relating thereto.

"5. That it clearly appears by the record and the evidence that the hearing upon said action upon the case before the Justice Presiding, in said Superior Court within and for the County of Androscoggin upon which said judgment was based, was held in the absence of the minor and his next friend and his parents and was without the introduction of evidence, either oral or written, other than a statement as to the facts made to the Court by the then attorney for the defendant and the plaintiff claims that, without more formal hearing, the said Justice of the Superior Court was without power to approve any settlement of said action or to enter judgment thereon."

Discussing these points in their order: (1) It is not necessary that a legal guardian or a guardian *ad litem* should be appointed in order that a minor should prosecute a suit at law or equity. In such cases actions may be brought, entered in court and pursued to judgment on behalf of the minor by a next friend. The practice is too well settled to require discussion. It is recognized in Secs. 30 and 31, Chap. 80, R. S. 1930, and under the provisions of the latter section cases so brought may be effectually compromised with the approval of the Court.

(2) The record contained evidence which warranted the Court below in finding that, after settlement of plaintiff's claim had been agreed upon between his father and the representatives of defendant, his mother was authorized to attend to the necessary details which followed and that she did so. This course of conduct is not open to criticism.

(3) A next friend or person authorized to represent him has full authority to settle or discharge a right of action on behalf of a minor and to consent to an entry of judgment provided that such action is approved by the Court as was done here.

(4) It is not necessary that an attorney representing a minor plaintiff should be directly employed or paid by the plaintiff or his next friend. In the absence of fraud, any arrangement with regard to employment of counsel, acceded to by the next friend, is sufficient. Neither is it necessary that counsel should personally investigate the case or present evidence to the Court. He may do no more than bring to the attention of the Court the settlement agreed on by the

next friend or the person authorized by the next friend to arrange the matter and satisfy himself that the Court is sufficiently informed concerning the case to act intelligently.

(5) It is not necessary that either the minor or the next friend should be present when the Court considers approving the settlement of an action in which a minor is plaintiff; neither is it necessary to formally introduce evidence unless the Court requires it. Under the circumstances existing here, the Court was justified in relying upon statements made by counsel for defendant and in approving the compromise without additional explanation.

This was not an unusual case. A minor child, while riding a motorcycle, collided with a trolley car and sustained an injury. The parents conferred with the attorney of the car company and its claim agent. Liability was denied but after discussion defendant offered to pay a certain amount in settlement. The parents agreed to the arrangement. It was necessary that a legal release should be procured. One of two methods might be pursued to accomplish that end — a legal guardian or guardian *ad litem* might be appointed, or suit might be brought by a next friend and the adjustment already agreed to completed under the supervision and with the approval of the Court. The latter course was followed. There is no suggestion of bad faith in the proceedings and no sound reason for disturbing the existing judgment.

Exceptions overruled.

COMER'S CASE.

Penobscot. Opinion December 13, 1932.

WORKMEN'S COMPENSATION ACT.

Petition for further compensation, authorized under Sec. 37, Chap. 55, R. S. 1930, should not be confused with petition for review authorized by another paragraph of the same section. The two proceedings are entirely distinct.

The Commission has no authority, statutory or inherent, to grant a rehearing on the merits of a case because of newly discovered evidence.

So long as the facts on which the awarding of compensation was predicated continue to be the facts in the case, so long does that which was established continue to be the law of the case.

The statutory provision relating to petition for further compensation may be invoked in cases where disability appears to have ended and the case finally closed if the injured employee suffers a recurrence of his former troubles traceable to the original injury or where it is discovered that compensatory injury exists which, at the time final decree was entered, was unknown and therefore not considered by the Commission.

The case at bar did not come within these limitations. The facts in issue were finally adjudicated at a former hearing. The decree then entered was not appealed from. It is not claimed that review will lie. The ruling of the Commission must stand.

On appeal from a decree of a sitting Justice affirming a decree of the Industrial Accident Commission, denying compensation to petitioner. Appeal dismissed. The case fully appears in the opinion.

Arthur L. Thayer, for petitioner.

Woodman, Skelton, Thompson & Chapman, for respondent.

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

PATTANGALL, C. J. Appeal from decree by a Justice of the Superior Court, confirming decree of the Industrial Accident Commission denying compensation.

On November 15, 1929, petitioner filed a claim for compensation for a personal injury alleged to have been sustained by him on the preceding day. Compensation was awarded on the ground that, although petitioner was, at the time of the accident and had been for some time prior thereto, suffering from a progressive disease of the heart, that condition was aggravated by physical exertion in the ordinary course of his work and that his collapse on the date alleged was caused by that exertion. The employer appealed and the decree was sustained by this Court. *Comer's Case*, 130 Me., 373, 156 A., 516.

On October 28, 1931, the employer brought a petition for review of incapacity; and on November 27, 1931, after hearing, the Commission found that it was "beyond question that Mr. Comer

was suffering from a progressive heart disease prior to his collapse on November 14, 1929. It is undisputed that he is still incapacitated to a great extent; the probability being that he is still totally incapacitated from earning. . . . We are forced to the conclusion that Mr. Comer's incapacity, attributable to his said injury, did not extend beyond November 4, 1931."

From this decree no appeal was taken, but on December 19, 1931, a petition for further award of compensation was filed, in which the following allegations appear: "My regular wages were paid me to August 23rd, 1930, and I have received compensation from that date to November 4th, 1931, since which time I have been unable to resume any remunerative form of occupation due to the injuries received as alleged. This petition is for compensation because of incapacity to work since Nov. 4th, 1931."

Respondent's answer denied the allegations contained in the petition and set up the further claim that the questions of fact involved therein had been decided in the review proceedings referred to above and were *res adjudicata.*

Hearing was had and a decree adverse to petitioner resulted. It is from that decree that the appeal now before us was taken.

The decree was apparently based upon three propositions: first, that the findings of fact in the review proceedings were *res adjudicata*; second, that any incapacity, total or partial, resulting from the injury, ceased as of November 4, 1931, and any incapacity suffered since that date was due to causes not attributable directly or indirectly to said injury; and third, that petitioner did not sustain the burden of proving any recurring incapacity as caused by the original injury. If the Commission's view concerning the first point is correct, or if the record contains evidence sufficient to support the other findings, the decree must stand.

Notwithstanding the petition before us is entitled "A Petition for Further Compensation," it rests squarely upon the proposition that the Commission erred in the findings of fact upon which it based its decree of November 27, 1931, from which no appeal was taken and against which review would not lie at the time these proceedings were instituted. It is claimed that the instant petition is authorized by the following provision contained in Sec. 37, Chap.

55, R. S. 1930: "If after compensation has been discontinued by decree or approved settlement receipt as provided by section forty-three hereof, additional compensation is claimed by an employee for further period of incapacity, he may file with the Commission a Petition for Further Compensation setting forth his claim therefor; hearing upon which shall be held by a single commissioner."

But this paragraph does not authorize review proceedings. They are provided for in the earlier portion of the same section: "While compensation is being paid under any agreement, award or decree, the incapacity of the injured employee due to the injury may from time to time be reviewed by a single commissioner upon the petition of either party upon the grounds that such incapacity has subsequently increased, diminished or ended. Upon such review the commissioner may increase, diminish or discontinue such compensation in accordance with the facts, as the justice of the case may require."

In *Conner's Case*, 121 Me., 37, 115 A., 520, it was decided that the Commission had no authority, statutory or inherent, to grant a rehearing on the merits of a case because of newly discovered evidence; and in Healey's Case, 124 Me., 56, 126 A., 21, 22, the Court approved the doctrine that "whether established correctly on general principles or not, so long as the facts on which the awarding of compensation was predicated continue to be the facts in the case, so long did that which was established continue to be the law of the case." It follows, of course, that the same reasoning and the same rule apply where compensation has been denied.

The statutory provision relied upon by petitioner was enacted after these cases were decided, but we do not think their authority is impaired by it. It may properly be invoked in cases where disability appears to have ended and the case finally closed if the injured employee suffers a recurrence of his former troubles traceable to the original injury or in cases where it is discovered that compensatory injury exists which, at the time final decree was entered, was unknown and therefore was not considered by the Commission.

Nothing of the kind appears here. The controversy is as to whether or not the findings of fact by the Commission evidenced

by the decree of November 27, 1931, were warranted. The facts in issue had been once and finally adjudicated. The ruling of the Commission in that respect must stand. There is sound basis also for the further conclusion that petitioner's incapacity after November 4, 1931, was unrelated to the accident for the results of which he received compensation under the original award. No claim is made that recurring incapacity was shown.

Appeal dismissed.

ORA D. VERRILL *vs.* MINNIE HARRINGTON.

MATTIE C. VERRILL *vs.* MINNIE HARRINGTON.

HAROLD E. VERRILL *vs.* MINNIE HARRINGTON.

LEONA W. ABBOTT *vs.* MATTIE C. VERRILL.

EDWARD HARRINGTON *vs.* MATTIE C. VERRILL.

MINNIE HARRINGTON *vs.* MATTIE C. VERRILL.

York. Opinion December 15, 1931.

MOTOR VEHICLES. NEGLIGENCE. JURY FINDINGS.

The operator of a motor vehicle intending to cross a street must use reasonable care in ascertaining the presence of cars attempting to pass from behind.

Notice of an intention to cross a way must be given to the drivers of cars behind in order to charge them with negligence in pursuing their course.

As in the case of cars coming from the opposite direction, the law charges the driver of a car crossing a highway with the duty of so watching and timing the movements of a car coming from behind as to reasonably insure himself of a safe passage either in front or rear of such car, even to the extent of stopping and waiting if necessary.

In the case at bar, there was no credible evidence that Minnie Harrington, the driver of the Nash car, was guilty of negligence. The weight of the evidence clearly indicates that the negligence of Mattie C. Verrill was the sole proximate cause of the collision here envolved.

The verdicts in all the cases at bar being based on a finding directly to the contrary, were manifestly wrong.

On general motions for new trials. Cross actions brought to recover damages alleged to have resulted from the negligence of the drivers of two automobiles which collided in front of the Rosemere Tea Room in the town of Wells. The jury brought in verdicts for the plaintiffs in the three actions against Minnie Harrington, and for the defendant in the cross actions against Mattie C. Verrill. General motions for new trial were thereupon filed in each case. Motions sustained. New trials granted. The cases fully appear in the opinion.

Willard & Willard,

Ray P. Hanscom, for Harringtons.

Waterhouse, Titcomb & Siddall, for Verrills.

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

STURGIS, J. These actions grow out of an automobile collision which occurred on September 25, 1931, in the town of Wells. In the Superior Court, where the cases were tried together, the jury brought in verdicts for the plaintiffs in the several suits against Minnie Harrington and for the defendant in the cross actions against Mattie C. Verrill. General motions for new trials filed in each case come forward in a single record.

The accident occurred in front of the Rosemere Tea Room located on the westerly side of the state highway which, at this point, has a three strip concrete surface thirty feet wide with gravel shoulders on each side, and runs practically north and south without substantial curve or grade. There are two entrances from the highway into the Tea Room grounds, each approximately thirty-five feet wide, with a space between them of ninety-two feet.

As Mrs. Verrill, accompanied by Ora D. Verrill, her husband's mother, and her own infant child, attempted to enter the northerly

driveway to the Tea Room in the Oldsmobile sedan which she was driving, her car was struck by a Nash sedan carrying Leona W. Abbott as a passenger and operated by Mrs. Minnie Harrington. The automobiles were traveling in the same direction. They came together at the westerly edge of the concrete or on the gravel just outside and stopped at practically right angles to each other in the ditch beyond the driveway. Both were badly damaged.

The occupants of each car seek to recover damages from the driver of the other automobile. Harold E. Verrill sues for his expenses and loss of consortium resulting from the injuries to his wife, Mattie C. Verrill, and also for damages to his car which she was driving. Edward Harrington sues for money expended for the care of his wife, Minnie Harrington, and for the loss of her consortium.

The story of the accident given by Mrs. Verrill is that, coming up from Wells Beach by the Mile Road, so called, she turned her car into the state highway and drove northerly in the right-hand lane. She says:

> "I went along at about twenty-five miles an hour and as I got near the entrance to the Rosemere Tea Room I looked in my mirror and saw that there was no car near me in the rear, and I knew that I had a clear way ahead of me, and I put out my hand and turned to the driveway, and got my front wheels into the driveway of the Rosemere Tea Room when I heard the sound of one horn and a crash instantly."

It seems that she intentionally passed the southerly driveway and attempted to go into the northerly entrance of the Tea Room in order that she might turn her car there for her return trip. She says she looked in her mirror before swinging across the highway and the only cars she saw following her were several hundred feet back. There was no traffic coming towards her. She claims she was driving twenty-five miles an hour in the right lane and slowed down to fifteen miles to make the turn. On cross examination, she testified:

> Q. From the time you came up around the turn at the Mile Road how many times did you look in your mirror to see if there was anybody following you?

A. I don't recall but once.

Q. And on that occasion you say that you saw some cars in the distance?

A. Yes, sir.

Q. How near were you to the drive that you were to turn in when you looked in your mirror?

A. Just a bit before it, I would say.

* * * * *

Q. But when you first looked in your mirror, as I understand it, you were northerly of that southerly entrance?

A. Yes, sir.

Q. And you were proceeding at about twenty-five miles an hour?

A. I might have been slowing down to make my turn.

Q. And you saw cars coming?

A. Yes, sir.

Q. And you didn't look again?

A. I looked before making my turn.

Q. And at the time you did look you were northerly of the southerly entrance here? You had passed that entrance, had you?

A. Yes, sir.

Q. And was still remaining on your slab of the road? Is that right?

A. Yes, sir.

Q. Now, in order to make that entrance there, as a practical proposition, you have to go pretty well up to it and make rather a sharp turn, don't you?

A. I didn't make a sharp turn.

* * * * *

Q. As a practical proposition, you had to keep on your own side of the road in order to get the width of road to get in there with sort of a new moon turn or half circle?

A. Half circle.

Q. And that day, from the time you looked in your mirror, after having passed the southerly entrance, from that time

until the collision you didn't look in your glass again after that; except that once?

A. No.

Mrs. Harrington testifies that, as she drove her Nash car from Ogunquit to her home in Kennebunk, she slowed down at the Mile Road, picked up speed again and, coming up to the Verrill car which was traveling at a lower rate of speed, turned from the right into the middle lane and, as she attempted to pass, without any warning, Mrs. Verrill pulled her car in front of her and across the road. Mrs. Harrington states that she "jumped" on her brakes and threw her car to the left, but they came together. She says that she pulled into the middle slab to pass just as she got by the southerly entrance, gave four quick blasts of her horn and, somewhere between the two driveways to the Tea Room, put on her brakes. Her judgment is that her brakes were on a distance of fifty-five feet back from the point of collision. She estimates her speed as she started to pass at thirty-five or thirty-eight miles an hour.

Several witnesses describe tire marks on the concrete and in the gravel which appeared to them to indicate the course which the Harrington car followed after the brakes were applied and the distance it went before and after the collision. The inferences which may be drawn from the location of these marks do not materially conflict with the testimony of the witnesses. Assuming that the marks were seventy to eighty feet long, as stated by a traffic officer, without evidence as to the rate of retardation which would result from the application of the brakes of the Harrington car, and there is none, any conclusion as to speed based on the marks is more or less speculative. The position and condition of the cars after the accident is also of limited probative value.

The state highway in Wells is divided into three lanes, each ten feet wide, those on the outside being for traffic going in opposite directions, the one in the middle for the passing of vehicles. It is well known that this use of the road is established by regulation and enforced. When Mrs. Harrington attempted to pass the Verrill car, she turned into the middle lane and blew her horn. She not only had no reason to anticipate that the car she was about to pass would swing across the road in front of her, but every reason to

believe to the contrary. Mrs. Verrill had passed by the first driveway, through which cars coming from the south would naturally be expected to enter the Tea Room grounds, and it is admitted that she proceeded straight ahead in the right-hand lane for some distance without in any way indicating that she intended to turn. Drivers of cars coming up behind her at that time had the right to assume that she would continue on, or at least remain in the lane she was traveling.

When Mrs. Verrill began her "half circle" turn across the concrete, she was bound to use reasonable care in guarding against a collision with cars approaching from behind. Her turn took her almost immediately into the middle lane, over which cars desiring to pass had the right of way. She looked in her mirror and saw cars back in the distance, but evidently gave no consideration to cars coming up the middle lane outside the range of the mirror's reflection and obscured from view by the back of her own car. Her testimony is that a glance in her mirror was the single precaution she took before extending her hand and making the turn.

It is familiar law that the operator of a motor vehicle intending to cross the street in front of a car coming from the opposite direction on its own right of way must give notice of the intention to cross in order to charge the driver of the other car with negligence in pursuing its course. The law charges the driver of the car making such a crossing with the duty of so watching and timing the movements of the other car as to reasonably insure himself of 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, 9, 115 A., 420; *Esponette* v. *Wiseman*, 130 Me., 297, 155 A., 650. No less strict rule can be applied to operators attempting to cross the right of way of cars coming from behind. Reasonable care must be exercised in ascertaining their presence in the passing lane. The precautions above stated must then be taken.

The argument of counsel, as we understand it, is that, when Mrs. Verrill looked in her mirror just before she turned, the Harrington car was one of those following behind several hundred feet, and so great was its subsequent speed that it traveled that distance and reached the point of collision while the Verrill car, going at the rate

of fifteen miles an hour, went diagonally across twenty feet of cement in little, if any, more than a second of time. The mechanical perfection of the automobiles of today has not yet produced such speed. A reasonable interpretation of the evidence places the Harrington car close up to the Verrill car as the latter made its turn. They were traveling the main trunk line highway and not in the compact or built-up section of the town. There were no cars approaching from the opposite direction and, as already stated, the conduct of the driver of the car ahead indicated to Mrs. Harrington that two lanes were and would continue to be open and unobstructed. Under these circumstances, there is no credible evidence that she was driving at excessive speed when she started to pass or thereafter failed to exercise the care which could be reasonably expected of a person confronted with the turn of a car directly in front of him, creating an emergency requiring the quickest of judgment and instant action.

We are convinced that the weight of the evidence clearly indicates that the negligence of the defendant Mattie C. Verrill was the sole proximate cause of this accident. The verdicts in all these cases are based on a finding directly to the contrary. They are manifestly wrong and must be set aside. In each case, a new trial is granted and the entry is,

Motion sustained.

MARY C. WARD, ADMRX.

vs.

MAINE CENTRAL RAILROAD COMPANY.

Washington. Opinion, December 16, 1932.

FEDERAL EMPLOYERS' LIABILITY ACT. RAILROADS. NEGLIGENCE.

Contributory negligence of the employee under the Federal Employers' Liability Act affects damages, not liability of the employer.

A railway engineer in operating his train is under a duty to look ahead and see if the track is clear. If he sees a person on the track it is his duty to warn him; and if, because of interfering noises or any other reason, it is impracticable to convey a warning by use of bell or whistle, it may become his duty to bring his train to a stop.

When the record as it stands and the case as submitted to the jury warrants no conclusion other than that the sole proximate cause of the death of plaintiff's intestate was his own negligence, a verdict for plaintiff must be set aside.

In the case at bar, the plaintiff's intestate knew that the noise of the compressor near where he was standing would prevent his hearing an approaching train or a warning from its bell or whistle. He had but to look up the track before he left a place of safety to observe an oncoming train. Regardless of all this, he negligently walked directly in the path of the approaching train, continuing on to a point where no opportunity for escape was presented. His own conduct, not that for which the defendant was responsible, caused the tragedy which followed.

On exceptions and general motion for new trial by defendant. An action under the Federal Employers' Liability Act for the benefit of the widow and minor children of Arthur C. Ward, an employee of the defendant, who was killed while at his work. Trial was had at the June Term, 1932, of the Superior Court for Washington County. The jury rendered a verdict for the plaintiff in the sum of $8,500.00. To the refusal of the court to direct a verdict for the defendant and to grant certain requested instructions, defendant seasonably excepted, and after the jury verdict filed a general motion for new trial. Motion sustained. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Perkins & Weeks,

Harold H. Murchie, for defendant.

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

PATTANGALL, C. J. Motion and exceptions. Action brought under the Federal Employers' Liability Act for the benefit of the widow and minor children of Arthur C. Ward, an employee of defendant, who was struck and instantly killed by its train while engaged in reconstruction work on a bridge on its line. It is admitted that the statute relied upon is applicable to the case.

The case was tried to a jury which found for the plaintiff. The issues raised below were (1) negligence of defendant, (2) negligence of plaintiff's intestate, (3) assumption of risk by plaintiff's intestate. The Presiding Justice ruled, as a matter of law, that plaintiff's intestate was negligent and submitted the remaining questions. The sole issue to be considered by this Court is whether the evidence, taken in the light most favorable to plaintiff, warranted the verdict.

The record discloses no serious conflict of evidence. The bridge in question was two hundred and eighty-six feet in length, erected over a section of rocky shore at an elevation of thirty feet and crossed by a single railroad track. It was too narrow to permit the passage of a workman and a moving train at the same time. Ward was engaged in working underneath the bridge, but was at times obliged to cross over it. In the early afternoon of the day on which he was killed, he left his work at the westerly end of the bridge and crossed to the opposite end for the purpose of procuring some needed tools. About ten feet from that end of the bridge and twelve feet south of the southerly rail of the track, a steam compressor used in riveting was located, the box of tools being near it. Ward assisted the men in charge of the compressor in starting it, procured the needed tools, and turned to go back to his work. He proceeded approximately ten feet to reach the easterly end of the bridge, along which he had walked, at most, an additional ten feet when he was overtaken by the train and killed.

From the point where he stood by the compressor, he had a clear and unobstructed view of the track for a distance variously estimated at from five hundred to eight hundred feet toward the east, the direction from which the train approached; and during the few seconds that elapsed before he reached the point at which he met his death, there was no time when he would not have seen the oncoming train had he even casually glanced up the track.

This was not a regular train, but he was aware that as a rule it crossed the bridge daily between 11.30 A.M. and 1.30 P.M. It was in the vicinity of 1.00 P.M. that he was killed. There can be no question but that he was negligent in leaving the platform on which the compressor stood and walking out on the bridge without looking to see if a train was approaching. But if the defendant was negligent,

Ward's negligence would not constitute a defense. Contributory negligence under the statute governing this case affects damages, not liability.

The first important question, therefore, with which we are confronted is whether or not defendant was negligent. Plaintiff in her writ charged negligence on four counts. A ruling by the Court removed two of them from our consideration. The remaining charges are (1) failure of engineer to observe intestate and to exercise due care in operating locomotive; (2) like failure on the part of the fireman.

Plaintiff contended that no lookout was kept by engineer or fireman and that no warning was given of the approach of the train. There is some slight conflict of evidence on the latter proposition. The trainmen testified that the bell was rung. Three witnesses called by plaintiff testified that they heard no bell. This does not seem important, however, because all agree that the noise of the compressor would prevent those standing near it from hearing the bell. The speed of the train for some fifteen hundred feet before it reached the bridge was between eight and ten miles an hour. There appears, therefore, to have been no negligence so far as warning or speed is concerned in the operation of the train, or at least none which could be deemed a proximate cause of the injury sustained.

There remains the failure of the men in charge of the engine to observe Ward on the track. Unquestionably an engineer is under a duty to look ahead and see that the track is clear. If he sees a person on the track, it is his duty to warn him; and if, because of interfering noises or for any other reason, it is impracticable to convey a warning by the use of bell or whistle, it may become his duty to bring his train to a stop.

The engineer and fireman both testified that they were in their proper positions in the cab and were looking ahead; that as they approached the bridge they could see that there was no one on it or on the track near its easterly end. There was a slight curve in the road and they testified that about one hundred feet of the track immediately in front of them was not visible because of this curve and the engine shutting off that much of their view. It was apparently during the time that the train was traversing that dis-

tance that Ward left his place of safety on the compressor platform and walked along the track and upon the bridge. Considering the distance travelled by him and the speed of the train, he must have stepped on to the track when the train was not more than seventy or eighty feet distant. Defendant contends that seeing the track clear, the engineer had a right to presume that no one would be sufficiently reckless to walk directly in the path of an engine in plain view and but a few feet away, and that as he had seen a clear track all the way along and had especially observed that the bridge was clear of pedestrians, he was in the exercise of ordinary care in proceeding on his way. There was no other course for him to pursue unless he stopped or practically stopped his train at the point where his view was obscured, and to require this, defendant argues, would be to insist on the exercise of extraordinary care.

This argument appeals to us as sound. In the brief of plaintiff, it is stated that Ward was "out on the bridge, probably something over thirty feet" when struck by the train. If the record bore out that statement, the case might stand on an entirely different footing, but the fact is otherwise.

When the train was stopped, Ward's body lay between the first and second cars, ten feet from the easterly end of the bridge. After he was struck, the engine, tender and one car passed over him. The contact with the train necessarily pushed his body somewhat forward. He had, therefore, travelled less than ten feet on the bridge when overtaken.

A witness for plaintiff testified that he saw Ward on the bridge, just before he was struck, thirty feet away from where the witness was standing, not thirty feet from the end of the bridge. Counsel inadvertently misinterpreted the answer and the jury may have done so, but the evidence is plenary as to where the body was found.

The duty of an engineer with regard to keeping a lookout for the purpose of safeguarding employees working on or about railroad tracks is discussed in many opinions. We know of no precedent which would warrant sustaining a finding of negligence under the circumstances shown here.

The construction crew was at work underneath the bridge. No employees had reason to be upon the surface of the bridge excepting as they crossed it from time to time in connection with their

duties, and before doing so had ample opportunity to observe an oncoming train. It is in evidence that another workman started to cross and had proceeded some distance when he saw this train approaching and immediately returned to a place of safety. The bridge was clear when the train, moving at a rate of twelve or fifteen feet a second, had arrived at a point where any observer could see that it must reach the bridge in six or eight seconds. It was not reasonable to anticipate that anyone would attempt to cross under these circumstances. Ordinary prudence did not dictate providing against such an exigency.

On this record and as the case was submitted to the jury, the sole proximate cause of Ward's death was his own negligence. He knew the danger incident to walking on a railroad track. He knew that if he was overtaken by a train while crossing the bridge, there was no escape from death. He knew that the construction train was not running on a schedule but was likely to cross the bridge at or near the time when it did cross on the day in question. He knew that the noise of the compressor near which he was standing would prevent his hearing an approaching train or a warning from its bell or whistle. He had but to look up the track before he left a place of safety to observe an oncoming train. Regardless of all this, he negligently walked directly in the path of the approaching train, continuing on to a point where no opportunity for escape was presented. His own conduct, not that for which the defendant was responsible, caused the tragedy which followed.

Under circumstances somewhat similar, the United States Supreme Court denied recovery in *Reese* v. *Philadelphia R. R. Co.*, 239 U. S., 463, 36 S. Ct., 134, 60 L. Ed., 384; *Great Northern Railway Co.* v. *Wiles*, 240 U. S., 444, 36 S. Ct., 406, 60 L. Ed., 732; *Southern Railway Co.* v. *Gray*, 241 U. S., 333, 368 Ct., 558, 60 L. Ed., 1030.

In view of our conclusions, we do not need to discuss either the doctrine of assumption of risk and its application to the facts here set out or the exceptions taken to the refusal of the Presiding Justice to instruct the jury as requested on that phase of the defense.

We realize that the verdict of a jury should not be lightly set aside; but to stand, it must be based upon evidence. In this case, we find none to support it. *Motion sustained.*

FRED W. BOWLEY, ADMINISTRATOR OF THE ESTATE OF RALPH W. BOWLEY

vs.

LAWRENCE SMITH.

York. Opinion, December 30, 1932.

JURY FINDINGS. DAMAGES. EVIDENCE.

When testimony is conflicting a jury finding based upon reasonably sufficient evidence will not be set aside.

In an action to recover damages for injuries resulting in instantaneous death an important factor in determining the amount which may be properly awarded is the earning capacity of the deceased.

Age, health, occupation, means, habits, capacity, education, temperament and character are all pertinent to show probable pecuniary usefulness of the deceased.

In the case at bar, the evidence was sufficient to warrant the jury finding of liability on the part of the defendant, but evidence bearing upon the amount of damages was not sufficient to form any basis for rational computation. While such damage is not susceptible of exact computation and must be left to the discretionary judgment of the jury there must be some definite evidence upon which to base that judgment.

On general motion for new trial by defendant. An action brought by the plaintiff as Administrator of the Estate of Ralph W. Bowley under the provisions of Sections 9 and 10, Chapter 101, R. S., to recover damages for the death of Ralph W. Bowley for the use and benefit of Marie S. Bowley the widow and Ralph W. Bowley, Junior, the son. The action arose out of a collision on the highway which resulted in the instantaneous death of plaintiff's intestate. Trial was had at the May Term, 1932, of the Superior Court for the County of York. The jury rendered a verdict for the plaintiff in the sum of $5,000.00. A general motion for new trial was there-

upon filed by the defendant. Case remanded to the lower court for hearing in damages only. The case fully appears in the opinion.

Willard and Willard, for plaintiff.

Skillin, Dyer and Payson, for defendant.

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

BARNES, J. This action is brought by the administrator of a traveller who was killed on a highway in Gorham, for the benefit of a widow and heir-at-law as provided by statute.

The traveller, driving a coupe in an easterly direction, just before midnight, on a September day, meeting a truck loaded with telephone poles, drove so that the forward end of one of the poles hit the left upright of the automobile, a sliver from the pole shattered the windshield of the automobile, striking the head of the driver and killing him instantly.

The defendant pleaded the general issue and contributory negligence on the part of the deceased.

Verdict was for the plaintiff in the sum of five thousand dollars.

Before this Court on motion for new trial, defendant relies on lack of evidence of negligence on his part, contributory negligence, and that the damages are excessive.

It is admitted that the truck in collision was the property of defendant, operated by his servant, in the business of defendant.

The road at the place of the accident was for a long distance in either direction, straight, practically level, from fifteen and six-tenths feet to nineteen and seven-tenths feet wide at points measured, an "old tarvia" road, with gravel shoulders flush with the tarvia, and unlighted except by the headlights of the vehicles in collision. The width of the tarvia surface as measured nearest the point of collision was sixteen and one-half feet.

The night was "dark but clear." The only witnesses who saw the collision were defendant's driver and a young man seated with the driver at the time of contact.

The truck was moving westerly; the automobile toward the east.

Fragments of broken glass were observed that night toward the southerly margin of the tarvia of the roadway, and what were accepted as wheel tracks of the automobile ran easterly along such

southerly margin to a point one hundred twenty-five feet easterly of the first deposit of shattered glass, and thence on a sweeping curve across the road and to the point in the field north of the road where the car overturned and stopped.

There is no evidence of the speed at which plaintiff's intestate was driving when he collided with the truck other than an estimate of the passenger in the truck cab that as he saw it coming toward him, when only its lights were visible, it seemed to him to be moving at the speed of fifty miles or greater.

The automobile was properly lighted, and the assertion that its driver was guilty of contributory negligence because not at the right of the middle line of the way, at the time of collision (a fact to be found by the jury), may be dismissed as not proven, there being evidence on which a jury might properly find that the collision occurred on some portion of the road south of its middle line.

In the record there is conflicting evidence as to negligence of defendant's servant, the truck driver.

His work that night was to convey a load of logs, known as telephone poles, each thirty-five feet long, from Yarmouth, Maine, to Ashland, Mass.

The means of conveyance furnished him was a Chevrolet truck, with cab, but without body, to which, in the rear, was attached, by a pole about twenty feet long, a trailer, of two wheels.

Above the rear axle of the truck was secured a bunk six feet, six and a half incles in length, and a similar bunk was fastened to the axle of the trailer.

At Yarmouth, with some assistance, the driver loaded this conveyance, as he testified, by placing poles, the heavier or butt ends forward, on the ends of the forward bunk, so that the ends of the poles came within two feet of the cab, and binding them to the forward bunk. Three more poles were laid on the bunks; then a second tier of four poles, and a third of three poles. This load he said he bound with chains.

With this load he said he was driving on his right hand side of the road, with left wheels, "about in the center of the road when I saw him coming."

The only witness to the collision, the truck driver, and the passenger at his side testified that the driver of the automobile ap-

proached them on the same side of the road as the truck; that the truck driver swung the truck to the very margin of the tarvia, on his right; that the automobile was turned to its right, cleared the head of the truck but collided with it before getting by.

The truck driver testified that he was slowing down as the automobile approached and that he stopped within the length of his load of the point of contact. The young men left the truck, and finding it impossible to right the automobile, lying in the field, secured the assistance of two men living near and travellers who stopped at the scene, and when the automobile was being righted up the driver was found unconscious within it, his head severely bruised, and a large sliver of wood as from a log, perhaps eight inches wide at its larger end upon or with the body.

Two residents of Westbrook, following plaintiff's intestate, some minutes later, saw the truck standing, lighted, on the roadway, and as they cleared it saw an object protruding two feet or so from the left forward portion of the load, and observers, there, who were witnesses saw that such a sliver had been torn from what they term the butt and forward end of the left log of the load of poles.

The driver testified that all the poles were straight, others that the slivered pole had a crooked butt and that this projected beyond the line of wheels of the truck.

Mr. Samuel Porello, of Westbrook, said: "As I approached the lights; as I went below the lights I had to turn to my right sharp in order to avoid hitting a post sticking out."

Mr. Vallee, riding with Porello, testified; "We drove in the middle of the road, but when we saw this car Sam went over on the side, and as we got by . . . as we approached these lights we looked up and saw this projection. It looked like a log . . . he swerved his car a little bit to one side . . . we went by."

Mr. Vallee further testified that later he went back and looked the truck over. He said, "Of course I looked the first thing for the place where this piece had been taken out, and this log seemed to be — I should say it was laid this way, across the road, so that it projected over about two to two and one-half feet beyond the cab, the side of the cab."

Mr. Anderson, of the state highway police, who arrived at the scene just after the automobile was righted up, testified that the outside log on the left side of the truck was twelve to fourteen

inches in diameter at the forward end; that from it a sliver had been taken off, that it was straight, but "might have flanged a little at the very butt end," and that it lay straight in the load. Mr. Anderson testified that the broken glass seen by him most westerly on the roadway was "about where the rear wheels of the truck were, . . . very near the center" of the road.

The testimony can not be reconciled, but after consideration of all the evidence a jury might properly find that defendant's load had shifted after being loaded, with the result that a log projected into the road so as to be dangerous to other travellers, and that it was negligence on the part of defendant's servant not to know of the dangerous situation and correct it.

The evidence was sufficient to warrant the jury finding of liability on the part of defendant.

The amount of damages shall be what the jury "deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought."

R. S., Chap. 101, Sections 9 and 10.

In such cases an important factor in determining the amount which may properly be awarded is the earning capacity of the deceased. *Welch* v. *M. C. R. R. Co.*, 86 Me., 570, 30 A., 116; *McKay* v. *New England Dredging Company*, 92 Me., 454, 43 A., 29.

Age, health, occupation, means, habits, capacity, education, temperament and character are all pertinent to show probable pecuniary usefulness of the deceased.

Oakes v. *M. C. R. R. Co.*, 95 Me., 103, 49 A., 418.

In the case at bar evidence bearing on this important issue was not sufficient to form any basis for rational computation. It is obvious that such damage is not susceptible of exact computation and that much must be left to the discretionary judgment of the jury.

But there must be some definite evidence upon which to base that judgment.

The case should be remanded to the lower court for hearing in damages only.

To that extent

Motion sustained.

URBAN H. BEAUPRE *vs.* LOUIS H. SCHLOSBERG.

Androscoggin. Opinion, January 3, 1933.

PLEADING AND PRACTICE. POOR DEBTOR PROCEEDINGS.

R. S., CHAP. 124, SECS. 51 AND 52.

In poor debtor proceedings under Revised Statutes, Chapter 124, *Section* 51, *a justice of the peace must affix a seal to his citation to the creditor.*

Although under Section 52 *of Chapter* 124, *R. S., service of such a citation must be by attested copy, it is not necessary that a seal be affixed thereto or a reproduction of the seal on the citation be made.*

A seal is necessary to authenticate the citation, but it is not a part of it so as to make it necessary to set it forth in the copy served.

In the case at bar, the principal on the bond fully performed one of the alternative conditions of his obligation. This discharged the defendant as a surety.

On exceptions by defendant to the acceptance of the report of a Referee. An action of debt submitted upon an agreed statement of facts to a Referee under rule of court with right reserved to except as to questions of law. The issue involved the validity of a copy of a citation issued to the creditor by a Justice of the Peace on the debtors application in poor debtor proceedings, which bore no seal. The Referee found for the plaintiff. Defendant seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

Robinson & Richardson, for defendant.

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

STURGIS, J. This action of debt was referred under rule of court with the right reserved to both parties to except as to questions of law. It comes to this Court on exceptions to the acceptance of the report of the Referee.

The Agreed Statement of Facts upon which this case was submitted shows that a judgment debtor who was not a party to this

action, having been arrested on an execution in favor of the plaintiff, was released on giving a bond, signed by himself as principal and by the defendant as a surety. The bond was in statutory form and contained the usual condition that the obligation should be void if the debtor, within six months thereafter, cited the creditor before two justices of the peace, submitted himself to examination and obtained the oath prescribed in Revised Statutes, Chapter 124, Section 55.

Within the prescribed period, on application of the debtor, a magistrate issued a citation to the plaintiff as creditor, which was in due form and under seal. Service was by copy setting forth the full text of the citation, including the teste, "Given under my hand and seal at Portland in said County this twenty-sixth day of January, 1931." There was, however, no seal upon the copy served nor indication therein, outside the copy of the teste, that the original citation bore a seal.

The creditor not appearing in answer to the citation, a disinterested magistrate was chosen and the certificate shows that the debtor was duly examined and the oath administered. The plaintiff contends that the disclosure proceedings were void by reason of the lack of a reproduction of a seal on the copy of the citation and the defendant was not thereby released from the obligations of his suretyship. The Referee so ruled and found that the defendant was liable for the full amount of the execution.

It is well settled that a citation by a justice of the peace to a creditor in poor debtor proceedings must be issued under the hand and seal of the magistrate and substantially in the form prescribed by statute. R. S., Chap. 124, Sec. 51. Although "now affixed to legal instruments principally to furnish evidence of their authenticity," so long as a seal is required to be affixed, it can not be dispensed with. The citation is void if issued without a seal. *Miller* v. *Wiseman*, 125 Me., 4, 130 A., 504, 505.

We are of opinion, however, that a copy of the seal is not an essential part of the "attested copy" of the citation to be served upon the creditor as provided by R. S., Chap. 124, Sec. 52. The general and universal rule seems to be that the seal of an original process need not be reproduced in the copy for service. We find no mandate here, nor conflict in underlying statutes elsewhere, which

warrants the adoption of a different rule in poor debtor proceedings.

In *Sietman* v. *Goeckner*, 127 Ill. App., 67, a summons in due form and substance signed by the clerk of the court under the seal of the court was duly issued and an exact copy served on the defendant, except that there was no seal on the copy nor any marks or characters on it to denote that the original summons was in fact impressed with a seal, and the court said:

> "Though the seal may be necessary to authenticate the writ itself, it is not a part of the writ, so as to make it necessary to set it forth in the copy served. *Clutterbuck* v. *Wildman*, Tyrwhitt's Reports, vol. 2, p. 277; Chitty's General Practice, vol. 3, p. 260; Anderson on Judicial Writs and Processes, pp. 69 and 179.*
>
> "The seal, within the meaning of the statute here under consideration, is no part of the summons. Its office is to evidence the validity of the summons. The defendant can not take it for granted that the original summons is not properly sealed to give it validity, merely because the copy served takes no notice of it."

In *Herold* v. *Coates*, 88 Neb., 487, 129 N. W., 998, 999, under a statute requiring that "the service shall be by delivering a copy of the summons to the defendant personally," it was held:

> "The copy delivered to defendant embodies the statutory contents of a summons and shows that the original was issued by the clerk of the District Court. It also contains the words, 'Witness my official signature and the seal of said Court,' It was a perfect copy except that the seal was not reproduced. To hold under such circumstances that the sheriff did not deliver a 'copy' of the summons to defendant would require a construction too narrow and technical. A copy of the seal is not an essential part of the copy contemplated by statute."

In *Elramy* v. *Abeyounis*, 189 N. C., 278, 126 S. E., 743, 744, it is observed:

> "In this case, the original summons bore the proper seal and the copy purported to have been attested in like manner. The

copy included every material part of the original except the seal, the omission of which not affecting the substance of the writ, did not impair the efficacy of the service or in any way mislead or prejudice the defendant. In affixing the seal, the object is to evidence the authenticity of the summons, but the seal is not a part of the summons in the sense that its impress upon the copy is essential to the validity of the original."

Further approval of this general rule is found in the text and citations of 21 R. C. L., 1325; L. R. A. 1917, C 154; 50 C. J., 484. The case of *Com.* v. *Quigley*, 170 Mass., 14, 48 N. E., 782, relied upon as holding to the contrary, is not in point.

On the evidence, the plaintiff's judgment debtor having fully performed one of the alternative conditions of his bond, the obligation became void and his sureties were discharged. The ruling below was error.

Exceptions sustained.

WALDO BROS. COMPANY

vs.

N. W. DOWNING

and

THE INHABITANTS OF THE TOWN OF LIMESTONE, TRUSTEE.

Aroostook. Opinion, January 6, 1933.

MUNICIPAL OFFICERS. BILLS AND NOTES. WORDS AND PHRASES.

There is a distinction between signing an instrument and countersigning it. The legal meaning of the word "countersign" is "to sign or mark for authentication"; "to sign in addition to the signature of another in order to attest authenticity."

Town officers have no authority to negotiate loans or execute notes in the name of a town without express authority of the town, given in its corporate capacity.

In order to determine the obligations assumed by those signing a document, the entire contents of the document must be considered.

A note taken with words written on its margin and not essential to it is taken subject to the explanation contained in the words, which bind the signer as firmly as though they were a part of the promise. Such words furnish evidence of the understanding of the promissor and promissee.

In the construction of a note, the intention of the parties is to control if it can be legally ascertained; and it is competent for the Court to determine from the paper itself, in the light of the circumstances in which it was given, what was the actual intention of the parties.

Applying these rules to the case at bar, an examination of the whole document leads to the conclusion that the plain intent of the treasurer of the town was to join with the selectmen in executing the note in question; and that the word "countersigned" prefacing her signature was used without thought of its technical legal meaning and may be disregarded. The note, as between the parties thereto, constituted a binding obligation of the trustee.

On exceptions by plaintiff. An action of assumpsit. The question at issue involved the validity of a promissory note given by the trustee to the principal defendant. The principal defendant was defaulted by agreement, but the Presiding Justice decreed and ordered trustee discharged with costs for trustee. To this decree and order, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

William R. Roix, for plaintiff.

Granville C. Gray, for defendant.

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

PATTANGALL, C. J. On exceptions by plaintiff. Assumpsit. Principal defendant defaulted. Trustee disclosure filed. Trustee discharged. Writ dated January 27, 1932, and served on trustee on the following day. Trustee admitted being indebted to principal defendant on open account in the sum of $1,114.10 on January 26, 1932, but claimed to have given him on that date a promissory note for that amount, thus liquidating the debt and relieving it from liability as trustee.

Plaintiff claims that the note in question is invalid and has no effect in extinguishing principal defendant's claim against the town, at least so far as these proceedings are concerned.

The disclosure of the trustee contained a copy of the document in question:

"$1,114.10 Limestone, Maine Jan. 26th, 1932.

On demand after date, the Inhabitants of the town of Limestone promise to pay to the order of N. W. Downing One thousand, one hundred and fourteen dollars and ten cents at any bank. Value received.

Inhabitants of the Town of Limestone.
by
E. A. Noyes
H. H. Thompson
W. K. Fenlason
Selectmen of the town of
Limestone.

Countersigned:
Edna H. Long
Treasurer of the Town of Limestone.

The above note is issued in accordance with a vote of the Inhabitants of the Town of Limestone passed at the annual Town meeting of the Inhabitants of said Town of Limestone, held March 16th 1931 to be used for current expenses during the year within which the same are made out of money raised during the current year by taxation and bearing interest at the rate not to exceed seven percent, and is a legal obligation of the Inhabitants of the said Town of Limestone, Maine.

Inhabitants of the Town of Limestone.
By
E. A. Noyes
H. H. Thompson
W. K. Fenlason
Selectmen of the Town of
Limestone, Maine.

Edna H. Long
Treasurer of the Town of Limestone."

In March, 1931, at their regular annual meeting, the Inhabitants of Limestone voted "to authorize the selectmen and town treasurer to execute and negotiate Town of Limestone notes for sums not greater than actually necessary to pay current expenses payable during the year within which the same are made out of money raised during the current year by taxation and bearing rate of interest not exceeding 7%."

The sole issue in the case is whether this note was legally executed and negotiated by the selectmen and the town treasurer in their official capacity in conformity with the vote of the Inhabitants of the Town of Limestone so as to create liability on the part of the town.

Plaintiff argues that such is not the case because the vote of the town was to "authorize the selectmen and treasurer" to execute and negotiate notes, and says that this note was executed by the selectmen alone without authority, that the signature of the treasurer on the note was without effect, being preceded by the word "Countersigned," and that by merely countersigning the instrument the treasurer created no liability on the part of the town.

It is true the town did not give the selectmen authority to execute and negotiate notes in its behalf. Neither did it give such authority to the treasurer. Joint action on the part of these officials was necessary in order to conform to the vote and bind the town. It is also true that there is a distinction between signing and countersigning an instrument. Webster defines the verb "countersign" as follows: "To sign in addition to the signature of another, in order to attest the authenticity. To sign or mark for authentication." And the noun, "The signature of a secretary or other person to a writing already signed by another, to attest its authenticity." These definitions are adopted by legal authorities. 15 C. J., 378.

Town officers have no authority to negotiate loans or execute notes in the name of the town without express authority of the town given in its corporate capacity. "This is too well settled to require citation of authorities." *Parson* v. *Monmouth*, 70 Me., 262; *Ross* v. *Brown*, 74 Me., 352.

In order to determine the obligation of the trustee to the principal defendant, we must consider as a whole the document executed by the officers of the town and delivered to him. In *Tuckerman* v.

Hartwell, 3 Me., 155, and *Hobart* v. *Dodge*, 10 Me., 595, our Court adopted the reasoning of *Jones* v. *Fales*, 4 Mass., 245, wherein, speaking of certain words written on the margin of a promissory note and not essential to it, the Court said, "The next question is, whether these words, thus written and placed, are a part of the promissor's contract. I do not think it material, whether they were a part of the original contract or added in explanation of it. For when the promissee took the note with these words on it, he was subject to the explanation in the memorandum, if it was one, as much as he would have been bound by these words, if they were a part of the promise. I consider those words as furnishing evidence of the understanding of the promissor and promissee . . ."

"In the construction of a note, the intention of the parties is to control if it can be legally ascertained. It is competent for the Court to determine from the paper itself in the light of the circumstances in which it was given what was the actual intention of the parties." *Nichols* v. *Frothingham*, 45 Me., 225.

The rule is well established that the intention of the parties to a contract is to be determined by a study of its entire contents, no part of which may properly be excluded from consideration; and it has been universally held that anything written or printed on a promissory note, prior to its issuance, relating to the subject matter of the instrument must be regarded as a part of the contract evidenced thereby and is to be given due weight in its construction.

Applying these rules to the instant case, an examination of the whole document leads to the conclusion that the plain intent of the treasurer of the town was to join with the selectmen in executing the note in question; and that the word "countersigned" prefacing her signature was used without thought of its technical legal meaning and may be disregarded. The note, as between the parties thereto, constitutes a binding obligation of the trustee.

Exceptions overruled.

JULIE E. JENSEN, EXECUTRIX *vs.* WESLEY M. SNOW.

Cumberland. Opinion January 9, 1933.

EQUITY. FRAUD. LACHES. PRINCIPAL AND AGENT.

No principal of law is better settled than that which requires an agent in all dealings concerning the subject matter of his agency to act with utmost good faith and loyalty and disclose all facts within his knowledge which bear materially upon his principal's interests.

The rule that withholding information, when good faith and honest dealing require that it shall be given, is as culpable as misrepresentation as to facts concerning which good faith and honest dealing require the truth to be spoken is fully applicable to the relation of principal and agent.

A mistake as to facts based on a fraudulent concealment is ground for rescission and cancellation.

A mistake as to the legal effect of a transaction is sufficient for that purpose if a confidential relation exists and the mistake occurs under such circumstances that fraud, imposition or undue influence can be inferred.

A person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he has actual or imputed knowledge of his rights.

Where there is a relation of trust and confidence between the parties, in the absence of actual knowledge, the law will not impute constructive knowledge and permit the perpetrator of a fraud to stand upon the defense of delay which is induced by lulling his victim into a sense of security while his confidence is being betrayed.

Irrespective of whether the injured party has an adequate remedy at law or for want of equitable remedy will suffer an irreparable loss, fraud is one of the fundamental grounds of equitable jurisdiction.

In the case at bar, the confidential relationship between the defendant and his principal in the transaction here involved was such that the law will not assume that there was no abuse of confidence. The presumption is of invalidity, which can only be overcome by clear evidence of good faith on the part of the agent and full knowledge and independent consent and action by the principal.

It being averred that the plaintiff's testator either had no knowledge of the frauds charged or none until just prior to his death, when ill health prevented the commencement of an action for rescission, and that such ignorance is at-

tributable to a continued confidence in the fidelity of his agent induced by the latter's concealments, laches, if there be such, are excused on the face of the pleading.

This action is not barred by Revised Statutes, Chapter 95, Section 103. Six years have not elapsed since the frauds here averred were discovered.

Inasmuch as Rasmus Jensen died testate, it may be assumed that there were devisees under his will. If not and there was intestacy, title to real property standing in his name passed by the laws of descent.

The executrix bringing this action had no title, by virtue of her office, in the real estate of her testator and, if she finally prevailed, it does not appear that she could alone do equity.

The holders of the legal title to the real estate here involved were indispensable parties and their joinder necessary before a final decree could be entered.

The plaintiff here stated a case cognizable and remediable in equity.

On appeal by complainant. A Bill in Equity for the cancellation of an assignment of a note and mortgage and of a deed. Respondent filed a demurrer which was sustained. Appeal was thereupon taken by complainant. Appeal sustained. Case remanded for further proceedings in accordance with this opinion. The case fully appears in the opinion.

Coombs & Gould,
Clarence W. Peabody, for complainant.
Albert E. Neal,
Laughlin & Gurney, for respondents.

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

STURGIS, J. Bill in Equity for the cancellation of an assignment of a note and mortgage and of a deed, with prayers for recovery of the moneys paid and for incidental and general relief. After amendment, the defendant's demurrers were sustained and the bill dismissed. The case comes forward on appeal.

In her capacity as executrix of the last will and testament of Rasmus Jensen, her husband, now deceased, the plaintiff avers, in substance, that from sometime in 1911 until June 30, 1930, when Mr. Jensen died, the defendant acted as his confidential adviser

and agent. All the decedent's surplus earnings were entrusted to and invested by the defendant, and the notes, mortgages and other securities taken were retained by him. Except for a short period immediately preceding Mr. Jensen's death, he relied solely on the defendant for advice as to all his investments, retained full confidence in him and neither sought nor accepted advice from other sources. As a preface to the foregoing, it is set out that Mr. Jensen was a man of humble calling with practically no knowledge of business matters. This averment sets out with requisite certainty that a confidential relation existed between the plaintiff's testator and the defendant.

The plaintiff continues her pleadings with the complaint that on January 28, 1922, the defendant acquired, through foreclosure, the equity of redemption in twenty-three lots of land with the buildings thereon situated at the corner of Ravina Street and Taft Avenue and in a common and undivided one-half interest in two hundred and one lots of land in Carter Place, so called, all in the city of Portland and subject to a first mortgage of $2,500 to one Arthur E. Moore as security for a note of even date and like amount. Two months later, on March 28, 1922, Blanche R. Snow, the defendant's wife, acquired title to this mortgage and note and on September 20, 1922, following, released from it the one-half interest in the two hundred and one lots in Carter Place. And the plaintiff avers that thereafter on November 1, 1922, the defendant, knowing that the maker of this mortgage was in default and that, after the release of the lots in Carter Place, the security of the mortgage did not exceed one-half the debt, induced the decedent, Rasmus Jensen, to purchase said note and mortgage and pay therefor $2,500, then also well knowing that the purchaser believed that the mortgage note was safely and fully secured. And it is set forth that the decedent, through his reliance upon the advice of and his confidence in the defendant, remained in ignorance of the inadequacy and practical worthlessness of the security of this investment until his death.

A summary of the FIFTH PARAGRAPH as amended is that on April 2, 1926, the defendant, having in his possession for investment sundry moneys, notes and mortgages belonging to the plaintiff's husband and all of a value of approximately $7,500, induced

him to accept therefor a parcel of land with the buildings thereon owned by the defendant and situated in South Portland, the defendant well knowing that the buildings were without modern improvements and in a low state of repair and the entire property worth not more than $2,500. The plaintiff avers that, as a part of this trade, her husband was induced to give and did give the defendant a lease of the premises for five years at a rental of $450 per annum but with no right of entry by the lessor, and an option of repurchasing the property during the term for $7,500. And she further avers that the defendant well knew that her decedent, misunderstanding and failing to comprehend the nature and effect of the transaction, believed that the property which had been conveyed to him was fairly worth the consideration which he paid for it, and that the defendant was legally bound by his option to repurchase it within five years. It is also pleaded that, all papers relating to this trade having been drawn by the defendant, he retained them together with the property in his exclusive possession and kept his principal in ignorance of the true nature and effect of the transaction until just prior to the latter's decease.

No principle of law is better settled than that which requires the agent in all dealings concerning matter of his agency to act with utmost faith and loyalty and disclose all facts within his knowledge which bear materially upon his principal's interests. The rule that withholding information, when good faith and honest dealing require that it shall be given, is as culpable as misrepresentation as to facts concerning which good faith and honest dealing require the truth to be spoken is fully applicable to the relation of principal and agent. As has been said, it is fraud to deal with a party in ignorance and leave him so. It is not necessary that the party sought to be charged should have created the false impression nor intended it. It is sufficient that he knows it and takes advantage of it. *Manufacturing Co.* v. *Smith*, 113 Me., 347, 351, 93 A., 968; *Barrett* v. *St. Ry. Co.*, 110 Me., 24, 29, 85 A., 306; *Prentiss* v. *Russ*, 16 Me., 30; *Lapish* v. *Wells*, 6 Me., 175.

We think the plaintiff has well pleaded a fraudulent concealment by the defendant in each of the transactions here attacked. A mistake as to facts based on such a fraud is undoubtedly ground for rescission and cancellation. So too, a mistake as to the legal

effect of a transaction is sufficient for that purpose if a confidential relation exists and the mistake occurs under such circumstances that fraud, imposition or undue influence can be inferred. *Stover* v. *Poole*, 67 Me., 217; *Busiere* v. *Reilly*, 189 Mass., 518, 75 N. E., 958. Here, in addition to the inferences fairly to be drawn from the facts averred, there are presumptions of fraud. The confidential relation between the defendant and his principal was such that the law will not assume that the transactions were fair and there was no abuse of confidence. The presumption is of invalidity, which can only be overcome by clear evidence of good faith on the part of the agent and full knowledge and independent consent and action by the principal. *Burnham* v. *Heselton*, 82 Me., 495, 20 A., 80.

The defendant assigns for special causes of demurrer that the bill shows that the plaintiff's husband was guilty of laches in not commencing and prosecuting actions in his lifetime to avoid his transactions here attacked. And against the demand for the cancellation of the assignment of the Samuel B. Lowell note and mortgage, he raises the bar of the Statute of Limitations.

As already noted, it appears on the face of the plaintiff's pleadings that the fraudulent acts and omissions with which she charges the defendant in connection with the Lowell note and mortgage occurred nearly eight years before her husband's death and that he lived four years at least after his trade for the defendant's South Portland property was consummated. Unexplained, these delays might be open to the charge of laches. But a person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he has actual or imputed knowledge of his rights.

Here, it is averred that the plaintiff's husband either had no knowledge of the frauds charged, or none until just prior to his death, when ill health prevented the commencement of an action for rescission, and his ignorance is attributed to a continuing confidence in the fidelity of his agent, induced by the latter's concealments. "One who, by his own fraud, has led another to his injury can not complain of the want of promptness of the plaintiff in discovering the fraud and proceeding to rescind, since it was the defendant's concealment in violation of his duty to him and his interests which prevented the plaintiff from knowing the actual conditions at the time of the transaction. Equity rewards the diligent,

but this has no application to the diligent in concealment and deceit." 1 Story's Eq. Jur., Sec. 86; *Mabry* v. *Randolph*, 7 Cal. App., 421, 427. Where there is a relation of trust and confidence between the parties, in the absence of actual knowledge, the law will not impute constructive knowledge and permit the perpetrator of a fraud to stand upon the defense of delay which is induced by lulling his victims into a sense of security while his confidence is being betrayed. *Kelley* v. *Boettcher*, 85 Fed., 55; *Krohn* v. *Williamson*, 62 Fed., 869; *Kilbourn* v. *Sunderland*, 130 U. S., 505, 9 S. Ct., 594, 32 L. Ed., 1005; *Arkins* v. *Arkins*, 20 Col. App., 123, 77 P., 256; *Phalen* v. *Clark*, 19 Conn., 420; *Driver* v. *Brunemer*, 40 D. C. App., 105; 5 Pomeroy's Eq. Jur., 27; 21 C. J., 249. The failure of Rasmus Jensen in his lifetime to seek avoidance of his transaction with the defendant can not, under the circumstances set forth here, be deemed laches which bar this action. The causes and excuses for his delay, apparent on the face of the pleading, are sufficient as against demurrer. *Shattuck* v. *Jenkins*, 130 Me., 480, 157 A., 543.

R. S., Chap. 95, Sec. 103, is the statute of limitations invoked. Its provision is that "if a fraud is committed which entitles any person to an action, the action may be commenced at any time within six years after the person entitled thereto discovers that he has a just cause of action. The statutory period has not run since the frauds here averred were discovered.

The bill, on its face, seems to be defective as to parties. Inasmuch as Rasmus Jensen died testate, it may be assumed that there are devisees under his will. If not and there was intestacy, title to real property standing in his name passed by the laws of descent. The executrix bringing this action has no title, by virtue of her office, in such property and, if she finally prevails, it does not appear that she can alone do equity. If the defendant should be ordered to return the considerations which he received for his South Portland property from the plaintiff's testator, he would be equitably entitled to a reconveyance of the property. Presumably, that could come only from the holders of the legal title. They seem to be indispensable parties. *Busiere* v. *Reilly*, supra; *Parker* v. *Simpson*, 180 Mass., 334, 341, 62 N. E., 401; *Strout* v. *Lord*, 103 Me., 410, 69 A., 694. This objection as to nonjoinder of the parties is apparent on the face of the pleadings. It is open but not argued under the

general demurrer. It may be raised by the court *sua sponte*. *Laughton* v. *Harden*, 68 Me., 208; *Strout* v. *Lord*, supra. Until all necessary parties are joined, no full and final decree can be entered.

Irrespective of whether the injured party has an adequate remedy at law or for want of equitable remedy will suffer an irreparable loss, fraud is one of the fundamental grounds of equitable jurisdiction. *Trask* v. *Close*, 107 Me., 137, 77 A., 698; *Masters* v. *Van Wart*, 125 Me., 402, 134 A., 539. We are convinced that the plaintiff has stated a case cognizable and remediable by a court of equity.

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

KIRSTEIN HOLDING COMPANY *vs.* BANGOR VERITAS, INC.

Penobscot. Opinion, January 9, 1933.

BANKRUPTCY. LANDLORD AND TENANT. FORCIBLE ENTRY AND DETAINER.

Upon the bankruptcy of a tenant, provided that by the terms of his lease the tenancy is not thereby terminated, the leasehold interest of the bankrupt passes to the Trustee if he elects to accept it as an asset of the estate to be reduced into money for distribution among the creditors.

If the Trustee does not within a reasonable time accept the property of the bankrupt as an asset of the estate, he is deemed to have elected to reject it and the title thereto remains in the bankrupt.

If the Trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his lessor are not disturbed.

If the Trustee once makes his election to renounce the lease as an asset of the bankrupt estate, his interest in it is terminated and a subsequent attempt to assign it is a nullity.

In the case at bar, the Trustee did not reject the plaintiff's lease to the bankrupt. Considering the many items of property in the bankrupt estate, the legal formalities necessarily to be observed and the magnitude of the transaction

generally, it can not be held that there was an unreasonable delay on the part of the Trustee in electing to affirm the lease.

The Trustee did not delegate its right of election to the purchaser. The lease became an asset of the bankrupt estate through the official affirmance of it by the Trustee.

The Trustee was within its rights in occupying the premises and paying the rent. When the lease was affirmed, the Trustee was substituted as lessee and thereafter its assignee succeeded to its rights and liabilities.

There being no default in the conditions of the lease, the defendant had the rights of a lessee in the plaintiff's premises and could not be deemed a disseizor under R. S. Chapter 108, Section 1.

On report. An action of forcible entry and detainer reported to the Law Court for its final determination upon so much of the evidence as was legally admissible. Judgment for the defendant. The case fully appears in the opinion.

A. M. Rudman, for plaintiff.

Andrews, Nelson & Gardiner, for defendant.

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

STURGIS, J. This is an action of forcible entry and detainer brought up on report upon so much of the evidence as is legally admissible.

The Kirstein Holding Company, a corporation, owns the land and buildings known as and numbered 35 on Main Street in Bangor, now occupied by the defendant. When purchased, the property was subject to a lease to the Schulte-United, Inc., a New York corporation, for the term beginning November 1, 1928, and ending February 28, 1949. By the terms of the indenture, the lessee had the right to sublet and to assign without release from its own obligations. There was no provision for a re-entry or forfeiture by the landlord in case the tenant became bankrupt or its estate otherwise devolved by operation of law. The ordinary covenants of a lease were included, but are not here material.

On February 5, 1931, the Schulte-United, Inc. having been adjudicated a bankrupt, the Irving Trust Company of New York

City was duly appointed and qualified as its Trustee. The bankrupt estate included about two hundred leases, twelve properties owned in fee, and the furniture, fixtures and merchandise in eighty-nine stores located in the United States and Canada.

The Trustee occupied the leased premises and paid rent in the amount stipulated in the lease until March 1, 1932, when the defendant corporation, to which it had assigned the lease, entered and took possession. Contending that the Trustee had lost its right to affirm the lease as an asset of the bankrupt estate prior to the assignment, the plaintiff refused to recognize the defendant's right of possession and instituted this action.

It appears that, following negotiations covering a period of some little time, on August 7, 1931, one David A. Schulte filed with the Creditors' Committee of Schulte-United, Inc. his offer for all the assets of the bankrupt estate, reserving the right, however, to select such lease-holds as he desired and reject the others, the leases on those taken to be assigned to him or his designee as he might elect. This offer was received by the Trustee on September 1, 1931, but it was not until October 23, 1931, that the Referee in Bankruptcy approved it and ordered that it be accepted. The offer called for written notice of acceptance on or before December 1, 1931, and that, in case thereof, the agreement should be closed not less than thirty (30) days nor more than forty (40) days thereafter. It is evident that this condition was complied with. On December 17, 1931, the Trustee wrote this plaintiff that it had agreed to assign this lease to D. A. Schulte or his designee and intended to make the transfer on December 31, following. The record shows that an assignment of the lease to the defendant, the Bangor Veritas, Inc., duly designated to receive the same, was made as of December 30, 1931. When the assignment was delivered does not appear and is not material to the case. It was recorded February 3, 1932, and was undoubtedly in the defendant's possession prior to that time.

It is well settled that upon the bankruptcy of the tenant, provided that by the terms of the lease the tenancy is not thereby terminated, the leasehold interest of the bankrupt passes to the trustee, if he elects to accept it, as an asset of the estate to be reduced into money by assignment or otherwise for distribution

among the creditors. A few of the many cases supporting this rule are *First Nat. Bank* v. *Lasater*, 196 U. S., 115, 25 S. Ct., 206, 49 L. Ed., 408; *Dushane* v. *Beall*, 161 U. S., 513, 16 S. Ct., 637, 40 L. Ed., 791; *Trust Company* v. *Railroad*, 150 U. S., 289, 14 S. Ct., 86, 37 L. Ed., 1085; *In re Frazin*, 183 Fed. Rep., 28; *Waston* v. *Merrill*, 136 Fed. Rep., 358; *English* v. *Richardson*, 80 N. H., 364, 117 A., 287; *Dow* v. *Bradley*, 110 Me., 249, 85 A., 896; *Fleming* v. *Courtenay*, 98 Me., 401, 57 A., 592.

It is equally well settled that, if the Trustee does not accept the property of the bankrupt as an asset of his estate within a reasonable time, he is deemed to have elected to reject it and the title to the asset, whatever it is, remains in the bankrupt. A lease is not terminated by the adjudication in bankruptcy of the tenant unless there be provision to that effect in the indenture, and, if the Trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his lessor are not disturbed, the bankrupt retaining "the term on precisely the same footing as before, with the right to occupy and the obligation to pay rent." *In re Roth*, 181 Fed. Rep., 667; *In re Scruggs*, 205 Fed. Rep., 673; *In re Sherwoods, Inc.*, 210 Fed. Rep., 754; *English* v. *Richardson*, supra. It necessarily follows that, if the Trustee once makes his election to renounce the lease as an asset of the bankrupt estate his interest in it is terminated and he has no further concern with it. *In re Sapinsky*, 206 Fed. Rep., 523, 524. A subsequent attempted assignment of it by the Trustee is, of course, a nullity.

Support for the plaintiff's claim that its lease with Schulte-United, Inc. was rejected by the Irving Trust Company is entirely lacking in this record. During the early months of its administration of the bankrupt estate, the Trustee several times notified the landlord that the right of election to affirm or disaffirm the lease was reserved and postponed because of the complicated nature of the estate. This asset was but one of many. Necessarily some few months passed before its worth could be ascertained. In fact, there is no indication that it had even a possible sale value until August 7, 1931, when the D. A. Schulte offer was made with its reservations and conditions. Until that offer was confirmed by the creditors and approved by the Referee in Bankruptcy, the Trustee could not and did not accept it. After that date, considering the

magnitude of the transaction, the many items of property involved and the legal formalities necessarily to be observed, the transaction was closed with creditable dispatch and, when, for the first time, the Trustee received definite assurance that this lease was not a burden, it accepted it as an asset for the creditors. The letter of the Trustee of December 17, 1931, warrants the inference that it had elected to affirm the lease at that time. We are not of opinion that the delay was unreasonable.

There is no merit in the contention that an unreasonable delay resulted from a delegation of the Trustee's right of election to D. A. Schulte. It is true that the Trustee awaited the purchaser's election to buy the lease before affirming it, but this was not a delegation of its right of election and the postponement was justified. The lease became an asset of the bankrupt estate only through its affirmance by the Trustee acting in its official capacity.

The plaintiff shows no prejudice or loss in its complaints that it was not fully and promptly informed of the various steps and proceedings taken by the Trustee in effecting the sale of the assets of the Schulte-United, Inc. or as to when the election to affirm this lease was made. The Trustee was fully within its rights in occupying the premises and paying the rent. *Crowe* v. *Bauman*, 190 Fed. Rep., 399; *In re Sherwoods, Inc.*, supra. Express notice was given that the election would be postponed until the value of the lease as an asset was determined. If the lease had been disaffirmed, Schulte-United, Inc. would have continued as a tenant. *In re Roth et cetera*, supra. When the lease was affirmed, the Trustee was substituted as lessee and thereafter its assignee succeeded to its rights and liabilities. There was, at no time, any default in the conditions of the lease.

The defendant, on this Report, having in the eyes of the law all the rights of a lessee in the premises at 35 Main Street in Bangor, owned by the plaintiff, it can not be deemed "a disseizor who has not acquired any claim by possession and improvement." R. S., Chap. 108, Sec. 1. This action of forcible entry and detainer, based on that statute, can not be maintained.

Judgment for the defendant.

WILHELMINA H. DAVIS *vs.* EDWARD T. TOBIN,

CATHERINE M. DAVIS *vs.* EDWARD T. TOBIN.

Aroostook. Opinion, January 10, 1933.

MOTOR VEHICLES. INVITED GUESTS. NEGLIGENCE. DAMAGES.

The negligence of the driver of an automobile is not imputable to a passenger who does not fail to do what an ordinarily prudent passenger would have done in the face of similar conditions.

When there is no standard by which damages can be measured, the question must be left to the sound sense and good judgment of the jury, to award such damages as seem to them to be fairly compensatory. When the verdict is within the bounds of reason, the Court will not interfere even though the verdict may seem to them somewhat large.

In the case at bar, the jury found no negligence on the part of the passengers. The admission of the depositions of the witnesses to the accident was within the properly exercised discretion of the Presiding Justice. In view of all the testimony the damages awarded to Catherine Davis could not be held excessive.

On exceptions and general motions for new trials by defendant. Two actions on the case tried together to recover damages for personal injuries sustained by the plaintiffs in a collision between an automobile in which they were passengers, and an automobile driven by the defendant. Trial was had at the February Term, 1932, of the Superior Court for the County of Aroostook. To the exclusion of certain testimony defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff, Wilhelmina H. Davis in the sum of $600.13, and for the plaintiff Catherine M. Davis, in the sum of $1,125.00, filed a general motion for new trial in each case. Motions and exceptions overruled. The cases fully appear in the opinion. .

Bernard Archibald,

H. C. McManus, for plaintiffs.

J. Frederic Burns, for defendant.

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

BARNES, J. In the Superior Court three cases, the two here considered and that of Frank A. Davis, the driver of the automobile in which the plaintiffs here were injured in collision with defendant's car, were tried together.

The jury returned a verdict in favor of the defendant in the case brought by the driver, and verdicts for the plaintiffs here.

Defendant brings the plaintiffs' cases up on general motions for new trial, and on exceptions.

The two cases may be treated effectually in one opinion.

The accident occurred in Union Square of Houlton village, at about 11.30 A.M., on August 31, 1929.

Frank H. Davis was then and there driving a roadster, his daughter Catherine seated at his right, his wife in the rumble.

He crossed the iron bridge, so-called, moving then southerly and proceeded into Union Square, which is an enlargement of the Bangor road.

Union Square joins Market Square on the east, Kendall Street on the south, and the Bangor road westerly.

Mr. Davis testified that he had previously driven up the Bangor road into Market Square a dozen times, but that he had never entered Houlton, by U. S. Route 2, over the iron bridge before; that he started from a stop near the mouth of the bridge, and moving in second gear, climbed the slight rise that faced him, if he should enter Kendall Street, a continuation of the road he was then on, or should turn to his right to proceed out along the Bangor road.

The turn to run out along the latter road is practically a right hand turn, and in the angle, flush with the sidewalk on Union Square and the northerly margin of the Bangor road, a hotel building cut off his view to the west, until he was up the hill and in the Bangor road.

As he drove into this intersection of four streets, an automobile standing before the hotel building further limited his field of vision.

At this time the top of the roadster was down, and the daughter, on the right front seat, was talking with her mother in the rumble, presenting, as she sat, her back toward the door and Bangor road.

Defendant, just before the collision, drove his car, a Hudson coach, from a car service shop situated, as he testified, three hundred feet westerly from the point of collision, up the Bangor road.

He testified, and all witnesses agree, that he traversed the southerly, his right hand, portion of the street from a point seventy-five or eighty feet westerly of the point of collision until very near the car of plaintiffs.

He testified that as he approached the intersection of Kendall Street and the Bangor Road he saw a car emerging from Kendall Street: that he soon saw the Kendall Street car swerve easterly as if to proceed into Market Square, and then for the first time saw the roadster when he was thirty-five feet from it, and thirty feet from the point of collision.

His words were, "It seemed to me as if he was going down Bangor himself; so I didn't pay much more attention to him. I didn't watch him strike at all, I was watching the other fellow; and the next time I looked around I see then he was starting to go straight across the street. When he did I turned sharp to the left to avoid him. I see I couldn't go around behind him, so I slammed on the brake."

While the jury had the above for consideration they had also the testimony of Mr. Davis that, on the scene and at the time, "I asked him what in the world was the matter that made him run into me, and he said he never saw me. He said positively that he never seen me." Of two men who were near the cars when they came together, had unobstructed view, and who testified that they looked at defendant's car as it rolled to collision, called by defendant, one gave no testimony as to speed of defendant's approach, or slackening before impact, the other that the approach was at about twelve miles an hour and that he observed no slackening.

Two disinterested men who stood almost in the path of the roadster, in depositions, aver that defendant's close approach was at a speed between thirty-five and forty-five miles an hour, and that he did not slacken speed until the cars were in collision.

A woman, who was seated in the car that stood in front of the hotel building, in her deposition testified that defendant drove his car, "at a fast rate of speed, and he was looking at my car which was standing on the side of the street and he was not looking in the

direction in which he was going . . . the driver was looking at a monkey playing in my car."

Further testimony of defendant, in cross examination, reads,

"Q. And at the rate of speed you were travelling just before the collision, with the condition the car was in and the brakes, how far do you say your car would have travelled if you had put your brakes on when you deemed a collision imminent?

A. It wouldn't have went very far.

Q. How far in your opinion?

A. Oh, somewheres around a foot.

Q. You thought the Davis car was about stopping, you say?

A. Well, I thought he was either stopped or he was stopping right there.

Q. What made you think that?

A. He was coming in on my left and I supposed I was protected on that side.

Q. Don't you know whether the Davis car was in motion or standing still when you first saw it?

A. I didn't pay much attention to it.

Q. Then why do you say that you thought it was going to stop if you didn't pay any attention to it?

A. I thought it was either going to stop or turn and go down Bangor.

Q. What made you think that?

A. Because he was coming in on my left-hand side."

A right forward part of the coach hit the right rear wheel of the roadster, with sufficient force to throw the Davis passengers violently about, and both cars stopped.

The testimony quoted above, with all the other admissible testimony, not including such as was by deposition, would seem to justify the finding of negligence on the part of defendant.

Mrs. Davis testified that she saw the sedan and screamed just before the impact, and remembered no details of the collision until after it was over, and someone was presenting a glass of water to her.

Miss Davis was precipitated through the doorway, falling so that her head and shoulder struck the roadway, her feet not clearing the car, and lapsed into unconsciousness.

It is not disputed that both women were injured, and the amount of damages is attacked as excessive only in the case of the girl.

It is urged that Mrs. Davis was negligent because of what she saw of the approach of the coach, and because she failed to do anything to avert an accident, or gave no suggestion to the husband, who was driving.

She did not attempt by act to participate in the driving, a course certainly not required of a passenger in the rumble. She did not continue conversation regarding defendant's approach. "She naturally relied upon the judgment of her husband in driving the car. Accidents in driving automobiles are often quite as likely to happen as to be averted *by outcries* and unwarranted suggestions and interferences with the driver."

Ward v. *Clark*, 179 N. Y. Supp., 466, 18 A. L. R., 354.

But she did warn her driver.

In law both women were passengers, and no negligence of the driver is imputable to either of them, unless they severally failed to do what an ordinarily prudent passenger would have done in the face of similar conditions.

The testimony of Mrs. Davis on this point reads as follows:

> "Well, I remember just as we came in the center of the street, almost the center, I suppose, I was looking around and I happened to look up the street to my right and I saw this car approaching very fast, and I said to my husband, 'Look at that car how it is coming.' He looked around and said, 'Oh, yes, but it's quite a distance from us.' Then I didn't think no more of it and turned to look the other way. Then as I turned again—I can't say how soon, not very long—I saw the car right near me.
>
> Q. About how far away?
>
> A. Well, I should say right up to there (indicating) or maybe a little nearer than that rail down there, the back rail (indicating rail in court room), and I screamed. As I did I saw the man in the car that was driving. He reached and he

seemed to be bewildered. He fumbled for something down below, I couldn't say what. Then the next thing I knew he struck us and I felt the car go up, and I thought we was gone, and that's all I remember."

At this point consideration of the exceptions to admission of depositions taken without the State is pertinent.

In the record we find this entry, made at the November term of the court below, 1931, Commission to issue to Conley, Esq., Boston, to take depositions of Mrs. Willard, Charles Allen and Henry Stone, in Mass., and that depositions were taken by or before the Commissioner named, upon interrogatories and cross-interrogatories filed by counsel on either side.

On trial, when the product of the commission to take depositions was offered, counsel for defendant objected to their admission, because, he said, before the issuance of the commission, counsel for the parties agreed that the Commissioner should notify the parties to the suits of time and place of taking the depositions, and that this was not done.

The position taken by counsel was properly presented to the justice below, and decision of the issue raised was properly within the judicial discretion.

We find that all steps required by XXIV of the Rules of Court, relating to taking of depositions by order of Court were complied with.

And although by inadvertence, the Commissioner was not apprized of a suggestion that the parties be notified, the question whether a wise exercise of judicial discretion, on this single issue, justified the admission of the depositions is decided in the affirmative.

From all the evidence so far considered we approve the finding of the jury that neither passenger was guilty of negligence; and, hence, the amount of damages awarded Wilhelmina H. Davis not being in question the motion, in her suit, shall be overruled.

As we have said, Catherine Davis, the daughter, was not guilty of negligence.

She was seated with the driver engaged in conversation with her mother. She heard the warning, turned and looked toward de-

fendant's car, heard her father's rejoinder to the warning, and resumed the interrupted conversation. It seems from the evidence that defendant's speed must have been higher than estimated by the occupants of the roadster, and it seems that defendant did not decrease that speed after the roadster had arrived at mid-intersection of the streets. But the jury was justified in determining that the negligence, if any, on the part of an occupant of the roadster which contributed to the collision as a proximate cause was not the negligence of either passenger.

Two exceptions were noted and argued in the case of the daughter. The second, to the admission of the depositions, has already been disposed of.

The other pertains to the amount of damages awarded the daughter, eleven hundred twenty-five dollars.

The girl, on the day of collision, was eighteen years old.

Describing the position of his daughter, as she lay after the impact, Mr. Davis said, "Her feet were lying in the doorway of the car, her back was across the running-board of the car and her head was in the street."

Asked whether she had always theretofore been an ordinarily healthy girl, he answered, "Yes, she has been very rugged always," that she had never complained of pains; but that since the accident she has complained of severe pains during her menstrual periods.

The mother testified that previous to the collision plaintiff had been "in perfect health."

Pursuing this line of inquiry we read,

"Q. Your daughter Catherine has lived in your household all her life?

A. Yes sir.

Q. Will you tell us whether or not, previous to her leaving on this vacation, she was in good health?

A. Yes, sir, she was, I should say, in perfect health.

Q. Never seemed to have any pains?

A. No.

Q. Do you know whether or not previous to this accident she had pains at the menstrual periods?

A. No, sir.

Q. She never complained of any pains?

A. Not to my knowledge, no, sir.

Q. Do you know whether or not she has complained of pain since that time?

A. Yes, indeed, she has; very much so.

Q. Whether or not they have affected her work?

A. Yes, they have.

Q. (The Court.) In what way?

A. Well, your Honor, she has to be out usually two days each month, and her nervous condition too, besides.

Q. Are they particularly bad at the beginning of the period or the same all through?

A. Usually the first two days.

Q. So that she has to leave her work?

A. Yes, sir, she has to.

Q. And remains at home?

A. Remains at home and the nurse comes the next morning to see her.

Q. What nurse is that?

A. From where she is employed.

Q. How long ago was this accident?

A. Well, it was two years last August.

Q. Do you say that this complaint of pain at the menstrual period has continued up to the present time?

A. Yes, sir, is has so."

The daughter testified that prior to the accident she had been in good health, and had felt during her periods of menstruation only the minimum of discomfort, but that shortly after the collision the normal menstrual function was impaired; her periods were irregular in time; the pains, "quite intense;" that when they begin on a working day, she goes to the hospital maintained for its employees by the Insurance Company for which she works, is there given medicine, and is forced to go to her home and remain there for a day, at times two days, and that up to the time of the trial, twenty-nine months after the accident, "each time it (the pain) is just as bad."

No other witness as to her physical condition was introduced, except a physician, introduced by the defendant.

After having been informed of the condition complained of, speaking as an expert, the doctor testified that the condition might persist for two years or longer but that he would not expect it to.

Asked to what he would attribute the disturbance and irregularity described he replied "to a nervous condition"; and he frankly stated that he would connect the accident with that condition.

This phase of the case is dwelt on thus fully as it bears also on the propriety of finding damages as great as the jury found.

The exception was noted to the exclusion of the following, in cross examination, "Do you know of any of your friends who, when these periods come around, leave their work and are away?"

Foundation, to justify the introduction of this question, if it might ever become admissible, would invoke complete physiological knowledge of so many individuals, and all finally to no convincing end, as to protract the trial beyond reason.

The decision was within the province of the Court, and was right.

When the amount of damages, in cases such as that of the young woman here, is to be assessed a troublesome question arises.

Injury established, she may recover for the undoubted shock of the accident, and for all the sufferings, mental and physical, which it caused; for loss of health and for loss due to diminished or interrupted earnings, past and future.

"For the endurance of the nervous condition caused by her injuries she is entitled to compensation. Such suffering may be both mental and physical.

"There is no standard by which the damages for such injuries as are shown in this case can be measured. In the end the question must be left to the sound sense and good judgment of the jury, to award such damages as seem to them to be fairly compensatory. And when it appears that the jury have discharged their duty with fidelity, and have reached a reasonable approximation of the damages, the court will not interfere even though the verdict should seem to them somewhat large. When the verdict is within the bounds of reason, the court will not institute a paring process to make it conform more exactly to their own views." *Felker* v. *Bangor Railway and Electric Company*, 112 Me., 255, 91 A., 980, 981.

So here it is not for the Court to say that the damages recovered are excessive, since the uncontradicted testimony shows an ab-

normal condition causing frequently recurring days of pain and inactivity, pain described as not less intense than when first suffered, and which the jury may have reasonably decided as probably to be endured periodically for some time in the future.

Exceptions and Motions overruled.

ANNIE M. HOADLEY

vs.

ANNIE M. WHEELWRIGHT AND CORA M. HUTCHINS.

Oxford. Opinion, January 14, 1933.

PETITION FOR PARTITION. EQUITY.

R. S. 1930, *Chap.* 102, *Sec.* 1, *which provides that one having a right of entry into real estate may bring a petition for partition, recognizes that the petitioner may not be seised and that his title may be in dispute.*

The purpose of this statute being to provide a simple and inexpensive procedure for the partition of land held in common or joint tenancy such end would be thwarted if one owner by merely filing an answer denying the petitioner's title could force him to establish his title at law before proceeding with the partition.

Cases which hold that it is necessary for the petitioner to establish his title before proceeding with partition proceedings are instances where relief is sought in equity.

In the case at bar, the rulings of the presiding Justice in refusing to stay the proceedings and in determining the issue of title were correct.

On exceptions by defendants. A petition for partition. Defendants filed answer denying plaintiff's title and setting up title in themselves. Trial was had at the May Term, 1932, of the Superior Court for the County of Oxford. Defendants asked for a stay of proceedings until the issue of title could be determined in an action of law. To the overruling of this motion, defendants seasonably

excepted. Exceptions overruled. The case fully appears in the opinion.

Frank A. Morey, for petitioner.

Cyrus N. Blanchard,

Frank W. Butler, for defendants.

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

THAXTER, J. This is a petition for partition brought under the provisions of Chap. 102, R. S., 1930, and heard by the Court without a jury, with the right to exceptions reserved to both parties. The defendants filed an answer denying the plaintiff's title to the premises and setting up an exclusive possession by themselves under a claim of title. The answer asserts that a petition for partition is not a proper form of action to try title to real estate, and prays for a stay of the proceedings until the plaintiff first establishes his title in a suit at law. The presiding Justice ruled that the question of title could be determined, refused to stay the proceedings, and after a hearing entered an interlocutory judgment that partition be made. To such rulings of the Court the defendant duly excepted.

The purpose of the statute authorizing partition of real estate is to eliminate by a simple and inexpensive procedure the evils and injustices which often are incident to the holding of land in common or joint tenancy. As the common owners have equal rights in the use and enjoyment of the estate, serious injury is likely to occur to the interests of all if they are not in accord in its management. To meet this difficulty the statutes provide for a prompt division of their respective interests. If one owner by merely filing a plea setting up want of title in the petitioner could force him to establish his title in a suit at law before proceeding with his petition for partition, the salutary purpose of the statutory remedy would be thwarted. Such has not been the procedure in this state.

In *Baylies* v. *Bussey*, 5 Me., 153, a petition for partition was filed. The respondent pleaded sole seisin in the lands described. The Court assumed the propriety of trying the issue of title. The point was made by the respondent that the petitioners could not main-

tain their process as it did not appear that they were actually seised of the premises. The Court said, page 158, that "a tenant in common may maintain his petition for partition, if he has a right of entry, though not actually seised."

In *Allen* v. *Hall*, 50 Me., 253, the Court points out that one of the difficulties in a partition sought by a bill in equity is that if there is any doubt about title the bill can not be maintained until this question has been settled by a suit at law. To obviate this very dilemma the statute providing for partition was passed. The Court said, page 263: "All questions concerning the title of the parties, and the nature and proportions of their interests, are to be determined by the jury; and their verdict is the basis of the interlocutory judgment, which must therefore conform to it. Upon all these matters the interlocutory judgment is conclusive."

Pond v. *Hussey*, 111 Me., 297, 89 A., 14, was a case of a petition for partition. The petitioner had previously brought a real action against the defendants to recover the same land, in which he was awarded judgment for twenty-one fortieths of it subject to the right of the defendants to compensation for certain buildings erected on it. Under the provisions of the statute no new action could be sustained for the land without payment within one year for such improvements. Without such payment the partition suit was brought. The Court held that such partition proceedings constituted a new action, and pointed out that under such process all questions concerning title were to be determined.

In *Norwood* v. *Packard*, 125 Me., 219, 132 A., 519, it was held that the rights of a child alleged to have been omitted from a will to share in certain real estate could be determined in a petition for partition.

Indeed the statute itself, R. S., 1930, Chap. 102, Sec. 1, which provides that one having a right of entry into real estate may bring a petition for partition, recognizes that the petitioner may not be seised and that his title may be in dispute.

The cases cited by counsel for the defendants, which hold that it is necessary for the plaintiff to establish title before continuing with proceedings for partition, are instances where relief is sought under a bill in equity. *Wilkin* v. *Wilkin*, 1 Johns. Ch., 111; *Gay* v.

Parpart, 106 U. S., 679, 1 S. Ct., 456, 27 L. Ed., 256; *Manners* v. *Manners*, 1 Green's, Ch. (N. J.), 384, 35 Am. Dec., 512; *Nash* v. *Simpson*, 78 Me., 142, 3 A., 53; *Pierce* v. *Rollins*, 83 Me., 172, 22 A., 110. The procedure set forth in these cases has no application when a petition is filed under authority given by statute. . . .

The rulings of the Presiding Justice in refusing to stay the proceedings and in determining the issue of title were correct.

Exceptions overruled.

STATE *vs.* JAMES G. TAYLOR.

Kennebec. Opinion, January 14, 1933.

CRIMINAL LAW. R. S. CHAP. 29, SEC. 88. INTOXICATING LIQUOR. EVIDENCE. EXCEPTIONS.

When the accused in a criminal case voluntarily becomes a witness in his own behalf he accords to the State's Attorney the right to inquire of him, in cross-examination, fully and in detail as to any fact, the existence of which renders probable or improbable the main fact sought to be proved. To some extent, more can be elicited from him than from a common witness, because his statements are admissions as well as testimony.

A bill of exceptions must include all facts essential to the reaching of a conclusion by the Court. Unless the bill is thus completely framed the exceptions fail.

In the case at bar, there was not sufficient data in the bill of exceptions to enable the Court to draw the conclusion that the question asked was even technically inadmissible.

The decision of the Court below in refusing to add the requested instruction to what he had already given in his charge was correct.

On exceptions by respondent. Respondent, charged with operating a motor vehicle under the influence of intoxicating liquor, was found guilty in the Gardiner Municipal Court. On appeal, trial was had at the June Term, 1932, of the Superior Court for the County of Kennebec. To the admission of certain testimony and to the re-

fusal to give a requested instruction, respondent seasonably excepted. Exceptions overruled. Judgment for the State. The case fully appears in the opinion.

H. C. Marden, County Attorney for the State.

Robert A. Cony, for respondent.

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

BARNES, J. The respondent was tried and found guilty of the crime, set out in our statutes, Chap. 29, Sec. 88, "Whoever shall operate or attempt to operate a motor vehicle upon any way, or in any other place when intoxicated or at all under the influence of intoxicating liquor or drugs, upon conviction, shall be punished, etc."

During the trial two exceptions were noted, to the admission of a question during cross-examination of respondent, and to refusal to give a requested instruction to the jury.

Regarding the evidence, respondent was being tried for an alleged misdemeanor.

The fact in issue was whether or not in the town of Randolph, on the twenty-ninth day of April, 1932, respondent did operate an automobile while under the influence of intoxicating liquor.

Respondent voluntarily became a witness in his own behalf. He thus accorded to the State's attorney the right to inquire of him in cross-examination, fully and in detail as to any fact, the existence of which renders probable or improbable the main fact sought to be proved.

> "When the accused volunteers to testify in his own behalf at all, upon the issue whether the alleged crime has been committed or not, he volunteers to testify in full. His oath in such case requires it. If he waives the constitutional privilege at all, he waives it all. He can not retire under shelter when danger comes.
>
> "The door opened by him is shut against retreat. The object of all examinations is to elicit the whole truth and not a part of it.
>
> "Under our rule, the cross-examination of a witness is not

confined to the matters inquired of in chief. A party, testifying as his own witness, can be examined just as any other witness could be in any respect material and relevant to the issue. To some extent, more can be elicited from him than from a common witness, because his statements are admissions as well as testimony.

"Any other construction would render the statute a shield to crime and criminals." *State* v. *Witham*, 72 Me., 531.

The question to which objection was made, and exception noted, was, "You do take a drink once in a while?"

In the short colloquy between Court and counsel for the respondent, prior to ruling, the Court suggested that the question objected to was, "whether he ever drank or whether he is a total abstainer."

It is not a question as to any precedent crime.

As the bill of exceptions is framed it does not include enough data for us to draw the conclusion that the question was even technically inadmissible.

We have no knowledge of what the State's evidence may have brought out. We do not know what the respondent may have admitted nor what he may have denied before this question was asked.

We cannot travel outside the bill of exceptions to discover any fact. *Jones* v. *Jones*, 101 Me., 447, 64 A., 815; *Doylestown Agr. Co.* v. *Brackett, Shaw & Lunt Co.*, 109 Me., 301, 308, 84 A., 146; *Borders* v. *B. & M. R. Co.*, 115 Me., 207, 98 A., 662; *Skene* v. *Graham*, 116 Me., 202, 100 A., 938; *State* v. *Houlehan*, 109 Me., 281, 284, 83 A., 1106; *State* v. *Wentworth*, 65 Me., 234; 28 *R. C. L.*, 444.

This Court has repeatedly ruled that on a bill of exceptions which does not include information essential to the reaching of necessary conclusions, as is the one before us, the exceptions fail.

The requested instruction reads as follows:—"The Jury must be satisfied beyond a reasonable doubt that this respondent at the time he was operating the car, was so under the influence of intoxicating liquors that his mental faculties were not functioning in their normal manner."

The decision of the Court below in refusing to add the requested

instruction to what he had already given in his charge was eminently right.

The condition that makes a driver, under the influence of intoxicating liquor or drugs, a menace to the travelling public, is not only a lessening of his mental alertness, or an exhileration thereof, but as well any weakening or slowing up of the action of his motor nerves, interference with the coördination of sensory and motor nerves, which may cause sluggishness where quickness of action is demanded.

In countless cases of daily occurrence tardiness of action by drivers of automobiles, trucks or busses may bring loss of property, maiming or death to people lawfully on our highways.

Exceptions overruled.
Judgment for the State.

HARRY M. SHAW, GUARDIAN, ET AL.

vs.

JOHN H. MERRILL ET AL.

Oxford. Opinion, January 16, 1933.

MORTGAGES. FORECLOSURE. WAIVER.

The mere fact that, after the year for redemption has expired, payments are made on account of the mortgage debt, will not work a waiver of foreclosure. Such payments, it has been said, may have been made because the premises were not adequate to satisfy the debt. The intention of the parties to waive the foreclosure should be shown by other evidence.

A grantee after foreclosure may take a title subject to redemption by the mortgagor. But a quitclaim deed by a mortgagee after foreclosure, for a sum equal to the mortgage debt, is not, of itself, enough evidence of a waiver of the foreclosure.

In the case at bar, the Justice found that, after foreclosure was completed, the mortgagee agreed to allow the mortgagor to redeem the premises upon the

payment, within a stated time, of an amount equal to what was due on the mortgages on that day. Such a conditional waiver was not sufficient to waive the foreclosure.

The defendant had a right to purchase. The amount he paid created no presumption that the title he took was open to redemption. The deed was in form in the nature of a release, containing words of grant as well as release, and as much a conveyance as any other kind of a deed. Having himself wholly paid the consideration, the grantee is not shown to hold the property under a resulting trust; nor was any fact or circumstance in evidence from which a trust might arise or result by implication of law. He was not the trustee of an express trust concerning lands, because the trust is not declared in writing. Any agreement he may have made to reconvey did not constitute a mortgage, because it was not made with one from whom an absolute title was taken simultaneously.

Even though the record might have justified finding that the grantee, before taking the deed, agreed that he would take subordinate to the conditional waiver, the fact was that he was neither paid nor tendered the redemption money within the time limited.

On appeal by plaintiff. A Bill in Equity seeking to have declared a deed given by a mortgagee after right of redemption had expired on foreclosed mortgages to be an assignment of the mortgages and transfer of the mortgage debt,—a waiver of foreclosure being claimed. From the decree of the sitting Justice dismissing the bill, plaintiff appealed. Appeal dismissed. Decree affirmed. The case fully appears in the opinion.

Albert Beliveau, for plaintiff.
George C. Wing,
Albert E. Verrill, for John H. Merrill.
Seth W. Norwood, pro se.

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

DUNN, J. This equity suit was heard in the Superior Court on bill, answer, and proof.

In the bill, as amended to admit a party plaintiff, and join a defendant, and to add additional averments, it is alleged, primarily, that the Paris Trust Company, the mortgagee, in three mortgage deeds of the same real estate, to secure in the aggregate $4,800.00 and interest, waived foreclosures that had become absolute; and

that the quitclaim deed of the property, subsequently given by that company to the original defendant, John H. Merrill, for a consideration equal to the balance due on the mortgages, was operative, not to convey a foreclosure title, but only to the extent that the grantor could lawfully convey. In other words, the bill alleged the transaction to have been, in its true nature and effect, an assignment of the mortgages and a transfer of the mortgage debts. A purpose of filing the bill was to have this declared the efficacy of the deed.

A decree dismissing the bill was signed, filed, and entered. The plaintiff appealed to this court.

Foreclosure of the mortgages, which was begun June 27, 1928, by giving public notice in a newspaper, became of registry record on August 10, 1928. The limitation of one year, for redemption, began after the first publication. R. S., Chap. 104, Sec. 7. Parol evidence was introduced, that on August 14, 1929, the mortgagor paid to the mortgagee the sum of $850.00, on August 17, 1929, $150.00, and on August 20, 1929, $53.31, on account and in part payment of the amount due on the mortgages.

The mere fact that, after the year, payments are made on account of the mortgage debt, will not work a waiver of foreclosure. Such payments, it has been said, may have been made because the premises were not adequate to satisfy the debt. *Jones on Mortgages*, Sec. 1269. The intention of the parties to waive the foreclosure should be shown by other evidence. *Lawrence* v. *Fletcher*, 10 Met., 344; *Tompson* v. *Tappan*, 139 Mass., 506; *Welch* v. *Stearns*, 74 Me., 71, 78. It was held in *Dow* v. *Moor*, 59 Me., 118, that a receipt following foreclosure of a part of the debt secured by mortgage, under an express understanding that the foreclosure was opened, was a waiver. In the case at bar, the Justice below found that, after foreclosure was completed, the mortgagee agreed to allow the mortgagor to redeem the premises upon the payment, within a stated time, of an amount equal to what was due on the mortgages on that day. Such a conditional waiver was not sufficient to waive the foreclosure. *Stetson* v. *Everett*, 59 Me., 376.

A grantee after foreclosure may take a title subject to redemption by the mortgagor. *Rangely* v. *Spring*, 28 Me., 127. But a quitclaim deed by a mortgagee after foreclosure, for a sum equal to

the mortgage debt, is not, of itself, enough evidence of a waiver of the foreclosure. *Crittenden* v. *Rogers*, 8 Gray, 452.

This grantee had a right to purchase. The amount he paid created no presumption that the title he took was open to redemption. The deed is in form in the nature of a release, containing words of grant as well as release, and as much a conveyance as any other kind of a deed. R. S., Chap. 87, Sec. 20. Having himself wholly paid the consideration, the grantee is not shown to hold the property under a resulting trust; nor is any fact or circumstance in evidence from which a trust may arise or result by implication of law. He is not the trustee of an express trust concerning lands, because the trust is not declared in writing. R. S., Chap. 87, Sec. 17. Any agreement he may have made to reconvey did not constitute a mortgage, because it was not made with one from whom an absolute title was taken simultaneously. *Jones on Mortgages*, Sec. 1266.

But, though the record might have justified finding that the grantee, before taking the deed, agreed that he would take subordinate to the conditional waiver,—in consequence whereof he would doubtless be concluded, on acquiring the title,—it is plain that he was neither paid nor tendered the redemption money within the time limited.

Other aspects of the cause need no reciting; the questions of fact thus far involved lie under other issues; the findings in respect to such questions are not to be reversed on appeal.

Appeal dismissed.
Decree affirmed.

LIZZIE MEADER *vs.* LENA M. CUMMINGS.

Oxford. Opinion, January 16, 1933.

EQUITY.

An equity decree, not shown on appeal to be manifestly wrong, must stand.

On appeal by plaintiff. A Bill in Equity to declare null and void a deed given by plaintiff to defendant. From the decree of the sitting Justice dismissing the bill, plaintiff appealed. Appeal dismissed. Decree below affirmed. The case sufficiently appears in the opinion.

Albert Beliveau, for plaintiff.

Aretas E. Stearns, for defendant.

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

DUNN, J. In this equity suit, the bill was filed by a mother against her daughter, to avoid a deed of conveyance of real estate. The gist of the allegations is that, at the time of the execution and delivery of the instrument, the plaintiff, supposing that she was making her will, did not know, nor in the then state of her mental and physical health, could know, that she was conveying her home property in fee-simple. The defense conceded that there was no monetary consideration for the deed. Whether the grantee gave any promise, as a result of bargain with the grantor, for a breach of which a right to action would arise, was not passed upon, of record.

The issue was on answer, replication, and proof. The Justice sitting, without filing a finding of facts, signed and entered a decree dismissing the bill. The plaintiff appealed.

The case involves no legal question of importance or interest, and a discussion of the evidence would avail nothing of value. An equity decree, not shown on appeal to be manifestly wrong, must stand. The mandate will be:

Appeal dismissed.
Decree below affirmed.

ANDREW M. CHAPLIN,

APPELLANT FROM DECREE OF JUDGE OF PROBATE.

Androscoggin. Opinion, January 17, 1933.

PROBATE COURTS. EQUITY. TRUSTEES.

When jurisdictional allegations are sufficient, the Probate Court has authority, at any stage, to the close of the proceedings, on finding the necessary facts to exist, to allow amendment of merely formally incorrect pleading.

The duties and liabilities of co-trustees are joint and not individual. They form, as it were, one collective trustee, and must execute the duties of their office in their joint capacity.

Where, because of fundamental difference in their points of view, testamentary trustees apply to a judicial court for the advice they think they need, they must bring in all necessary parties.

A general equity rule requires that all persons interested in the object of the suit, and within the jurisdiction, and capable of being made parties, must be made such, else their rights will not be bound.

When, however, they are required to be parties merely as owners and protectors of certain interest, then the proceedings may take place, if that interest receives an effective protection from others. In such case the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree.

In the case at bar, the contingent interest or right of any possible afterborn person appears, on review, to have been virtually represented, so that there might be a fair trial and honest determination, on behalf of all.

Neither the question of abuse of discretion nor the matter of substitution of judicial discretion was involved. Trustees between whom there was radical diversity of opinion, sought instruction by the court. With this, and only this, had the evidence relevancy.

On exceptions by appellant. A petition brought by one of the trustees under the will of Mary E. Bradford for permission to sell certain shares of stock, held by said trustees. After hearing on the

petition the same was granted by the Judge of Probate for the County of Androscoggin. Appeal was thereupon taken by a co-trustee. To the denial of certain rulings of law, and from the findings and decision of the presiding Justice, appellant seasonably excepted. Exceptions overruled. Decree affirmed. The case fully appears in the opinion.

Ralph W. Crockett, for appellant.

Oakes & Farnum, for appellee.

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

DUNN, J. The will of Mary E. Bradford, late of Lewiston (whose decease occurred in 1917), created a trust. The trust attached, and the trustees qualified. They later disagreed. The trouble arose over the selling price of certain shares of the capital stock of a merchandising corporation, located and doing business in the former home city of the testatrix. Some of the shares the testatrix herself had owned; the rest the trustees had received as a dividend. The will provided that the trustees might retain the investment without fear of personal loss. This provision did not, it might be noted in passing, entirely obviate the necessity of exercising that good faith and diligence which is at once the duty of a trustee, and his protection.

For four years prior to 1931, the stock had paid no dividend.

Designating herself a trustee, and alleging that she and her three daughters, whom the petition named, were the beneficiaries of the trust, one of the trustees applied—under R. S., Chap. 82, Sec. 10—to the Probate Court, that she be authorized to sell the stock for $13,500, and reinvest the proceeds. She also prayed for directions in reference to best effectuating the objects of the trust.

Personal notice was ordered, and made, on the co-trustee. No other notice was ordered. The co-trustee appeared. His counsel objected to the petition,—assigning, first, that it had been filed by but one of the trustees; next, that in view of the discretion confided in the trustees, the petition was unnecessary; still further, that the Court should not take jurisdiction, in the absence of a showing of an abuse of that discretion. On these grounds, dismissal of the petition was urged.

The petition, as framed, fell short of what would have been better pleading, but technical strictness was not indispensable. When jurisdictional allegations are sufficient, the Probate Court has authority, at any stage, to the close of the proceedings, on finding the necessary facts to exist, to allow amendment of merely formally incorrect pleading. *Danby* v. *Dawes*, 81 Me., 16 A., 255. Massachusetts holds that if the pleading is practically insufficient, an amendment may be ordered. *Edds & wife, Appellants*, 137 Mass., 346. *Ela* v. *Ela*, 84 Me., 423, 24 A., 893, is an authority on the equity of probate proceedings. See, too, *Farnum's Appeal*, 107 Me., 488, 493, 78 A., 901; and *Merrill* v. *Regan*, 117 Me., 182, 186, 103 A., 155.

The Probate Court overruled the objections. The three daughters of the petitioner (now appellee) became parties to the proceedings. The case was heard on the merits, without suggestion of surprise or prejudice. The position of the trustees on the record, as petitioner or respondent, was immaterial; both were actors. The one introduced evidence tending to support the petition; opposition went to the value of the stock. Apparently the Court regarded the petition as amended in conformity with the proof.

The duties and liabilities of co-trustees are joint and not individual. They form, as it were, one collective trustee, and must execute the duties of their office in their joint capacity. Perry on Trust, Sec. 411; Lewin on Trusts & Trustees, p. *258; *Cox* v. *Walker*, 26 Me., 504. On sustaining the petition, the Probate Court decreed that the trustees sell the stock, within ten days; a minimum price of $13,500 was fixed.

The respondent appealed to the Supreme Court of Probate, which Court the Superior Court is. R. S., Chap. 75, Sec. 31.

Briefly, the reasons of appeal were:

1. The failure of the petition, as drawn and presented by one trustee, without mention of the co-trustee, to state a case wherein the Probate Court had power to authorize the petitioner alone to sell.

2. That, on the petition and prayer, the Probate Court could not decree that the trustees sell the stock.

3. That the Probate Court improperly substituted its discretion for that of the trustees.

4. That refusal on the part of the appellant, as a trustee, to assent to a sale of the stock for less than its worth, was not evidence of an abuse of his discretion.

There was stipulation of record, in term time, that the presiding Justice hear the appeal in vacation, judgment to be as of the term. That this agreement was conclusive on the parties, they do not question. See, as having analogy, *Gurdy, Appellant*, 103 Me., 356, 360, 69 A., 546.

When the cause came on to be heard, rulings of law were requested, that the Court could not, under the petition as drawn, order and direct either the one (appellee) trustee, or both trustees, to sell the stock. These requests were expressly denied. Other requested rulings, in reference to (a) the substitution of judicial discretion for that of the appellant trustee; (b) the want of authority in the court—no abuse of discretion being shown—to interfere with the exercise of a trustee's judgment; (c) that refusal to join in a sale of the stock for less than its fair value, was not an abuse of discretionary authority; (d) that if the book or liquidating value of the stock exceeded the price mentioned, or even if that price was "all it was worth," mere refusal to sell would not be evidence of an abuse of discretion;—were not ruled in the language of the requests, but only as embodied in the findings and rulings of the Justice. Exceptions were noted to the refusals to rule, and to the rulings made.

It is sufficient to say, of the first exception, that a sale by one trustee alone was not decreed. Such a sale would have been void. *Wilbur* v. *Almy*, 12 How., 180, 13 Law ed., 944.

The second exception demands more consideration. Where, because of fundamental difference in their points of view, testamentary trustees apply to a Judicial Court for the advice they think they need, they must bring in all necessary parties. *Cary* v. *Talbot*, 120 Me., 427, 431, 115 A., 166. Whether this was done, is raised by the exception.

The provisions of the will, introduced into the evidence, and instanced in the briefs, as material to the decision of this case, are as follows:

> "Second: The personal property which may constitute a portion of said trust estate, including the proceeds derived

from a sale of all or any part of my interest in said homestead, shall be held by said trustees upon the following uses, purposes and trusts: . . .

"(c) The balance of the net income of said trust fund shall be applied during the life of my daughter, Grace L. Jordan, first to the payment of the taxes, insurance and repairs, or my proportion of the same, required to maintain my interest in the homestead at No. 91 Pleasant street hereinbefore referred to, and the balance of said income shall during the lifetime of said Grace L. Jordan be paid to her.

"Third: At the death of said Grace L. Jordan, if the same occurs after my youngest surviving grandchild has arrived at the age of twenty-three years, the surviving trustee shall distribute said trust fund in equal proportions among the children of said Grace L. Jordan who may then be living and the issue of any deceased child, such issue taking the share its deceased parent would have taken if living; . . ."

Counsel are in accord that, gathering the intention of the testatrix, not from one clause of the will, but from the whole will and all its parts, and adopting a construction which gives force and effect to every word and clause, the "youngest surviving grandchild" of whom the testatrix speaks, is that one of the three daughters of Grace L. Jordan (all living when the testatrix died) who was last to attain the age of twenty-three years.

A general equity rule, harmonizing with the principles of justice, requires that all persons interested in the object of the suit, and within the jurisdiction, and capable of being made parties, must be made such, else their rights will not be bound. *Miller* v. *Whittier*, 33 Me., 521. In a case like the present, as has been seen, a similar rule applies. *Cary* v. *Talbot*, supra.

General rules usually admit of some exceptions. The reason of such exceptions is thus laid down: "If they are required to be parties merely as the owners and protectors of a certain interest, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others. It is the interest which the Court is considering, and the owner merely as the guardian of that interest; if, then, some other persons are

present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required, and the Court may, without putting any right in jeopardy, take its usual course and make a complete decree." Calvert on Parties, Sec. 2, p. 20; *Sweet* v. *Parker*, 22 N. J. Eq., 453.

It will be remembered that the petition was for the sale of the trust property; and reinvestment of its proceeds, subject to the trust. The interests of all persons in being were before the Court. No antagonism of interests was presented. No interest might be divested. Mrs. Jordan could protect not only her own interest, but the contingent interest of possible afterborn persons,—i.e., "issue" (the term being used in its restricted sense)—which, if born to any of her three daughters, might, at the end of the trust, take what their parent would have been entitled to have and receive if then living. True, Mrs. Jordan, as a trustee, is one of the holders of the legal title, but she also has a life interest in the trust estate.

There being a possibility of issue (children) being born to the daughters of Mrs. Jordan, which issue might take a possible share, these daughters could competently represent the contingent interest of the unborn persons. Mere privity in blood does not authorize one party to defend the interest of another, but the daughters who may become mothers are themselves contingent remaindermen. In the event of the death of any of them, during the continuance of the trust, the will gives to her "issue" (children).

The general rule of earlier mention "was originally a rule of convenience; for the sake of convenience it was relaxed." *Bedford* v. *Ellis*, (1901), A. C., 1 (England). The question of convenience is one which rests largely in the discretion of the Court. *Smith* v. *Williams*, 116 Mass., 510; *Cassidy* v. *Shimmin*, 122 Mass., 406, 409; *Libby* v. *Norris*, 142 Mass., 246, 7 N. E., 919.

In the instant case, the contingent interest or right of any possible afterborn person appears, on review, to have been virtually represented, so that there might be a fair trial and honest determination, on behalf of all. 20 R. C. L., 670; Ann. Cas. 1913C, note p. 659; 24 Am. & Eng. Ency. of Laws, 2d ed., 759; note to *Rutledge* v. *Fishburne*, 97 A. S. R., 757. This proceeding is, essentially, an equitable one. Decisions therefore, in equity, which recog-

nize the doctrine of virtual representation may be justly cited to sustain it. *Ridley* v. *Halliday*, 106 Tenn., 607, 61 S. W., 1025, 53 L. R. A., 477; *Gavin* v. *Curtin*, 171 Ill., 640, 49 N. E., 523, 40 L. R. A., 776; *Sweet* v. *Parker*, supra; *Hale* v. *Hale*, 146 Ill., 227, 259, 33 N. E., 858, 20 L. R. A., 247, 256; *Miller* v. *Texas & Pacific Railway Co.*, 132 U. S., 662, 22 Law ed., 487.

On the subject of the remaining exceptions, little need be said. Neither the question of an abuse of discretion nor the matter of the substitution of judicial discretion was involved. Trustees between whom there was radical diversity of opinion, sought instruction by the Court. With this, and only this, had the evidence relevancy.

The exceptions are overruled. No exception was taken to the decree, affirmatory of that of the Probate Court which was signed and entered. That decree is hereby affirmed.

Exceptions overruled.
Decree affirmed.

DEVOE'S CASE.

Aroostook. Opinion January 18, 1933.

WORKMEN'S COMPENSATION ACT. INDUSTRIAL ACCIDENT COMMISSION.

When a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the Commission is without power to reopen the case and modify its finding because of error.

The statutory enactment providing that after compensation has been discontinued by decree or approved settlement receipt, additional compensation may be given for a further period of incapacity does not modify the above principle.

The intent of the statutory provision is to permit the making by the parties of a settlement discontinuing compensation, or the entry of a decree to the same effect without thereby foreclosing the right of the employee to recover further compensation if he suffers a recurrence of trouble due to the injury, or if it is discovered that compensatory injury exists, which at the time the final decree was entered, was unknown to the parties and therefore not considered by the Commission.

In the case at bar, neither the injured man nor the Commission was aware of the internal injuries which were causing a continuation of the disability. On their discovery the Commission was not without authority to award compensation.

A Workmen's Compensation Case. Appeal by respondent from decree of a sitting Justice affirming the decree of the Industrial Accident Commission awarding compensation to the petitioner. Appeal dismissed. Counsel fees and costs to be allowed appellee to be fixed by the Court below. The case fully appears in the opinion.

J. Frederic Burns, for petitioner.

William B. Mahoney,

James C. Madigan, for respondents.

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

THAXTER, J. This is an appeal from a *pro forma* decree of a Justice of the Superior Court affirming a decree of the Industrial Accident Commission awarding further compensation to the petitioner.

The petitioner was injured September 25, 1929, in an accident arising out of and in the course of his employment. In the report of the accident and in an agreement for compensation filed October 22, 1929, the injury is described as a fractured rib. On October 8, 1930, an informal hearing was held to determine the petitioner's incapacity. By agreement the employer and insurance carrier subsequently on November 19, 1930, filed a formal petition. On November 24, 1930, the Commission made the following finding and decree: "From the case as presented we can see no causal connection between the injury and the incapacity now claimed. We feel that full consideration of the entire matter indicates that incapacity resulting from the injury did not exist beyond September 6, 1930.

"It is therefore ordered and decreed that compensation payments shall cease as of said date."

At the time of the hearing on October 8 the injury was understood to have been a fracture of the ninth rib in the left chest, and the petitioner complained at that time of pain and inability to straighten up. The decree from which the present appeal is taken is based on a petition for further compensation filed May 10, 1932,

in which the petitioner claims that there was an injury to his internal organs arising out of the same accident, which resulted in incapacity subsequent to that for which compensation had been paid. In the hearing on this petition the employee's complaints of pain and inability to straighten up were substantially the same as at the preceding hearing on October 8, 1930. The testimony indicated, however, that these disabilities were due not to the fractured ninth rib but to an injury to the spleen lying just beneath the fractured rib. It was also discovered that the eighth rib had been fractured as well as the ninth. The Commission made a finding that the petitioner "has been totally incapacitated for earning since October 8, 1930, as a direct or indirect result of the fractured rib (or ribs) sustained September 25, 1929." Compensation was ordered paid from October 8, 1930, with a credit to be given for payments made from October 8 to October 17, 1930.

The employer contends that after a finding of fact had been made in the former proceeding inconsistent with the right to further compensation, the Commission was without power to reopen the question after it had been decreed that incapacity due to the injury had ended.

It is undoubtedly true that when a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the Commission is without power to reopen the case and modify its finding because of error. *Conners' Case*, 121 Me., 37, 115 A., 520; *Healey's Case*, 124 Me., 54, 126 A., 21.

The petition in this case was filed under the provisions of Chap. 55, Sec. 37, R. S. 1930, which reads in part as follows: "If after compensation has been discontinued, by decree or approved settlement receipt as provided by section forty-three hereof, additional compensation is claimed by an employee for further period of incapacity, he may file with the Commission a petition for further compensation setting forth his claim therefor; hearing upon which shall be held by a single commissioner."

This clause does not modify the principles enunciated in *Conners' Case* and in *Healey's Case*, supra, as is clearly pointed out in the recent opinion in *Comer's Case*, 131 Me., 386. The intent of this statutory provision is to permit the making by the parties of a settlement discontinuing compensation, or the entry of a decree to

the same effect without thereby foreclosing the right of the employee to recover further compensation if he suffers a recurrence of trouble due to the injury, or if it is discovered that compensatory injury exists, which at the time the final decree was entered, was unknown to the parties and therefore not considered by the Commission. *Comer's Case*, supra. Such purpose is in accord with the liberal aim of the statute, which seeks on the broadest principles to provide a just recompense for those injured in industrial accidents.

The decisions cited by counsel for the employer, which hold that decrees ending compensation are final, are from jurisdictions where the Industrial Accident Commissions have no such statutory authority as is conferred here. See *F. Jarka Co.* v. *Monahan*, 29 Fed. (2 ed.), 741, 742.

It is clear that neither the injured man nor the Commission was aware of the internal injuries which were causing a continuation of the petitioner's disability. On their discovery the Commission was not without authority to award additional compensation.

Appeal dismissed.
Counsel fees and costs to be allowed appellee to be fixed by the Court below.

RALPH MAYO *vs.* GEORGE C. DEARBORN.

Cumberland. Opinion January 18, 1933.

DEEDS. COVENANTS. EQUITY.

A provision in a deed poll of real estate, in form an agreement, that a fountain, aqueduct and tub should be kept in repair, to afford a source of water supply for property the title to which the grantor retained, does not create a right, for the violation of which, in the period of his ownership, the plaintiff, an owner by purchase from the grantor's heirs, can take advantage at law.

Generally, where there is no personal duty, obligations of this nature are protected, beyond the immediate contracting parties, in equity. Equitable relief,

when appropriate, looks to the future, and ascertains as well the damages accrued in the past.

On report. An action of assumpsit to recover damages for alleged failure of the defendant to perform a covenant or contract to keep in repair a certain fountain aqueduct leading to premises owned by the defendant. After the evidence was taken out at the October Term, 1931, of the Superior Court for the County of Cumberland, the case was by agreement of the parties reported to the Law Court for its determination on so much of the evidence as was legally admissible. Plaintiff nonsuit. The case fully appears in the opinion.

Connolly & Welch, for plaintiff.

Edgar F. Corliss, for defendant.

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

DUNN, J. This case was reserved in the Superior Court for decision by this Court on a report of the evidence.

The warranty deed, dated December 20, 1912, and duly recorded, made by Isaphine Mains to George C. Dearborn (the defendant), conveyed the northerly part of a lot of land in Naples, Maine, which the grantor owned, together with the right to supply the granted premises (by means of an existing aqueduct), with water from a spring or fountain on still other land, with easement to the fountain for the purpose of making repairs. Then, in the granting part of the deed, and before the habendum, are the following words: "but reserving for the benefit of my premises southerly of the premises herein conveyed the right to take and have water conducted to my said premises remaining as the same now exist by way of the premises herein conveyed in the way and manner now conducted, said Dearborn, his heirs and assigns to keep in repair and good order said fountain and the aqueduct leading to the premises herein conveyed and the tub or receptacle therein furnishing water for my said premises still by me owned and retained said grantor reserving the right of entry for the purpose of repairing the aqueduct leading from said tub or receptacle to said premises not herein conveyed."

The foremost question in the case is whether the quoted language, so far as it relates to keeping the fountain, aqueduct and tub in

repair, created a right, for the violation of which, in the period of his ownership, the plaintiff—an owner by purchase from the grantor's heirs of the real estate, the title to which she retained—can take advantage at law.

The answer must be in the negative.

The stipulation in the deed poll, not being in the form of a technical covenant, sealed by the grantee, is not a covenant running with the land; and no action of assumpsit may be maintained by the plaintiff, notwithstanding that title traces to him from her whose deed contains the provision in question. *Maine* v. *Cumston*, 98 Mass., 317; *Martin* v. *Drinan*, 128 Mass., 515; *Kennedy* v. *Owen*, 136 Mass., 199; *Childs* v. *Boston & Maine Railroad*, 213 Mass., 91, 99 N. E., 957; *Johnson* v. *Muzzy*, 45 Vt., 419.

The deed embodies in form an agreement, the promise of the grantee being the simple one implied by law from his acceptance of the instrument, and claim of ownership thereunder. *Maine* v. *Cumston*, supra; *Bronson* v. *Coffin*, 108 Mass., 175, 186; *Locke* v. *Homer*, 131 Mass., 93, 102; *Plimpton* v. *New York, N. H., & H. R. R. Co.*, 221 Mass., 548; *Winthrop* v. *Fairbanks*, 41 Me., 307; *Baldwin* v. *Emery*, 89 Me., 496, 498, 36 A., 994; *Harvey* v. *Maine Condensed Milk Co.*, 92 Me., 115, 119, 42 A., 342. The promise was not merely to the grantor for her lifetime, but looked ahead. It was intended to be in perpetuity, for the benefit, as the deed itself expressed it, of her (grantor's) premises. *Bailey* v. *Agawam National Bank*, 190 Mass., 20, 76 N. E., 449.

Generally, where there is no personal duty, obligations of this nature are protected, beyond the immediate contracting parties, in equity. *Whitney* v. *Union Railway Co.*, 11 Gray, 359, 363; *Bailey* v. *Agawam National Bank*, supra; *Childs* v. *Boston & Maine Railroad*, supra; *Lorando* v. *Gethro*, 228 Mass., 181, 188, 117 N. E., 185. Equitable relief, when appropriate, views the future, and ascertains as well the damages accrued in the past. *Downey* v. *Hood*, 203 Mass., 4, 11, 89 N. E., 24; *Childs* v. *Boston & Maine Railroad*, supra.

In the present action, the plaintiff must fail.

Plaintiff nonsuit.

STATE OF MAINE *vs.* C. GUY HUME.

Kennebec. Opinion January 24, 1933.

CRIMINAL LAW. PLEADING AND PRACTICE. LAW COURT.

The Law Court has no jurisdiction of a special motion for a new trial not presented to the trial Judge but sent to it directly.

In criminal cases, a motion for a new trial based on any ground must be directed to the Justice presiding at the trial. If it is denied in a case involving a felony, the respondent may appeal to the next law term. If the offense is a misdemeanor only, the ruling of the trial Judge is final.

The Law Court has jurisdiction and can hear and determine only those matters authorized by statute and brought to it through the established course of procedure.

The extent to which a cross-examination concerning matters collateral to the issues being tried may be carried is within the discretion of the presiding Justice.

In the case at bar, although a direct denial of the State's charges and a contradiction of its witnesses raised an issue of fact for the jury, the evidence being sufficient to sustain a verdict, there was no error in the denial of the respondent's motion for a directed verdict.

The exclusion of further inquiry in regard to checks, after the facts incident to the making and using of nine or more checks had been fully covered, was a proper exercise of the discretion of the presiding Justice.

The evidence offered as to the respondent's note of March 5, 1929, for $2,100 concerned an independent transaction and was irrelevant.

The exclusion of the notice of counsel for the respondent to produce documents was not error, in as much as it does not appear that the respondent was debarred from introducing secondary evidence of the contents of the documents or that his counsel was restricted in his comments on the failure or refusal to produce.

On exceptions and special motion by respondent. At the trial of the respondent at the June Term, 1932, of the Superior Court for the County of Kennebec, for obtaining money by false pretenses,

certain evidence offered in his behalf was excluded and his motion for a directed verdict was denied. To these rulings he seasonably excepted, and also filed a special motion alleging error in the charge of the presiding Justice. The special motion for a new trial was not presented to the trial Judge, but comes directly to the Law Court. Exceptions overruled. Special motion overruled. Judgment for the State. The case fully appears in the opinion.

H. C. Marden, County Attorney, for the State.

Harvey D. Eaton, for respondent.

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

STURGIS, J. The respondent was convicted in the Trial Court of obtaining money by false pretenses. At the close of the evidence, the prosecuting attorney, by leave of Court, entered a *nolle prosequi* as to other charges and the respondent moved for a directed verdict. Exceptions to a denial of this motion and to the exclusion of evidence were duly reserved.

Counsel for the respondent presents a special motion for a new trial based on an alleged error in the charge of the presiding Justice. If this error exists and the respondent can take advantage of it by this motion, which is at least doubtful, well-recognized defects in procedure deprive this Court of jurisdiction. The motion was not presented to the trial Judge, but comes directly to the Law Court. This is contrary to the rules of criminal procedure. In criminal cases, a motion for a new trial based on any ground must be directed to the Justice presiding at the trial. If it is denied in a case involving a felony, the respondent may appeal to the next law term. R. S., Chap. 146, Sec. 27. If the offense is a misdemeanor only, the ruling of the trial Judge is final. *State* v. *Dodge*, 124 Me., 243, 127 A., 899; *State* v. *Gustin*, 123 Me., 307, 122 A., 856. The Law Court has jurisdiction and can hear and determine only those matters authorized by statute and brought to it through the established course of procedure. *Simpson* v. *Simpson*, 119 Me., 15, 109 A., 254.

The gist of the first charge laid in the indictment is that on the 23rd day of May, 1929, the respondent feloniously and designedly and with an intent to defraud presented to one Elbridge T. Foster

a promissory note of that date for twelve hundred and seventy-five dollars payable one month after date to the order of the Ticonic National Bank of Waterville and, falsely pretending that a promissory note theretofore given by Foster and indorsed by the respondent was then due and the note presented was to be used in renewal thereof, induced Foster to sign the new paper and thereafter discounted it for cash or credit at the bank. It is also charged that on July 31, 1929, the respondent made and presented to Foster a promissory note of that date for fifteen hundred dollars, payable to the order of the Ticonic National Bank and, falsely pretending that this note was also to be used to renew another promissory note made by Foster, thereby induced him to sign it and forthwith used it as an original instrument. In neither case were there then any notes of Foster due or renewable.

The testimony of the complaining witness supports the charges laid in the indictment. He states that he made the notes in controversy for the accommodation of the respondent as alleged in the indictment, not as original loans, but for the purpose of renewing notes which the respondent told him and he believed were outstanding against him and then due and payable. He is corroborated by an employee who testifies that he was present when the respondent obtained the execution of the note of May 23, 1929, and heard him ask for a note to renew "a big note that came due." Mr. Foster's wife was told by her husband in the presence of the respondent that it was a renewal. The records of the Ticonic National Bank show that both instruments were indorsed by the respondent and discounted as new notes.

The respondent, taking the stand in his own behalf, denied that he represented that either of the notes in controversy were renewals of other paper and told the jury that in each instance it was clearly understood that the transaction was an original accommodation. He disclosed that he had been swapping checks with Mr. Foster for several years and using the notes for discount or credit. He claimed that he paid for the accommodation as he received it.

We are of opinion that, if the testimony of the State's witnesses was believed, it was sufficient to establish the guilt of the respondent beyond a reasonable doubt. A direct denial of the State's charges and a contradiction of its witnesses raised an issue of fact which

was for the jury. There was no error in the denial of the respondent's motion for a directed verdict. *State* v. *Donahue*, 125 Me., 517, 133 A., 433; *State* v. *Harvey*, 124 Me., 226, 127 A., 275.

In the course of the cross-examination of the complaining witness, seventy checks drawn to his order by the respondent were introduced and an inquiry was begun as to the purpose for which they were received and the use made of them. After the witness had been questioned concerning nine or more checks and had stated that he swapped his own checks for them, the presiding Justice, on being informed by counsel for the respondent that he intended to cross-examine in regard to all the checks, stated that he did not think it was necessary to take the time of the Court for such extended inquiry and, for this reason, excluded further testimony along this line. By way of comment, he said the witness had asserted his inability to give the whereabouts of the checks. The exception to this ruling can not be sustained. The check-swapping transactions between the respondent and Elbridge T. Foster were collateral to the issues being tried. The extent to which a cross-examination concerning such matters may be carried is within the discretion of the presiding Justice. *State* v. *Rollins*, 73 Me., 380. Nor do we find that any prejudice could have resulted from the reference to the inability of the complaining witness to give the whereabouts of the checks. Assuming as argued by counsel that a strict interpretation of his testimony indicated that the witness was able but had neglected to produce the checks, the erroneous statement of fact in the comment could not have had any effect upon the result of the trial. If there was error, it was undoubtedly inadvertent and harmless.

There is no greater merit in the exception taken to the exclusion of testimony regarding the consideration Mr. Foster paid for a note of $2,100 dated March 5, 1929, and signed by the respondent and his wife. This was an independent transaction and the facts incident to it do not appear to have any tendency to establish the probability or improbability of the matters in issue. The evidence was clearly irrelevant.

The remaining exception relied upon here is based on the exclusion of a letter sent by counsel for the respondent demanding that the complaining witness produce at the trial everything which he had of a documentary nature relating to the respondent's transac-

tions with him. Certain checks presumably in the possession of the witness were not produced, but the record fails to show that the respondent was debarred from introducing secondary evidence of their contents or that his counsel was restricted in his comments on the failure or refusal of the witness to produce them. The admission of the exhibit would have added nothing to the respondent's defense. It was not error to exclude it.

Exceptions overruled.
Special motion overruled.
Judgment for the State.

THERESA W. PELLETIER

vs.

LUELLA DEERING, INDIVIDUALLY

AND

AS EXECUTRIX OF THE ESTATE OF LOTTIE A. HALEY.

Androscoggin. Opinion January 25, 1933.

WILLS. EQUITY. TRUSTS. CONTRACTS.

Where services are performed in pursuance of a valid contract for the disposition of property by will to a particular person and the promisor fails to comply with the agreement, if recovery is not barred by the Statute of Frauds, an action will lie for damages for breach of the contract or upon a quantum meruit, *or, if the requisite equities attend, by a bill to impress a trust.*

The remedy is at law, however, unless the promisee has changed his or her condition or relation so that, his claim being in no way inequitable, a refusal to complete the contract would be a fraud upon him and no adequate remedy at law is afforded.

Upon the facts proved in the case at bar, a fraud upon the plaintiff was not shown.

The remedy at law was full, adequate and complete.

Neither the bill nor the proof offered in support thereof shows grounds for equitable relief.

On report. A Bill in Equity to impress a trust on property of the decedent in the hands of the defendant as her executrix. The action is based on the alleged breach of the decedent's agreement to bequeath her entire personal estate to the plaintiff. By consent of the parties the case was reported to the Law Court for its determination, on so much of the evidence as was legally admissible. Bill dismissed. Decree below in accordance with the opinion. The case fully appears in the opinion.

Louis J. Brann,

Peter A. Isaacson, for plaintiffs.

Herbert E. Holmes, for defendants.

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

STURGIS, J. This Bill in Equity is brought to impress a trust on the property of Lottie A. Haley, deceased, now in the possession of the defendant as executrix under her will. The action is based on the alleged breach of the decedent's agreement to bequeath her entire personal estate to the plaintiff. By consent of the parties, the case is reported to this Court for decision upon so much of the evidence as is legally admissible.

Lottie A. Haley formerly lived with her husband on Towle Street in Auburn at what is known as Parsons Mills. The couple were advanced in years and childless. While they lived in their home at Parsons Mills in the summer time, for more than nine years during the winter months, the Haleys rented rooms from the plaintiff and her husband, Frank P. Pelletier, who lived in a rented flat in Lewiston, and the families became very intimate. So close was this friendship that on November 27, 1929, when Mr. Haley lost his life in an accident, the Pelletiers assisted the widow in her funeral arrangements and invited and received her into their home as a guest. There is abundant evidence that there, in the early days of her bereavement, Mrs. Haley was cared for and comforted with marked kindness and consideration.

Within a week after her arrival at their home, Mrs. Haley had arranged with the Pelletiers that they should support and maintain

her for the rest of her life and have all her property. On December 5, 1929, an attorney was called to the Pelletier home, and his statement of what took place gives a clear account of the agreement made and its partial performance. He says:

> "A. As near as I can, the conversation was as follows: Mr. and Mrs. Pelletier stated that they had been having some talk with Mrs. Haley with relation to supporting Mrs. Haley the rest of her natural life, and after some conversation Mrs. Haley told me that she was to give all of her property to the Pelletiers, and they in return were to provide her with a home at Parsons Mills, and furnish her with whatever she needed the rest of her life, and that she wanted a will drawn up to carry out the intent of their understanding. She also said that Mr. Pelletier was to repair the home there at Parsons Mills, that is, her old home, and make it suitable for the habitation of the two families, and that she would in time give him a deed so that he could borrow money on it. I prepared the will, and there was other general conversation, and of course all pertinent to the same general idea."

The attorney then states that he drew a will in which Mrs. Pelletier was sole beneficiary and Mrs. Haley executed it. He advances the opinion that Mrs. Haley understood what she was doing and was of sound mind. He advised that the agreement of the parties be reduced to writing, but this was not done. In his office a few days later, he prepared a deed conveying Mrs. Haley's home at Parsons Mills to Mr. Pelletier, and on December 26, 1929, it was executed. The making of this agreement, the will and the deed of her home at Parsons Mills by Mrs. Haley, as thus described, is confirmed by other witnesses and must be accepted as fully proved.

Alterations on the Haley house at Parsons Mills were begun without delay. Mr. Pelletier placed a mortgage upon the property and borrowed $1,700 from a local Loan and Building Association. A foundation was put under the house, two rooms were added, the kitchen was enlarged, water and electricity were put in and a flush closet was installed. Early in January, the Pelletiers gave up their rent in Lewiston and moved to Towle Street. Mrs. Haley accompanied them, was given the use of one of the new rooms furnished

with such of her own furniture as she desired, and through the winter it would seem that the Pelletiers fully and faithfully carried out their agreement.

In March, 1930, however, Mrs. Haley became dissatisfied. Complaining of the noise caused by some of the Pelletier children, of whom there were several, and annoyed by the operation of a radio, she left the house on Towle Street and took rooms elsewhere. On April 22, 1930, she revoked and destroyed her will in favor of Mrs. Pelletier and made a new will in which the defendant, who is her niece, was sole beneficiary. On May 5th following, she met the Pelletiers in the office of the attorney who had previously acted in the matter and, offering to allow them to retain the real estate which they had received from her, attempted to obtain their release of any further claims under her agreement. They charged her with unfairness and unreasonableness, asserted their own full performance of the agreement and insisted that she should abide by it. She refused to return to Towle Street or to give them her personal property. No compromise or settlement was effected.

On August 4, 1930, Mrs. Haley executed another will, again making the defendant Luella Deering, her sole beneficiary and executrix. She was still estranged from the Pelletiers. They occupied the property she had given them, while she maintained herself in boarding houses in Auburn and Lewiston without aid from or contact with them. On Thanksgiving Day, however, she called on the telephone and expressed a desire to spend the day with them. They sent for her and she went back to Towle Street. Witnesses called for the plaintiff testify that, before the day was over, Mrs. Haley had arranged to again live with the Pelletiers and began another stay with them.

It appears that Mr. Pelletier had started to erect a shed at the rear of the house on Towle Street, and there is evidence that Mrs. Haley requested him to build it into a two-room cottage for her use. He borrowed $200 from her, gave her a mortgage on the entire property as security, and built the cottage. She lived in it through the winter of 1931. She had grown infirm, a chronic heart trouble was more serious and a long-existing lameness had increased. Mrs. Pelletier and members of her family served Mrs. Haley with meals in the cottage and there ministered generally to her needs.

Trouble arose again in the spring. On March 15, 1931, Mrs. Haley left the Pelletiers' home and engaged board and room elsewhere. Whatever may have been the cause of her departure, the fact remains that she never returned. In June or July following, Mr. Pelletier paid her attorney the money he had borrowed to build the cottage, and her mortgage securing the loan was discharged. The inference is warranted that the Pelletiers had then arranged to trade the land and buildings obtained from Mrs. Haley for property at Danville, some miles away, and a discharge of the mortgage was necessary to clear title.

On August 25, 1931, Lottie A. Haley died and thereafter her will of August 4, 1930, of the tenor already stated, was admitted to probate, the defendant was duly appointed and qualified as executrix thereof, and, in that capacity, became intrusted with the estate of the testatrix, which is personal property amounting to $2,871.64 according to the appraisal.

The special prayers of the bill are that the defendant, both as executrix and as sole legatee under Mrs. Haley's will, be adjudged and decreed trustee for and ordered to transfer to the plaintiff all the goods and chattels, including moneys on deposit or in hand, belonging to the estate. The defendant, in her answer, denies that there is equity in the bill, charging affirmatively in substance that (1) the plaintiff Theresa W. Pelletier and her husband obtained the agreement from Lottie A. Haley on which they rely by fraud and undue influence; (2) that by reason of the failure of the plaintiff and her husband to carry out their own part of the agreement, Mrs. Haley was justified in leaving their home and refusing to give them her personal estate; and (3) that the plaintiff has a plain, adequate and complete remedy at law. A plea of non-joinder of Frank P. Pelletier as a party is appended to the answer.

The evidence in this case clearly shows that the defendant's decedent, Lottie A. Haley, entered into a valid and binding contract with the plaintiff, Theresa W. Pelletier, and her husband, Frank P. Pelletier, by which she obligated herself in the first instance to convey her real estate to Mr. Pelletier and to bequeath her personal estate to Mrs. Pelletier. It is equally well shown that her promisees engaged to support and maintain her for the rest of her life in the

house in which she had lived for years and under the agreement was to convey to Mr. Pelletier.

There was partial performance of the contract on both sides. As we have pointed out, the Pelletiers supported and maintained Mrs. Haley as long as she would stay with them. She, in turn, conveyed her real estate to Mr. Pelletier, made a will in favor of Mrs. Pelletier and accepted support and maintenance from them during two winters. In the spring and summer of 1930, however, she repudiated her agreement, revoked her will and made other testamentary dispositions of her property. Although she went back to the Pelletiers for the winter of 1931, her departure the following March, her failure to make a new will and her conduct generally indicated that she intended to abide by her earlier repudiation of her contract and, so far as she was concerned, it was at an end.

The case reported does not support the defendant's charge of undue influence. The agreement made with the Pelletiers for her support and maintenance, on its face, was as fair and advantageous to Mrs. Haley as to them. She was an eldery woman, not in good health, alone and in need of care, and they were her closest friends. Although she was undoubtedly grief-stricken at the time and moved by the kindness and attention she received, the weight of the evidence indicates that she acted as a free agent and according to her own volition.

There is no convincing proof that Mrs. Haley was denied reasonably suitable and sufficient support and maintenance. She had years of acquaintance with the Pelletier family, knew all the members of it and their family life and it does not appear that they changed their mode of living or conduct materially after they moved to Towle Street. There is evidence that the room Mrs. Haley occupied the first winter was of her own choosing and that the cottage was built the next year at her request and she occupied it voluntarily. We are not convinced that she was justified, on this record, in violating her contract. The important question here is whether the plaintiff can have a remedy for its breach in this action in equity.

A valid contract for the disposition of property by will to a particular person is undoubtedly enforcible, and, where services are performed in pursuance thereto and the promisor fails to comply

with the agreement, if recovery is not barred by the Statute of Frauds, an action will lie for damages for breach of the contract or upon a *quantum meruit* for the reasonable value of the services rendered, or if the requisite facts and circumstances attend, it may be enforced by a bill in equity to impress and declare a trust. *Emery* v. *Wheeler*, 129 Me., 428, 152 A., 624.

There are, however, limitations upon the right to equitable relief in cases of this kind. If the promisee under an agreement such as is found here has changed his condition and relation so that a refusal to complete would be a fraud upon him and there is present no inadequacy of consideration nor circumstances nor conditions rendering the claim inequitable, if the courts of law afford no adequate remedy, a court of equity will 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; *Lang* v. *Chase*, 130 Me., 267. If these essential equitable Me., 94, 149 A., 833; *Lang* v. *Chase*, 130 Me., 267, 155 A., 273. If these essential equitable requisites are lacking, the remedy is at law.

The plaintiff, Theresa W. Pelletier, moved from a tenement in Lewiston to a remodeled home in Auburn with modern conveniences. From December, 1929, to sometime in March following, a period of about three months, she was kind and attentive to Mrs. Haley and incurred the burden of having an additional member in the family. Again, from Thanksgiving Day of the next fall until March 15, 1931, she served Mrs. Haley, and the demands upon her were more exacting. It is to be assumed, however, that the expense of Mrs. Haley's support and maintenance fell upon Mr. Pelletier. He was a party to this transaction and his wife's rights in this action must be weighed in the light of his responsibilities, obligations and the reward which he received. Acquiring a home for himself in place of a rented flat, subject, it is true, to the cost of remodeling, he received an equity of redemption of substantial value which he used as a part payment on the purchase price of another house. Mrs. Pelletier as his wife had a potential interest in the property and that received in exchange. She occupied and used each as her home. The indirect benefit which she received from the real estate can not be ignored.

The estate of Lottie A. Haley includes only personal property and there is no proof that any peculiar or sentimental value attaches to any part of it. The plaintiff can be fully compensated by money damages for all the services she has performed under her contract with the decedent or for the breach of it if she elects to make that the gist of her action. We do not find such a change in the plaintiff's condition or relation as will warrant a finding that Mrs. Haley's breach of her contract was a fraud. The plaintiff has a full, complete and adequate remedy at law and she should seek it in that forum.

The defense of non-joinder raised by the plea needs no consideration here. Lacking allegations and the support of proof, which show grounds for equitable relief, this bill must be dismissed. The case being here on report, judgment must be so entered.

Bill dismissed.
Decree below in accordance with this opinion.

UNITED STATES PLYWOOD COMPANY, INC.

vs.

ROBINSON VERRILL, TRUSTEE.

York. Opinion January 30, 1933.

BANKRUPTCY.

Prior to the 1910 *amendment of the Bankruptcy Act the trustee had only such rights as the bankrupt had. The amendment of* 1910, *however, as to property "in the custody" or "coming into the custody" of the bankruptcy court placed the trustee in the position of a creditor holding a lien on the property and as to property "not in the custody of the bankruptcy court" in the position of a judgment creditor holding an execution duly returned unsatisfied.*

If the property in question is subject to claims or liens valid against creditors, it is not to be regarded as property "in the custody of" or "coming into the custody" of the bankruptcy court as contemplated by the provision of this section, so that the trustee would have a lien thereon. As before the passage of the

amendment the trustee takes the bankrupt's title subject to equities good as against general creditors.

The purpose of the amendment to the Bankruptcy Act is to place the trustee, not in the position of an attaching creditor as to all property held by the bankrupt, but only as to such property over which general creditors at the time of bankruptcy might have asserted a claim by means of attachment or by some similar process. It is not the intent of the Bankruptcy Act to permit the trustee to seize property in the hands of the bankrupt subject to equities in favor of third parties.

In the case at bar, the real estate in question had been in open possession of the plaintiff's predecessor in title for several years. The bankrupt had never directly or indirectly made any claim to it. It was not property which within the meaning of the Bankruptcy Act, was "in the custody" of "coming into the custody" of the bankruptcy court. As to it the defendant was vested with the rights of a judgment creditor holding an execution duly returned unsatisfied. His rights were subordinate to the holder of the unrecorded deed.

On exception by defendant. A real action heard by the court. After ruling by presiding Justice ordering judgment for the plaintiff, the defendant excepted. The sole issue was one of title to real estate as between the plaintiff and the defendant. Exception overruled. The case fully appears in the opinion.

Willard & Willard,
Woodman, Thompson & Skelton, for plaintiff.
Verrill, Hale, Booth & Ives, for defendant.

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

THAXTER, J. This is a real action heard by the court with right of exceptions reserved, and is before us on an exception to a ruling of the presiding Justice ordering a judgment for the plaintiff. On the pleadings the sole issue is one of title to real estate as between the plaintiff and the defendant.

The facts are agreed upon. Orlando W. Brown on June 8, 1927, conveyed the real estate in question by warranty deed to the American Specialty Manufacturing Co. Through inadvertence this deed was not recorded but the corporation until it was adjudicated a bankrupt in February 1931 occupied the property and remained in possession of it. In its bankruptcy schedule the com-

pany listed this property as one of its assets. The plaintiff, a creditor of the company, attached this property September 17, 1930; the suit went to judgment February 28, 1931; a levy was made March 19; and a deed of sale to the plaintiff was duly recorded May 5, 1931. Such is the basis of the plaintiff's title. Orlando W. Brown died March 22, 1928, leaving a will under the terms of which his son, O. Wendell Brown, was made general devisee of his father's real estate. The son was adjudicated bankrupt May 5, 1931, and the defendant in this action is his trustee in bankruptcy. At no time did the son ever make any claim to the real estate, which seems to have been regarded by all concerned as the property of the corporation, and no attachment was ever made against his real estate.

Disregarding the devolution of this title, we shall treat the question as if it were one of priority between the holder of an unrecorded deed and the trustee in bankruptcy of the grantor. The same principles applicable to the decision of such issue govern the rights of the parties to this action.

R. S. 1930, Chap. 87, Sec. 14, provided in part as follows: "No conveyance of an estate in fee simple, fee tail, or for life, or lease for more than two years or for an indefinite term is effectual against any person except the grantor, his heirs and devisees, and persons having actual notice thereof unless the deed or lease is acknowledged and recorded in the registry of deeds within the county where the land lies." . . .

In view of this provision the bankrupt, even assuming that he could have conveyed a title to a *bona fide* purchaser, could himself have maintained no claim to this real estate. A creditor, however, complying with the requirements of R. S., Chap. 95, Sec. 63, and attaching the real estate without notice of the rights of the holder of the unrecorded deed would have priority over such holder. *Stanley* v. *Perley*, 5 Me., 369; *Roberts* v. *Bourne*, 23 Me., 165; *Veazie* v. *Parker*, 23 Me., 170; *Parker* v. *Prescott*, 87 Me., 444, 32 A., 1001. The question is whether the trustee of the bankrupt stands in any better position than the bankrupt himself, and has rights similar to those of a *bona fide* purchaser or of an attaching creditor.

Under the provisions of the Bankruptcy Act prior to 1910 the trustee took only such rights as the bankrupt had, and in a suit

challenging his title or right to possession of the property could interpose no defense that was not available to the bankrupt himself. Thus it has been held that the failure to record a conditional sale agreement gave the trustee no lien on the property. As the conditional vendor had the right to retake the property from the bankrupt, it had the same right as against his trustee. *York Manufacturing Co.* v. *Cassell*, 201 U. S., 344, 50 Law Ed., 782.

The defendant contends, however, that since the amendment to the Bankruptcy Act adopted June 25, 1910, Chap. 412, Sec. 8, 36 Stat., 840, U. S. C. A. 11, Sec. 75, the trustee in bankruptcy is in the position of an attaching creditor, and has a lien on the property superior to that of the holder of an unrecorded deed. The provisions of this amendment in so far as they relate to this question read as follows: "Such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

If the property in question is subject to claims or liens valid against creditors, it is not to be regarded as property "in the custody" or "coming into the custody" of the bankruptcy court as contemplated by the provisions of this section, so that the trustee would have a lien thereon. As before the passage of the amendment the trustee takes the bankrupt's title subject to equities good as against general creditors. Such is the trend of decisions construing this statute.

In *Clark* v. *Snelling*, 205 Fed., 240 (C. C. A., First Cir.), a bankrupt held real estate under a parol agreement to transfer it to his mother who had been in possession of it for many years and had made improvements on it. In spite of the fact that the bankrupt could have given a valid title to a *bona fide* purchaser, the Court held that the trustee in bankruptcy took the bankrupt's title subject to the mother's equitable right to compel a conveyance. The Court said, page 244, with particular reference to the amendment of 1910: "We agree with the learned District Judge in finding nothing in the Bankruptcy Act, as it stands at present, which must

be understood to give a trustee the full beneficial ownership of land whereof the bankrupt has the bare legal title only, or as impairing the right of the equitable owner, under the law of the state, to hold such land against all claims except those of an actually attaching or levying creditor, and against those claims if the creditor can be charged with notice."

The decision in this case has been followed in a very recent case in the same circuit. *Vincent* v. *Tafeen*, 40 F. (2d), 823. Here a creditor with an equitable lien on property of the bankrupt took possession of the same before the bankruptcy. The trustee claimed that under the provisions of the amendment of 1910 he was in the position of an attaching creditor with a right superior to that of the equitable lienor. The Court found, however, that this was not property "in the custody" or "coming into the custody of the bankruptcy court," and that accordingly the trustee was not in the position of a creditor holding a lien on it.

In the case of *In re Perelstine*, 19 F. (2d), 408, it is held that the right of a vendor to rescind a sale for fraud by the vendee is good against the trustee in bankruptcy of the vendee.

In *Sapero* v. *Neiswender*, 23 F. (2d), 403 (C. C. A., Fourth Cir.), a bankrupt prior to his bankruptcy had assigned notes secured by a mortgage of real estate to the petitioner as part payment of a debt. The notes were endorsed and delivered but the bankrupt failed to assign the mortgage. Under the statutes of Maryland the title to the notes was presumed to be in the person holding the record title of the mortgage. The Court ruled that, as there was nothing in the Maryland statutes which made the unrecorded assignment void as to creditors, the bankrupt held the mortgage deed and the legal title conveyed therein as trustee for the petitioner, and the trustee in bankruptcy held it subject to the same equity. The Court regarded this as property not in the custody of the bankruptcy court and accordingly as to it the trustee was vested only with the rights of a judgment creditor holding an execution duly returned unsatisfied.

See to the same effect as the above *Robertson* v. *Scholtzhauer*, 243 Fed., 324, *In re Gamble*, 14 F. (2d), 847.

The main purpose of the amendment of 1910 was to change the rule declared in *York* v. *Cassell*, supra, under which the trustee in

bankruptcy had no greater rights in property subject to an unrecorded conditional sale agreement or chattel mortgage than did the bankrupt himself. Its intent was to place the trustee, not in the position of an attaching creditor as to all property held by the bankrupt, but only as to such property over which general creditors at the time of the bankruptcy might have asserted a claim by means of attachment or by some similar process. *Potter Manufacturing Co.* v. *Arthur*, 220 Fed., 843; *Pacific State Bank* v. *Coats*, 205 Fed., 618; Collier on Bankruptcy, 13 ed., pages 1052-1059.

In the cases cited by counsel for the defendant the unrecorded conveyances referred to were void under the various state statutes as to creditors, and under the provisions of the Bankruptcy Act as amended the trustee was given a lien on such property for the benefit of creditors. *Davis* v. *Harlow*, 130 Md., 165, 100 A., 102; *Cooper Grocery Co.* v. *Park*, 218 Fed., 42 (C. C. A., Fifth Cir.); *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U. S., 641, 60 L. Ed., 841; *Potter Manufacturing Co.* v. *Arthur*, supra; *Townsend* v. *Ashepoo Fertilizer Co.*, 212 Fed., 97.

The aim of the Bankruptcy Act is to marshall the property of an insolvent debtor and to apply it in accordance with well recognized equitable principles for the benefit of his creditors. It is not its intent to seize upon property in his hands which is subject to equities in favor of third persons. The principle asserted by Chief Justice Peters in an analogous situation applies here. "Equity disdains to take the property of one man to pay another's debt." *Houghton* v. *Davenport*, 74 Me., 590, 594.

The fallacy of the defendant's contention here is in assuming that, because the Bankruptcy Act as amended places the trustee in the position of a lien creditor as to certain property, it did so with respect to all property which the bankrupt might by any means have transferred. As is pointed out in the very able opinion in *Clark* v. *Snelling*, supra, page 243, "There is difficulty in saying that by provisions giving trustees certain rights, remedies, and powers all further rights are also given which might, in any event have been obtained by exercising the rights, remedies, and powers described as given."

The real estate here in question had been in the open possession of the plaintiff's predecessor in title for several years. The bank-

rupt had never directly or indirectly made any claim to it. Though he had a record title which he might have transferred to a *bona fide* purchaser, it was not property which, within the meaning of the Bankruptcy Act, was "in the custody" or "coming into the custody" of the bankruptcy court. As to it the defendant was vested with the rights of a judgment creditor holding an execution duly returned unsatisfied. Such creditor unless there has been a valid attachment has no lien prior to a levy. R. S. 1930, Chap. 95, Sec. 63; *Brackett* v. *Ridlon*, 54 Me., 426. His rights are subordinate to those of the holder of the unrecorded deed.

Exception overruled.

GEORGE H. TUTTLE, APPELLANT

FROM

COUNTY COMMISSIONERS OF SOMERSET COUNTY.

Somerset. Opinion February 10, 1933.

WAYS. DAMAGES. PLEADING AND PRACTICE. R. S., CHAP. 27, SEC. 8. COUNTY COMMISSIONERS.

The Statute governing appeals from a location of a way by county commissioners is mandatory and strict compliance with its terms is necessary.

The provisions of the Statute as to appeals from the decision of county commissioners in the matter of estimating damages resulting from the laying out of ways are also mandatory and are to be strictly construed.

When a bill of exceptions is silent as to whether the ruling complained of was made as a matter of law or as a matter of discretion, it is to be presumed that the trial court ruled as a matter of discretion.

Exceptions do not lie to the exercise of discretion in allowing and disallowing amendments.

In the case at bar, the appellant having failed to take or enter his appeal from the location of the way in accordance with the Statute, the decision of the county commissioners was final.

The appellant's appeal, filed at the May Term of the Superior Court, 1932, can not be construed as the complaint required by the Statute.

It was not so made or intended and its deficiencies in form and substance do not permit it to be treated as a substitute.

The complaint not having been filed as required by law, the appeal was properly dismissed.

The bill of exceptions does not show that the ruling denying the appellant's motion to amend was made as a matter of law.

On this record, the ruling denying the appellant's motion to amend is not exceptionable.

On exceptions by appellant. The issue involved an appeal from the decision of the County Commissioners of Somerset County in which they laid out a town way across the land of appellant, and estimated and awarded damages. Exceptions overruled. The case fully appears in the opinion.

Ames & Ames, for appellant.

Merrill & Merrill, for appellees.

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

STURGIS, J. Upon the petition of ten owners of real estate under improvement in Smithfield, the County Commissioners of Somerset County, having jurisdiction thereof, laid out a town way through and across the land of George H. Tuttle, the appellant, and awarded damages. No appeal from the location or from the estimate of damages having been taken or filed, at the March Term, 1931, of their court, the return was recorded and proceedings closed as provided in R. S., Chap. 27. The appellant, claiming to be aggrieved both by the location of the way and the estimate of damages done, thereafter attempted to appeal.

Parties interested may appeal from the location of a way by county commissioners at any time after their decision has been placed on file and before the next term of the Superior Court for said county, but must enter their appeal at such term. R. S., Chap. 27, Sec. 61. The Statute is mandatory, and strict compliance with its terms is necessary. *Webster* v. *County Commissioners*, 64 Me., 434; *Same*, 64 Me., 436. The appellant here having failed to take or enter his appeal in accordance with this provision, the location of the way by the county commissioners was final. This is conceded on the brief.

The appellant seeks, however, to save his right of appeal from the estimate of damages. He had the right to appeal therefrom, at any time before the third day of the regular term of the court of county commissioners succeeding that at which the return was made, to the term of the Superior Court first held in the county where the land was situated more than thirty days after the expiration of the time within which the appeal was to be taken, excluding the first day of its session. In order to perfect such an appeal, he was required to file notice thereof with the county commissioners within the time above limited and, at the first term of the Superior Court, file a complaint setting forth substantially the facts. R. S., Chap. 27, Sec. 8. He failed to make and perfect his appeal in accordance with this provision.

When, however, any person, aggrieved by the estimate of damages for his land taken for a town way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may, within six months after the expiration of the time when said appeal might have been taken, apply to a Justice of the court in term time or vacation and, after due notice and hearing, permission may be granted to him to take his appeal to such term of the court as the Justice shall direct and on such terms as may be ordered, and subsequent proceedings shall be as if said appeal had been seasonably taken. R. S., Chap. 27, Sec. 20. Invoking this provision, the appellant, at the January Term, 1932, of the Superior Court, was granted permission to take his appeal and directed to enter it at the following May Term.

It was then the duty of the appellant to file notice of his appeal with the county commissioners and file a complaint in the Superior Court at the designated term, setting forth substantially the facts upon which the case should be tried, in accordance with the requirements of R. S., Chap. 27, Sec. 8, *supra*. His compliance with this provision and the order of the Court was only partial. As of April 30, 1932, he filed with the county commissioners not only a notice of his intention to appeal from their estimate of damages, but also an appeal directed to the commissioners in their official capacity. At the May Term of the Superior Court, he there filed, not the complaint required by the Statute, but the appeal which he had previously filed and directed to the county commissioners.

On the eleventh day of the September Term, 1932, of the Superior Court, on motion of the Inhabitants of the Town of Smithfield, the appeal was dismissed. Thereafter, the appellant filed a motion in which he recited the fact of the dismissal of his appeal and moved for permission to amend by adding a complaint addressed to the Superior Court and intended to be in substantial compliance with the statutory requirement. The motion to amend was denied. Exceptions to both rulings were reserved.

Appeals from the decisions of county commissioners in the matter of laying out ways are regulated exclusively by statute, the provisions of which are mandatory and to be strictly construed. "The Statute is not a machine in the hands of the Court, capable of being adjusted to suit the exigencies of the case and thus enable parties to escape the legal consequences of their laches and mistakes. When the Statute provides that a thing may be done and prescribes the time and mode of doing it, these directions should be strictly followed." *Webster* v. *County Commissioners*, 64 Me., 436. In this case, compliance with the order of the court and the Statute required that the appellant file a complaint at the May Term, 1932. Unfortunately, he did not do so. His appeal, perhaps appropriate in other proceedings, can not be construed as a complaint. It was not so made or intended, and its deficiencies in form and substance do not permit it to be treated as a substitute. The complaint not having been filed as required by law, the presiding Justice properly dismissed the appeal.

The bill of exceptions does not show that the ruling denying the appellant's motion to amend was made as a matter of law. When a bill of exceptions is silent on this point, it is to be presumed that the trial court ruled as a matter of discretion, and not of law. Exceptions do not lie to the exercise of discretion in allowing and disallowing amendments. *Rendering Co.* v. *Harrington*, 114 Me., 394; *Clark, Appellant*, 111 Me., 399; *Gilman* v. *Emery*, 66 Me., 460. If it be assumed, but not decided, that the motion was timely and the proposed amendment could be properly allowed, for the reasons stated, the denial of the motion was not exceptionable.

Exceptions overruled.

4-ONE BOX MACHINE MAKERS *vs.* WIREBOUNDS PATENTS COMPANY.

Cumberland. Opinion February 14, 1933.

EQUITY. PATENTS.

The decree of a single Justice in equity must conform to the mandate of the Appellate Court.

A license granted by a patentee may be deemed exclusive and properly so designated, but the terms of the contract may be such that no monopoly is created on the failure of which a right of action would accrue.

On exceptions by defendant to modified final decree. Exceptions overruled. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives,

Douglas, Armitage & McCann, for plaintiff.

Woodman, Skelton & Thompson, for defendant.

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

PATTANGALL, C. J. On defendant's exceptions to modified final decree, the cause having been heard by this Court on appeal from original final decree and remanded for entry of new decree in accordance with opinion. 4-*One Box Machine Makers* v. *Wirebounds Patents Company*, 131 Me., 70.

The principal contention at the former hearing before us related to an agreement between the parties, by which a temporary reduction was effected in royalties payable by plaintiff to defendant under a contract entered into May 16, 1916. It was admitted that such a reduction was agreed upon on March 7, 1928. Defendant contended that the arrangement terminated on May 20, 1929, and that after that date the original royalties were resumed. Plaintiff contended that the reduced rate was for a longer period. The Court below found for plaintiff on this issue but the finding was reversed above, and in the decree now before us royalties are computed accordingly. The exception taken to the method employed in making

this computation is overruled, as also is the exception relating to taxation of costs.

The remaining exception is to the inclusion in the decree of the following paragraph: "That the license from the defendant to the plaintiff dated May 16, 1916, and described in the plaintiff's bill is an exclusive license." Defendant argues that this finding was not germane to any question open to consideration in the case then before the Court and that any finding concerning it is prejudicial to defendant's rights in litigation now pending between these parties involving the question of eviction.

The record discloses that a like finding appears in the original decree from which appeal was taken and that the opinion of this Court referred to above contains these statements: "The license, though its language in such behalf is not express, is exclusive." "The appeal presents many questions. This court differs from the trial court only regarding the application of the doctrine of estoppel." "The appeal is sustained, but for no other purpose than that of remanding the cause for the entry of a decree which shall modify the original decree as this opinion indicates. In all other respects, the decree below is affirmed."

This mandate, in terms, compelled the Court below to include in its decree the paragraph of which defendant complains. The issue of eviction was not involved. The opinion of the Court in 4-*One Box Machine Makers* v. *Wirebounds Patents Company*, supra, recites that "A stipulation by the parties removes the question of partial eviction and the issues raised thereby; this without prejudice to either party's right to try these issues in a separate suit."

After the Court had passed upon the first bill, another bill was filed by plaintiff, directly raising the issue of partial eviction based upon the hypothesis of an exclusive license. Defendant demurred, the case came forward on report, and the demurrer was sustained. 4-*One Box Machine Makers* v. *Wirebounds Patents Company*, 131 Me., 356, 163 Atl., 167.

In this opinion, the Court said:

> "The plaintiff calls attention to the language of this court in the opinion in 131 Me., 70, in which it is stated that this license is exclusive, and counsel, then placing on the phrase

'exclusive license' their own interpretation, argue that the question is *res adjudicata.* If as is stated by them this issue has been decided, and if it follows necessarily as they say that an eviction under an exclusive license occurs on a declaration of invalidity of the patent with a consequent inability of the licensee to prevent an unauthorized use, the question of eviction which is now being argued would likewise seem to be closed. Yet counsel have stipulated in the previous case and the court there found that the question of eviction was open. It is obvious therefore that we did not hold that this license is exclusive in the sense in which the defendant uses that term, namely, that it purports to grant an exclusive right or a monopoly on the failure of which a right of action would accrue."

It is to be assumed that the decree before us goes no farther than the opinion of the Court on which it is based and that, in declaring the license exclusive, it does not imply that it purported "to grant an exclusive right or a monopoly on the failure of which a right of action would accrue."

In this view of the matter, the decree is not inconsistent with the recent opinion of the Court, nor can it prejudice defendant's rights in any pending litigation between the parties involving the question of eviction.

Exceptions overruled.

WILLIAM E. PERLIN *vs.* MAURICE E. ROSEN.

Cumberland. Opinion February 15, 1933.

EVIDENCE. EXCEPTIONS.

If the only bearing of evidence offered is to prove a collateral fact, it is not relevant and should be excluded. But if any circumstance, which tends to make the premises set up in the pleadings more or less improbable, is offered in evidence it should be admitted.

When there is not enough in the bill of exceptions itself to enable the Law Court to determine whether or not the excepting party was aggrieved by the exclusion of evidence the exception fails.

In the case at bar the Court finds that the defendant's rights were unduly abridged by the exclusion of certain testimony, and sustained five of his exceptions.

On exceptions and general motion for new trial by defendant. An action of assumpsit to recover the sum of $1,500, with interest, that plaintiff alleged he had loaned defendant. Trial was had at the March Term, 1932, of the Superior Court for the County of Cumberland. To the exclusion of certain testimony offered in his behalf, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $1,520, filed a general motion for new trial. Exceptions two, three, four, five, and nine sustained. The case fully appears in the opinion.

Harry E. Nixon,
Wilfred A. Hay, for plaintiff.
Maurice E. Rosen, pro se,
Franklin Fisher,
Barnett I. Shur, for defendant.

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

BARNES, J. The writ in this case is in assumpsit, plaintiff declaring for money, $1,500, loaned by him to defendant.

The plea denies indebtedness, or any such loan.

In May, 1929, both parties were members of the bar, and practising. They then occupied offices in the same suite, and were more or less closely associated. In particular plaintiff was, with one Berkowitz, administrator of an estate in process of settlement, and defendant advised plaintiff as his counsel.

The defense was that the money was received from plaintiff, not as a loan, to be repaid, but rather as a contribution on the part of plaintiff, and in his own behalf, to make up a sum demanded of plaintiff as administrator, bound to settle his account in his said capacity, in proceedings before the Court of Probate.

Upon trial the jury found for plaintiff for the amount declared; and the appeal is on exceptions to the exclusion of evidence, and on motion for a new trial, on the usual grounds.

As early as the twelfth day of November, 1930, defendant recognized himself indebted to the plaintiff, as administrator, in a sum

that might approach $10,000, and plaintiff was accordingly indebted to the estate.

Pressure was brought to bear on the administrator, and perhaps on both parties, for settlement, and, on November 28, 1930, plaintiff borrowed $1,500 of his father and handed it to defendant.

Of the above there is no dispute.

Trial was before Court and jury. Plaintiff's testimony was brief.

Defendant promptly introduced the details of settlement, under pressure, of the administrator's account before the Probate Court.

From the defendant's testimony it appears that large sums of money of the estate came into his hands, to a total of perhaps $31,000.

Plaintiff's testimony established the presumption that the $1,500 transferred from him to defendant was a loan as charged.

In this situation defendant is entitled to reasonably wide latitude in examination of transactions between him and plaintiff. But not all such transactions are to be examined into. Collateral issues are not to be introduced. Matters for adjudication in the Probate Court were not being tried in the Superior Court. That Court should, in the exercise of wise discretion, eliminate from consideration all matters not relevant to this issue, loan or no loan. If the only bearing of evidence offered is to prove a collateral fact, it is not relevant and should be excluded.

But if any circumstance, which tends to make the premises set up in the pleadings either more or less improbable, is offered in evidence it should be admitted. See *Nickerson* v. *Gould*, 82 Me., 512.

Nine exceptions were argued.

Exceptions one and eight relate to the same point, the admissibility of a document prepared by defendant a fortnight or more before the date of the alleged loan. This document, Exhibit 1, was offered early in the trial and then excluded as not authenticated. At the close of the taking of testimony, it was finally offered and excluded. There is not enough in the bill of exceptions to enable us to determine whether or no defendant was aggrieved by the exclusion, and the exhibit was not brought up. We cannot travel outside the bill to find abuse of discretion; hence this exception fails.

And the same rule applies to the rejection of Exhibit 3, exception No. 7.

Sixteen days after the beginning of attempts to assemble the funds required to balance his account as administrator, plaintiff found it necessary to possess himself of $13,075.90.

At this time, as he said, on November 28, the alleged loan was made, and four days later defendant, in the presence of plaintiff, at a Portland bank turned over securities and cash to the bank, and plaintiff received a certificate of deposit in the above amount.

The theory upon which the defense appears to be based is that the administrator and his counsel each contributed of their funds to make the deposit for which certificate was issued, and that a great part of the $1,500 obtained from plaintiff's father was included in the funds exchanged for the certificate of deposit.

This plaintiff denied, urging that at a time when he was pressing his counsel, it is unreasonable and contrary to human experience that he would put $1,500 or any other sum into the hands of such debtor otherwise than by way of loan.

While being examined on this line, plaintiff was asked a question which we interpret to amount to this: Will you now go over any records or data which you have and tell us what *you* gave for the certificate of deposit.

Exclusion of this question gave rise to exception two.

Pursuing inquiry as to how the consideration for the certificate of deposit was made up, defendant asked plaintiff . . . "if we may assume that some cash went into that certificate of deposit, would it represent something which I owed you or the estate, if it was my cash?

"A. It would show monies due from you to me as administrator of the Zimmerman estate.

"Q. Now, I ask you to show me one single item that I owed you that you have not been paid for, excluding any cash that went into the certificate of deposit?" On objection this question was excluded, and exception three taken.

Further inquiry was as follows, "Now will you tell me what there was that was excluded at the time that the certificate of deposit was given you that you have not received payment for?" Exception four was noted to the exclusion of this question.

The certificate of deposit was purchased to balance the account of the administrators.

Defendant admitted that the shortage was in large part due to his own withholding of money of the estate, but attempted to prove it was in part a shortage of plaintiff's, and that the $1,500 was obtained by plaintiff and turned over to defendant to build up the amount then requisite to meet the demands of the Probate Court.

Tedious as the inspection of books of account, and the identification of checks and their disposition might be, while attempting to prove his exoneration from what might amount to conversion, defendant was entitled to present evidence and to glean from plaintiff such evidence as was within the knowledge of the latter and would tend to prove that a part of the cash which, with checks, made up the amount of the certificate of deposit, was funds of the plaintiff.

The analysis of the problem before him may well have been distasteful to the learned Justice presiding. He was properly watchful to exclude collateral matters that could not do otherwise than uselessly encumber the jury. But in ending the inquiry as evidenced in these three exceptions it appears defendant's rights were unduly abridged.

Exceptions two, three, and four are sustained.

During the course of the trial, defendant offered to prove through a journal of the plaintiff that there had in fact been more money paid by defendant to him than was owed by defendant. Such proof was rejected and exception five is sustained for the same reason as were the three above.

Exception was taken to the exclusion of an exhibit offered by defendant during the direct examination of his former bookkeeper, Miss Wheat. This was defendant's check, dated January 17, 1931, drawn by witness, payable to the firm, Laughlin and Gurney, for the sum of three thousand dollars. Miss Wheat testified that the exhibit was attached to a letter to Mr. Gurney, which, as she recalled the event, was taken by plaintiff to Mr. Gurney.

Subsequently defendant testified as follows: "The hearings in the Probate Court developed shortages on the part of Mr. Perlin. Various matters developed, so it was advisable in the first place for me to get out of the case. I suggested to him that he get Mr. Gurney. He got Mr. Gurney. I went up to see Mr. Gurney; we went up together.

"Mr. Gurney asked for a check as a retainer. I went over it with Mr. Perlin. He didn't have the money and I drew my check for three hundred dollars, and Mr. Gurney subsequently appeared in the Probate Court for Mr. Perlin."

This plaintiff denied. He testified that defendant retained Mr. Gurney to conduct negotiations that led to settlement of the amount of defendant's charges in the probate of the estate, and the record justifies the exclusion of the Gurney check.

But even if not strictly inadmissible, all the facts relative to the check were brought fully into the evidence, and defendant cannot have been hurt by the exclusion of the check.

As to the ninth exception: defendant testified that after several "hearings," in which these parties, with counsel, and counsel for the heirs interested in the estate in probate, participated, terms of settlement were reached.

Defendant testified that he relinquished claim to any fees for legal services and counsel, amounting to "around two thousand dollars"; that plaintiff "waived his commission," and that he, defendant, furnished $2,500 to effect the settlement.

Defendant testified, "we finally reached a settlement, with Mr. Perlin's approval, for twenty-five hundred dollars to be paid in addition to any money received."

His question included a statement that plaintiff, in 1929, collected the proceeds of three mortgages, due to him as administrator; deposited these sums with other interest money, and was finally an inquiry whether or no plaintiff paid interest for the use of such money of the estate.

On objection the question was excluded.

Plaintiff denied any agreement, or reason for agreeing, to participate in paying the twenty-five hundred dollars to the estate.

Defendant contended that large sums belonging to the estate had been in plaintiff's hands for more than a year, and that, in accord with the terms of settlement, the interest on such sums should be credited to him, in case the jury reached the stage of computation.

Cross-examination on this point, to a reasonable degree of thoroughness should have been allowed.

Exceptions two, three, four, five, and nine sustained.

So ordered.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

FRANK H. INGRAHAM, APPELLANT *vs.* NATHAN BERLIAWSKY.

Knox County. Decided January 21, 1932. On exceptions. The sole exception shown by the record was taken by defendant to the refusal of the presiding Justice to order a non-suit. Such a refusal is entirely a matter of discretion, to which no exception lies. Exceptions overruled. *Frank H. Ingraham*, for plaintiff. *Rodney I. Thompson*, for defendant.

DOMINICK M. SUSI *vs.* DIAMOND MATCH COMPANY.

Somerset County. Decided January 22, 1932. On motion. Action for damages for breach of contract. Verdict for plaintiff. Damages $5,004.

In October, 1930, the parties entered into a written contract by the terms of which plaintiff agreed to cut and haul from certain timber lots during the season of 1930-1931 all of the pine logs located thereon suitable for match stock according to certain specifications verbally agreed upon, the total quantity being estimated at one million feet, and land the same on skidways of defendant's mill, for which defendant was to pay seventeen dollars per thousand feet.

There was on the land from which these logs were to be cut a substantial quantity of timber, consisting of fir, white birch, poplar, Norway pine, burned timber and white pine unsuitable for match stock. Plaintiff planned to cut all of the timber and haul it

to the mill where it was to be sorted, scaled and sawed. The logs accepted as match stock were to be paid for by defendant, those rejected to remain the property of plaintiff, he to pay four dollars a thousand feet for sawing same. There was no provision in the contract as to who should have authority to determine which of the logs were suitable for match stock, and disagreement on that point gave rise to this litigation.

Work was begun on December 13, 1930, and continued with some interruptions until January 31, 1931. During that time 108,813 feet of match stock had been accepted and paid for. In addition, there had been delivered at the mill yard 366,427 feet of logs which defendant had refused to accept, and there were 52,000 feet of logs in the woods awaiting hauling.

Defendant's agent complained that plaintiff was not furnishing a reasonable supply of stock for the mill. Plaintiff asserted that if the logs were properly and fairly sorted, there were in the mill yard sufficient logs suitable for defendant's use to meet its demand; whereupon defendant ordered a cessation of the work, and contractual relations ceased between the parties.

Defendant claimed that plaintiff was at fault by not supplying it with stock of the required quality. Plaintiff claimed that defendant arbitrarily refused to accept stock which fully met the reasonable requirements of the contract. Thus an issue of fact was framed and much testimony was heard bearing upon the question. The evidence is neither clear nor conclusive. It furnishes fair basis for one of three distinct conclusions, namely, that the contract was abandoned by mutual agreement, that it was breached by plaintiff, or that it was breached by defendant. The jury reached the latter conclusion. Whether we agree with it or not, we cannot say that reasonable men, viewing the evidence fairly, might not arrive at such a decision; hence the verdict must stand. But patent error appears in the assessment of damages.

The total amount of white pine on plaintiff's land when cutting began was 782,148 feet. As nearly as could be ascertained, 363,721 feet remained in standing trees when the cutting was abandoned. Defendant had cut 418,721 feet of pine, all but 52,000 feet of which he had hauled to the mill. Of this amount, seventy per cent or 292, 899 feet is claimed to have been suitable for match stock.

Defendant had accepted and paid for 108,813 feet, leaving 184,086 feet improperly rejected. By reason of changed market conditions, plaintiff may be entitled to damages on this amount at a rate of eleven dollars per thousand feet or $2,024.95.

There is no evidence in the record from which it is possible to compute the damage, if any, caused by failure to market the standing timber. The case is silent as to price or value of stumpage either at the time the contract was made or at any period since, and also as to the cost of cutting. It is asserted that the loss on this item was five dollars per thousand, but there appears to be no basis for the assertion. In the absence of evidence, only nominal damage may properly be assessed against defendant on this item. Motion sustained. New trial granted, unless within thirty days from filing of mandate plaintiff file a remittitur of all of the amount of the verdict in excess of $2,024.95. *H. R. Coolidge, Merrill & Merrill*, for plaintiff. *Butler & Butler*, for defendant.

STATE OF MAINE *vs.* DONALD KILBRETH.

Oxford County. Decided March 21, 1932. The respondent was tried on an indictment charging the sale of intoxicating liquor and was convicted. He brings the case before us on an exception to the refusal of the presiding Justice to give the following requested instruction to the jury.

> "If you find from all the evidence in this case that the respondent was acting as an agent of the purchasers, and that his only interest in the matter was to obtain the liquor for them, and to receive as compensation for his services one (1) quart of the liquor which he purchased for them, you would be justified in finding that the respondent was not guilty of making a sale of any part of the liquors as charged in the indictment, because if from all the evidence you find that he was so acting, any liquors which he received would be in payment for his services to the real purchasers, for this would constitute a sale by Smith or Eastman, or both, to the respondent in payment for his services rendered to them."

The respondent's contention was that he acted in the handling of certain alcohol as the representative of the purchaser and not as the agent of the seller. If such were the fact, he could not be found guilty under an indictment which charged him with the sale of it. The requested instruction in so far as it embodied such a statement of the law was proper. *State* v. *Parady*, 130 Me., 371; *State* v. *Ennis*, 121 Me., 596. A reading of the Judge's charge, however, which is printed in full, indicates that he specifically covered the point raised by the respondent's request; and the refusal of the Court to reiterate what had already been said is not subject to exception. Exception overruled. Judgment for the State. *E. Walker Abbott*, for the State. *Arthur J. Henry*, *George A. Hutchins*, for respondent.

INHABITANTS OF THE TOWN OF BURNHAM

vs.

INHABITANTS OF THE TOWN OF KNOX.

Waldo County. Decided April 2, 1932. On defendant's motion. Action brought to recover for supplies furnished a pauper, the sole issue involved being his town of settlement. He originally resided in Burnham but in 1910 removed to Knox and, according to plaintiff's contention, made his home there until 1916 when he removed and lived elsewhere for a short time, returning to Knox during that year and residing there until 1922, since which time he has lived in various places but in none for the five years required to gain a pauper settlement.

Defendant, admitting that the pauper had made his home in Knox at various times between 1910 and 1922, asserted that he never resided there for five consecutive years. On this point the jury heard much conflicting evidence and decided in plaintiff's favor. The verdict is one which might well have been reached by intelligent and honest searchers after truth whose duty it was to judge of the credibility of the witnesses who appeared before them. This Court can not disturb a decision so reached on this simple

issue of fact. Motion overruled. *F. Harold Dubord, Clyde R. Chapman*, for plaintiff. *Buzzell & Thornton*, for defendant.

ADRIAN C. ROBINSON *vs.* CHARLES R. BUSWELL.

Penobscot County. Decided April 2, 1932. Action for breach of warranty that two heifers sold by the defendant to the plaintiff were sound and free from communicable diseases. The case comes forward to this court on general motion after a verdict for the plaintiff in the sum of one thousand dollars ($1,000).

The record disclosed conflicting testimony as to what was said by the defendant at the time of the sale, but, after careful examination and consideration of the printed record, we see no reason to disturb the findings of the jury that there was such a warranty as claimed by the plaintiff.

Nor do we deem it necessary to go into the details bearing on the question as to whether or not there was a breach of that warranty.

Prior to the purchase of the two heifers from the defendant on October 11, 1928, the plaintiff had never had a case of contagious abortion in his herd. Thereafter, as disclosed by the record, many calves were lost by reason of premature birth, and injury to the herd itself necessarily resulted. A careful weighing of all the testimony bearing on that phase of the case satisfies us that the jury was justified in finding that there was a breach of warranty and that the loss suffered by the plaintiff was due to contagious abortion communicated to his herd from the heifers purchased of the defendant. The verdict of the jury should not be disturbed as to this finding.

Nor do we see any reason to set aside its conclusion as to the amount awarded. No exception was taken to any portion of the Judge's charge relating to damages, or otherwise, and we have a right to assume that full instructions were given as to all elements which might enter into the determination of the amount to be awarded as compensation for the plaintiff's loss.

The entry must be, Motion overruled. *P. A. Hasty, B. W. Blanchard*, for plaintiff. *P. A. Smith, E. P. Murray*, for defendant.

THELMA BLANCHARD *vs.* FANNIE LAMPORT.

Cumberland County. Decided April 9, 1932. Action of trespass for the recovery of damages for injuries resulting from an assault by the defendant upon the plaintiff.

Trial of the case resulted in a verdict for $750 in favor of the plaintiff. General motion brings the case to this court.

The evidence of the plaintiff and defendant was almost entirely conflicting. No one else was present at the time of the occurrence of the affair.

The verdict of the jury furnishes sufficient reason for assuming that it accepted as true the testimony of the plaintiff and that it reached the conclusion, on all the evidence in the case, that she was entitled to recover compensation for the injuries received by her.

After a most careful reading of the printed case, we are unable to say that the finding of the jury was so manifestly wrong that it should be set aside. Oft repeated as is the statement that the jury had the opportunity to see the witnesses and weigh the value of their testimony as they gave it on the stand, the force of it can not be lost sight of by this Court as cases involving sharply conflicting evidence in which new trial is sought under general motion come before it.

The issue for the determination of the jury at the trial was whether or not the defendant committed an assault on the plaintiff, and by its verdict the triers of fact answered that question in the affirmative. We are not confronted with the question of whether or not the plaintiff may have been guilty of an assault on the defendant by reason of the use of greater force than was necessary under the circumstances for her own self-protection; that would be a question for another tribunal.

The declaration contained an allegation that the assault was vicious and malicious and asked for the allowance of exemplary damages. We may safely assume that the jury was instructed on

that point and that its verdict was returned with full recognition of its rights to assess punitive damages, if it felt the circumstances of the case justified it. We are unable to see any reason why the verdict should be disturbed as to the amount of the award.

The entry, therefore, must be, Motion overruled. *White & Willey*, for plaintiff. *Max L. Pinansky, Abraham Breitbord*, for defendant.

NONA Z. FOWLES *vs.* SIGURD JENSEN.

Cumberland County. Decided April 22, 1932. Complaint under the bastardy act. Exceptions to refusal of presiding Justice at *nisi prius* to direct a verdict in favor of respondent.

There was sufficient evidence in support of complainant's allegations not only to warrant but to compel the submission of the case to the jury for decision. No other question is raised for our consideration. Exceptions overruled. *Henry N. Taylor*, for complainant. *Henry C. Sullivan*, for respondent.

STATE OF MAINE *vs.* HARRY KOVENSKY AND EMERY LEO.

Cumberland County. Decided April 22, 1932. The respondents have been convicted of robbery. They filed a motion for a new trial, which was denied by the presiding Justice, and have appealed from this ruling.

The evidence for the State shows that the respondents on Congress Street in Portland late at night solicited a ride from one Louis E. Laverge. Their request was granted, Laverge essaying to take them to Park Avenue where they said they lived. He states that when they had reached a secluded spot known as Deering's Oaks, he felt what he thought was a gun pressed against his back and was forced to hand over to them his money and his watch. He had approximately eleven dollars with him and turned over this to them with the watch. They then took him in his car to a spot near the Eastland Hotel where he lived, told him to get out and drove off. He immediately notified the police who found the two men early

in the morning at Young's Hotel, so called, on Temple Street. On one of them was found $6.35 and in the bed where they had slept was the balance of the money. On a side street near the hotel was the victim's car in which was found the watch. At the police station the men denied any connection with the episode.

At the trial they admitted having taken the ride with Laverge, and stated that the money had been given to them by him, and that he had driven them to the park for the purpose of making improper advances to them.

The jury apparently took little stock in such story and with the jury's judgment we heartily concur. The conduct of the respondents, their statements to the police, the eagerness of the victim for their apprehension are entirely inconsistent with the truth of their testimony. Such defense was obviously an afterthought.

The evidence was amply sufficient to justify the jury's verdict. In fact we do not see how they could have reached any other conclusion than they did. Appeal dismissed. Judgment for the State. *Walter M. Tapley, Jr.*, *Albert Knudsen*, for the State. *Harry S. Judelshon*, *Jacob H. Berman*, for respondent Kovensky. *Herbert J. Welch*, for respondent Leo.

LUCY E. RING, LIBELLANT *vs.* HARRY E. RING, LIBELLEE.

Cumberland County. Decided May 6, 1932. On exceptions to a decree granting a divorce on the grounds of cruel and abusive treatment. The libellee, among other contentions, claimed condonation. The case requires no extended comment. It is sufficient to say that, in fact and in law, the record discloses abundant justification of the decision of the Justice below.

The entry must be, Exceptions overruled. Decree below affirmed. *Howard Davies*, for libellee. *Frank H. Haskell*, for libellant.

STATE OF MAINE *vs.* HAROLD L. KENNISON.

Lincoln County. Decided May 11, 1932. The respondent was convicted as an accessory before the fact to breaking and entering

with intent to commit a felony. His motion for a new trial on the usual grounds was overruled by the presiding Justice and an appeal taken to this court. Exceptions to the denial of the motion were also reserved and allowed.

Before the case was argued in the Law Court, the respondent filed in the Trial Court a special motion for a new trial on the ground of alleged newly discovered evidence. The motion was denied and the appeal then taken is brought forward to be considered with the pending case.

The principals in the felony, upon their arraignment, pleaded guilty and testified at the respondent's trial that he counseled and procured their wrongdoing, and their statements were supported in some measure by attending facts and circumstances. A reading of the entire evidence, including the respondent's denial of guilt, discloses no sufficient reason for setting aside the verdict.

The respondent's exceptions to the denial of his motion for a new trial were erroneously taken and allowed in the Trial Court. This court has jurisdiction to review the denial of a motion for a new trial in a criminal case only on appeal.

The special motion for a new trial is without merit. One of the principals in the felony, when solicited by the respondent, indicated a willingness to change the testimony he gave at the trial, but upon the stand in support of the special motion affirmed the truth of the substantial details of his original statement. We find no new evidence which would justify a different verdict. Appeals dismissed. Exceptions overruled. Judgment for the State. *Weston M. Hilton*, County Attorney, for State. *Adelbert L. Miles*, for respondent.

ALICE L. SCANNELL *vs.* THE MOHICAN MARKET.

Androscoggin County. Decided June 2, 1932. This was an action to recover damages for personal injuries received by the plaintiff while in the defendant's grocery store as a customer. At the close of the plaintiff's case the defendant's motion for a nonsuit was granted by the Justice presiding and the case is before us on exceptions to that ruling.

We deem it unnecessary to discuss the facts disclosed, which, as far as they are essential, are not in dispute. The burden rested on the plaintiff to show negligence on the part of the defendant. We unhesitatingly find that she failed to sustain that burden. She presented no evidence sufficient to have warranted the submission of the case to the jury. If the case had been so submitted, on the record before us a verdict in her favor could not have been upheld.

The entry must be, Exceptions overruled. *Berman & Berman*, for plaintiff. *Locke, Perkins & Williamson*, for defendant.

FREDERICK E. FITZMAURICE *vs.* HAROLD J. MCGINN, EXECUTOR.

Androscoggin County. Decided October 12, 1932. Motion and exceptions. Action brought against the executor of the estate of Thomas J. Fitzmaurice to recover the proceeds of certain insurance policies in which at the time of testator's death his estate was named as beneficiary. Plaintiff's case was based on an alleged contract entered into between him and the testator, by the terms of which plaintiff was named as beneficiary in the policies in question in consideration of his paying the premiums thereon. He was so named and did pay one premium on each of the policies. No other premiums came due prior to testator's death. Plaintiff, therefore, claims to have fulfilled his contractual obligations and claims that a later change of beneficiary from him to testator's estate was in breach of the contract.

The record presents an irreconcilable conflict of evidence but the conclusion reached by the jury, that the contract claimed by the plaintiff was made and breached by the testator, was sustained by testimony which can not be said to be incredible or inconsistent with reason. The motion must therefore be overruled.

Three exceptions were relied upon by defendant. The first related to the admission of evidence tending to show plaintiff's financial responsibility at the time the alleged contract was entered into, his ability to carry it out and knowledge of that fact on the part of testator. This evidence was admissible, in view of the circumstances and developments of the case.

The second exception related to the admission of evidence by plaintiff, in rebuttal, of a conversation with defendant after testator's death concerning the insurance policies. It is objected that this was not rebuttal because defendant did not testify. It tended to rebut the entire theory of the defense. If it was true, it destroyed the force of very much of the evidence adduced by defendant. It was clearly admissible. True, a portion of plaintiff's answer to one of the questions to which objection was made was not responsive, but as defendant made no motion to strike this part of the answer from the record, he has no legitimate complaint to make on that point at this time.

The third exception is to plaintiff's being permitted to testify that the money which he expended in paying the premiums on the policies had not been repaid to him. There was no claim that such was the case and the evidence was unnecessary, but it could not have been prejudicial. It was simply a repetition of an admitted fact. Motion and exceptions overruled. *Frank T. Powers*, for plaintiff. *Fellows & Fellows*, for defendant.

CHARLES J. GATCHELL *vs.* EDWARD H. MOODY.

Cumberland County. Decided October 15, 1932. When, about 1887, an ancient tide mill in Harpswell was torn down, and its machinery and timber removed by a purchaser, or one claiming under him, the stones that had been used for grinding grain were not disturbed. They eventually settled into the mud beneath where the mill had stood, and there remained until 1931.

On September 19, 1931, the defendant had one of the millstones in the yard of his home. The plaintiff replevied it.

The defendant filed a plea of the general issue, accompanied by a brief statement denying plaintiff's title, and setting up title in a third person, a stranger to the action. The brief statement also alleged that if the plaintiff ever had had title to the property, he had either abandoned it, or transferred his right and interest. Defendant demanded a return. The plea was joined.

At this stage the case was referred, the right to exceptions as to questions of law being reserved.

The distinct issue was whether, when the action was begun, the plaintiff had the right (not necessarily as against the world, but as against the defendant), to exclusive possession of the replevined chattel, coupled with ownership, general or special.

The referee decided for the plaintiff, and awarded him nominal damages. The Superior Court accepted the report of the referee, over written objection by the defendant, who excepted.

The plaintiff had the burden of proof. He introduced evidence sufficient in kind and character to carry a reasonable degree of conviction. In other words, he made out a *prima facie* case. The counter proof adduced did not essentially affect the inclination of the weight of the evidence to his side.

Such preponderance, or greater weight of the evidence, was to the effect that plaintiff's father died intestate, prior to 1887, seized of the real estate comprising the mill and mill privilege. The decedent was survived only by his wife and two sons, the plaintiff being one.

Apparently the razing of the mill, and the removal of its structure and machinery, were by no other authority than a bill of sale from the widow. Her estate or interest in the lands of her husband, under the laws of that day, was merely that of dower. Dower gave no right to sell the building and contents. The widow may, however, have been otherwise empowered, or her act subsequently ratified, but the matter is not of record; nor is it of present moment.

The plaintiff's brother was the father's other heir. He never married, dying intestate, after his mother's death, before the commencement of the replevin suit, leaving plaintiff as his sole heir.

The plaintiff, then, derived title to the millstone — as a part of the mill — through inheritances. Assignment, or liability to assignment, of the mill in dower, was at an end at the time of the second inheritance, the widow being dead.

There was no evidence of abandonment, or of voluntary transfer of the property. Nor, to answer a point made by the defendant's bill of exceptions, was there any sufficient evidence of the loss of title through adverse possession.

Ownership of the stone entitled the plaintiff to its possession.

The referee's report was rightly accepted. Exceptions overruled. *Ellis L. Aldrich*, for plaintiff. *Louis A. Jack*, for defendant.

SOPHIE KLOPOT

vs.

JOHN SCUIK AND AUGUSTA TRUST COMPANY, TRUSTEE.

Kennebec County. Decided October 19, 1932. This action of assumpsit, begun by trustee process, was entered at the October Term, 1931, of the Superior Court for Kennebec County, and at the following term the defendant, appearing specially, filed a plea to the jurisdiction denying legal service of the process. At the June Term, 1932, the defendant's plea was overruled and an exception, then allowed, was forthwith certified to this court. The defendant did not plead over, nor was the case closed.

The exception is brought to this court prematurely. When his plea, directed to the jurisdiction, was overruled and an exception taken, the defendant had the right to answer over on the merits. R. S., Chap. 96, Sec. 37. Unless he refused to exercise that right or otherwise waived it, the duty of the presiding Justice was to "proceed and close the trial," whereupon the case would stand continued on the docket of the Trial Court, marked "Law." R. S., Chap. 91, Sec. 24. The case could not be properly certified to the Law Court until its rescript would be decisive and final. This rule of practice was approved under earlier statutes *in pari materia* in *Stowell* v. *Hooper*, 121 Me., 152. It remains in force under the present statutes. Exceptions dismissed. *Carleton & Carleton*, for plaintiff. *Herbert E. Foster*, for defendant.

ROLAND D. GRANT, LIBELLANT *vs.* AMY G. GRANT.

York County. Decided November 3, 1932. This is a libel for divorce from the bonds of matrimony. The libellant, on the theory

that the prayer of his libel had been denied, took an exception. The exception was allowed, and has been argued at the bar. The bill of exceptions alleges in substance that denial of divorcement was contrary to the only reasonable conclusion which might be drawn from the entire evidence.

The judgment or decree denying divorce, though — as the bill of exceptions recites it — *prima facie* valid, is subject to vacation on direct attack, at the instance of the injured party, in an appropriate proceeding, for irregularities other than of a purely technical nature, in rendition.

For this reason, the exception is overruled without further consideration, and without prejudice. Exception overruled. *Willard & Willard*, for libellant. *Waterhouse, Titcomb & Siddall*, for libellee.

FOREST H. GRANT, BY JUDSON M. GRANT, NEXT FRIEND

vs.

GEORGE M. DOLLEY.

JUDSON M. GRANT *vs.* GEORGE M. DOLLEY.

ANNIE L. MUNCY *vs.* GEORGE M. DOLLEY.

FLORENCE M. GRANT *vs.* GEORGE M. DOLLEY.

Penobscot County. Decided November 8, 1932. The plaintiff, Judson M. Grant, was the owner and driver of an automobile which was in a collision with a car owned and driven by the defendant. The plaintiffs, Forest H. Grant, Florence M. Grant and Annie L. Muncy, were passengers in the Grant car. The four actions were tried together and verdicts rendered for the plaintiffs in the following amounts: for Forest H. Grant $495, for Judson M. Grant $2,824.33, for Florence M. Grant $3,510.41, for Annie L. Muncy $1,503.50. The cases are before us on the defendant's general motions for new trials and on an exception to the exclusion of the testimony of one Roland E. Lancaster as to the value before the accident of the plaintiff's automobile. The testimony was excluded on the ground that the witness had not been properly qualified as an

expert. This exception was not argued by the defendant and must be overruled. The ruling was one within the discretionary power of the presiding Justice and there appears no abuse of such discretion.

The plaintiff, Judson M. Grant, was driving his car in a southerly direction over the state highway in the town of Hampden. The defendant was driving his car northerly over the same road. It was daylight, the road was dry, straight, and free from traffic, the vision unobstructed. It is admitted that the collision took place on the plaintiff's side of the road. The defendant claims that the plaintiff just prior to the collision had been driving on the wrong side of the road and continued there till the defendant in the face of what appeared to be a certain collision turned his car to the left. He is corroborated in part by the two passengers who were riding with him. The plaintiff, Judson M. Grant, testified that while he was driving on his own side of the road, the defendant suddenly veered over and collided with him. He is corroborated by Mrs. Muncy who testifies that the plaintiff's car kept to its own side of the highway. Tracks in the highway show that the defendant's car swerved suddenly to the left just prior to the collision. Such circumstantial evidence is not inconsistent with the story that the plaintiffs give of the accident.

The evidence was conflicting and the issue peculiarly one within the province of the jury.

We have examined the testimony relating to the damages with care and are unable to say that the jury erred in the amount awarded in any case. Motions overruled. Exception overruled. *A. C. Blanchard, B. W. Blanchard*, for plaintiffs. *George F. Eaton*, for defendant.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR AND EXECUTIVE COUNCIL OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, NOVEMBER 18, 1932, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta
November 18, 1932.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, in accordance with the request of the Executive Council, and being advised and believing that the questions of law are important, and that it is upon a solemn occasion, I, Wm. Tudor Gardiner, Governor of Maine, respectfully submit the following statement of facts and questions and ask the opinion of the Justices of the Supreme Judicial Court thereon:

Statement

In accordance with the provisions of Chapter 8 of the Revised Statutes, a general election was held throughout the State on Monday, September 12, 1932. Subsequent to the election, on September 28, 1932, in accordance with Section 55 of that Chapter, the Governor and Council opened and compared the votes returned, had the same tabulated, and found by those returns that John G. Utterback of Bangor appeared to be elected as Representative to Congress from the Third District by a plurality of two hundred ninety-four (294) votes over Ralph O. Brewster of Dexter.

Within twenty days after the returns were so opened and tabulated, Mr. Brewster appeared and filed a written application alleging that the return or record of the votes cast in certain plantations did not correctly state the vote as actually cast for Representative to Congress because certain provisions of law relating to the conducting of elections and making of returns from plantations had not been complied with, and requested that the return or record be corrected in accordance with the number of ballots actually cast.

The Sections especially under consideration are:

Section 42, of Chapter 8, of the Revised Statutes.
Article XLVII, Section 5, of the Constitution of Maine.
Section 79, of Chapter 8, of the Revised Statutes.
Section 81, of Chapter 8, of the Revised Statutes.

Questions

The following questions are respectfully asked:

1. In canvassing the returns of plantations is it the duty of the Governor and Council from the returns and records required by these sections to be filed with the Secretary of State to determine whether or not the plantation officials have complied with the provisions of law?

2. If it is their duty to so determine, and from the records it is apparent that the provisions of these sections have not been "fully complied with," how are the Governor and Council to construe the phrase, "such votes shall be rejected," contained in Section 81, Chapter 8?

Respectfully submitted,

WM. TUDOR GARDINER,
Governor of Maine.

CLEMENT F. ROBINSON,
Attorney General.

To His Excellency, Governor William Tudor Gardiner, and the Honorable Executive Council:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to us, bearing date of November 18, 1932, in connection with canvassing the returns of plantations.

Question.

In canvassing the returns of plantations is it the duty of the Governor and Council from the returns and records required by these sections to be filed with the Secretary of State to determine whether or not the plantation officials have complied with the provisions of law?

Answer.

We answer this question in the affirmative.

Question.

If it is their duty to so determine, and from the records it is apparent that the provisions of these sections have not been "fully complied with," how are the Governor and Council to construe the phrase, "such votes shall be rejected," contained in Section 81, Chapter 8?

Answer.

The phrase "such votes shall be rejected" is mandatory.

Very respectfully,

William R. Pattangall
Charles J. Dunn
Guy H. Sturgis
Charles P. Barnes
Sidney St. F. Thaxter.

Dated November 18, 1932.

Memorandum.

Mr. Justice Farrington is unable to act because of illness.

William R. Pattangall.

QUESTIONS AND ANSWERS

Questions Submitted by the Executive Council of Maine to the Justices of the Supreme Judicial Court of Maine, November 29, 1932, with the Answers of the Justices Thereon

STATE OF MAINE

Executive Department

Augusta
November 29, 1932.

To the Honorable Justices of the Supreme Judicial Court:

Under and by virtue of the authority conferred upon the Executive Council by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions of law are important, and that it is upon a solemn occasion, the majority of the Executive Council of the State of Maine respectfully submits the following statement of facts and questions, and asks the opinion of the Justices of the Supreme Judicial Court thereon:

Statement

In accordance with the provisions of Chapter 8 of the Revised Statutes, a general election was held throughout the State on Monday, September 12, 1932. Subsequent to the election, on September 28, 1932, in accordance with Section 55 of that Chapter, the Governor and Council opened and compared the votes returned, had the same tabulated, and found by those returns that John G. Utterback of Bangor appeared to be elected as Representative to Congress from the Third District by a plurality of two hundred ninety-four (294) votes over Ralph O. Brewster of Dexter.

PLANTATIONS:

Within twenty days after the returns were so opened and tabulated, Mr. Brewster appeared and filed a written application alleging that the return or record of the votes cast in certain plantations did not correctly state the vote as actually cast for Representative to Congress because certain provisions of law relating to the conducting of elections and making of returns from plantations had not been complied with, and requested that the return or record be corrected in accordance with the facts.

The Governor and Council proceeded to examine the returns and records on file in the Secretary of State's office (which are attached hereto) with the object in view of correcting the return or record.

They are unable to agree as to how much of this material is proper for their consideration.

They are also unable to agree as to whether or not the material which they deem proper for their consideration is in itself sufficient to fulfill statutory requirements.

DISTINGUISHING MARKS:

During the examination of the ballots in ten Aroostook towns and plantations, eleven hundred and thirty-seven (1137) ballots, about a third of the total cast, were challenged as bearing distinguishing marks. A majority of the Governor and Council could not agree, as shown by attached record.

FRAUD AND IRREGULARITIES:

In his application Mr. Brewster further alleges that the lack of "Voting Booths," "Fraud," and "Irregularities" in conducting the election rendered the ballots from certain enumerated precincts invalid, or useless as evidence of the will of the electorate. He requested that the return or record be corrected in accordance with the number of ballots actually cast.

In support of his allegations he filed certain affidavits, exhibits, and specifications. These were amplified by personal testimony and by counsel in an informal manner before the Governor and Council.

When such issues are raised Mr. Brewster's contention is that the right, power, authority and duty of the Governor and Council are

the same in a general election as in a primary election, believing the statutes under which they function to be *in pari materia.*

Mr. John G. Utterback questioned the right of the Governor and Council to consider any of the allegations in relation to their duty of canvassing the returns.

The Governor and Council are unable to agree as to how much of this material is proper for their consideration in the performance of their duties.

They are also unable to agree as to what is the proper procedure for them to follow in settling the case in issue.

Questions

The following questions are, therefore, respectfully asked:

1. Does it appear from the returns and records on file in the Secretary of State's office that the plantations of Caswell, Hamlin, St. Francis, St. John and Wallagrass have been duly organized and that Section 79 has been fully complied with, within the intent and meaning of the law as set forth in Section 81 of Chapter 8 of the Revised Statutes?

2. Should it affirmatively appear by a finding by a majority of the Governor and Council that the provisions of Sections 79 and 81 of Chapter 8 of the Revised Statutes have been fully complied with before the votes from a plantation can be tabulated and counted?

3. Is it the duty of the Governor and Council to count the ballots in a precinct for any candidate upon which a majority can agree as being legal votes, and correct the return in accordance therewith, notwithstanding there are other ballots upon the legality and counting of which a majority cannot agree?

4. In canvassing the returns of a general election what right, power, authority and duty have the Governor and Council to investigate and pass upon questions of fraud, irregularities, and illegal practices in the conduct of the election?

If it is their right and duty to investigate, what are their powers to accept or reject ballots in accordance with their findings?

5. Has the Governor when acting as chairman of the tribunal constituted under Section 55 of Chapter 8 of the Revised Statutes

a right to a casting vote to "make" as well as to "break" a tie vote?

Respectfully submitted,

ALLEN C. T. WILSON, Chairman
GEORGE C. LORD
FREDERICK ROBIE
LEWIS O. BARROWS
Members of Executive Council.

Attest:
EDGAR C. SMITH,
Secretary of State.

TO THE HONORABLE EXECUTIVE COUNCIL OF MAINE:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to us, bearing date of November 29, 1932, in connection with canvassing the returns of plantations.

QUESTION.

Does it appear from the returns and records on file in the Secretary of State's office that the plantations of Caswell, Hamlin, St. Francis, St. John and Wallagrass have been duly organized and that Section 79 has been fully complied with, within the intent and meaning of the law as set forth in Section 81 of Chapter 8 of the Revised Statutes?

ANSWER.

It appears from an examination of the records and returns on file in the office of the Secretary of State, which have been submitted with this question, that the plantations of Caswell, Hamlin, St. Francis, St. John and Wallagrass have been duly organized; that in the plantations of Caswell, Hamlin and St. Francis the provisions of Section 79, Chapter 8, Revised Statutes 1930 have been complied with so as to satisfy the requirements of Section 81 of said chapter; but that such provisions have not been complied with in the plantations of St. John and Wallagrass. The votes of these two plantations should be rejected.

QUESTION.

Should it affirmatively appear by a finding by a majority of the Governor and Council that the provisions of Sections 79 and 81 of Chapter 8 of the Revised Statutes have been fully complied with before the votes from a plantation can be tabulated and counted?

ANSWER.

The statement accompanying the question recites, in effect, that, on opening and tabulating the votes returned, the Governor and Council found that "John G. Utterback of Bangor appeared to be elected as Representative to Congress . . ."

Error, if such there be, arising from failure to comply with the mandatory provisions of Sections 79-81 of Chapter 8 of the Revised Statutes or otherwise, is correctible on concurrent action by the Governor and Council.

QUESTION.

Is it the duty of the Governor and Council to count the ballots in a precinct for any candidate upon which a majority can agree as being legal votes, and correct the return in accordance therewith, notwithstanding there are other ballots upon the legality and counting of which a majority cannot agree?

ANSWER.

We answer this question in the negative.

QUESTION.

In canvassing the returns of a general election what right, power, authority and duty have the Governor and Council to investigate and pass upon questions of fraud, irregularities, and illegal practices in the conduct of the election?

If it is their right and duty to investigate, what are their powers to accept or reject ballots in accordance with their findings?

ANSWER.

The right, power, authority and duty of the Governor and Council in canvassing the returns of an election, so far as Representatives to Congress are concerned, are defined and limited by the pro-

visions of Sections 43, 44 and 55, Chapter 8, Revised Statutes 1930, supplemented in the cases of plantations by the provisions of Sections 79, 80 and 81 of the same chapter. These statutes convey no right, power, authority or duty upon the Governor and Council to investigate and pass upon questions of irregularities, illegal practices or fraud in the conduct of a Congressional election. By express provision of the Federal Constitution, the determination of such questions is exclusively within the jurisdiction of the House of Representatives of the Congress of the United States.

QUESTION.

Has the Governor when acting as chairman of the tribunal constituted under Section 55 of Chapter 8 of the Revised Statutes a right to a casting vote to "make" as well as to "break" a tie vote?

ANSWER.

The Governor and Council, in exercising the powers and performing the duties in respect to elections delegated to them under Section 55 of Chapter 8 of the Revised Statutes, act in their executive capacity. They do not constitute a single tribunal in which the Governor votes as a member, but a bipartite body in which his vote is as Governor and the votes of the Councillors are as members of the branch of the Executive. Action, affirmative or negative, lies in the concurrence of the vote of the Governor with that of the Council. A tie vote, in effect, results when the Governor and his Council disagree.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER.

Dated December 9, 1932.

MEMORANDUM.

MR. JUSTICE FARRINGTON is unable to act because of illness.

WILLIAM R. PATTANGALL.

RULES OF COURT

STATE OF MAINE

SUPERIOR COURT — Augusta
January 28, 1933.

All of the Justices of the Superior Court concurring, the following Rule of Court is established.

Rule 41 of the Revised Rules of the Supreme Judicial and Superior Courts, 129 Me., 518, is amended so as to read as follows:

Cases, including libels for divorce, remaining on the docket for a period of two years or more with nothing done shall be dismissed for want of prosecution unless good cause be shown to the contrary. Actions continued for judgment shall not be continued further for judgment after the term of default unless for cause. Motions for renewal of orders of notice must be in writing, stating the reasons why the former order was not complied with.

W. R. PATTANGALL,
Chief Justice.

STATE OF MAINE

SUPREME JUDICIAL COURT AND SUPERIOR COURT — Augusta
January 28, 1933.

All of the Justices concurring, the following Rule of Court is established.

Rule 22 of the Revised Equity Rules, 129 Me., 531, is amended by striking out the word "sixty" in the eighth line thereof and inserting the word "thirty."

W. R. PATTANGALL,
Chief Justice.

INDEX

ACTIONS.

In a suit by the injured person against the original wrongdoer, his cause of action is single and indivisible and includes all damages which naturally result from the original injury or any part of it.

If he obtains judgment, acceptance of satisfaction of it extinguishes his cause of action against other tort-feasors liable for the same injury and bars action against them.

This rule applies though the wrongdoers are severally rather than jointly liable for the injury.

Wells *v.* Gould and Howard, 192.

In an action of trover a plaintiff, regardless of the allegations in his writ, is limited in his recovery by his testimony as to the number of articles converted.

Bouthot *v.* Bouthot, 199.

If a partnership is liable for a tort, each member thereof is individually liable, and an action may be maintained against a member of the partnership as a joint tort-feasor. The theory is that of agency.

Roux, Pro Ami *v.* Lawand, 215.

In a suit by a judgment creditor against a jailer for damages because of his not having received the debtor into custody, a declaration alleging that the debtor offered to so deliver himself but not alleging that he did deliver himself nor that he accompanied the offer with evidence of the authority of the jailer to receive him, is bad on demurrer.

Putnam *v.* Fulton, 232.

An action for money had and received lies when one has in his possession money which in equity and good conscience belongs to another, or if, having had the money, he has paid it out with knowledge of the plaintiff's right to it.

Ketch *v.* Smith, 275.

In an action of deceit for fraudulent representations in the sale of certain shares of corporation stock where the issue was restricted to a charge that the

plaintiff was induced to buy the shares of stock by the false representation of the defendant that the corporation was sound financially, when in truth it was insolvent, evidence as to the amount that defendant had herself invested in the enterprise, her alleged guarantee of the payment of dividends, the salaries that she and her husband drew as officers of the company, and the facts as to the management of the corporation after the purchase of the stock by the defendant is irrelevant and inadmissible.

Shine *v.* Dodge, 277.

At common law, no right or cause of action existed between the spouses while the marriage relation continued.

As to third persons, the joinder of the husband was required in all actions by or against a married woman, unless he was an alien who had always resided abroad or was regarded as civilly dead.

Chapter 112 *of the Acts and Resolves of* 1876, *authorizing a married woman to prosecute and defend suits at law or in equity, either in her own name without the joinder of her husband, or jointly with him, is in derogation of the common law and has been construed strictly.*

The statute authorizes suits by the wife against third persons, but not against her husband.

It only authorizes her to maintain alone such actions as previously could be sustained when brought by her husband alone or by him as a party plaintiff with her.

The subsequent reënactment of this statute without change in three general revisions of the statutes must be deemed legislative affirmance of the construction given it by the judiciary.

The doctrine of stare decisis *applies to the law so established and re-affirmed.*

Sacknoff *v.* Sacknoff, 280.

Much greater particularity and precision of description and statements are required in an action to enforce a forfeiture of property for non-payment of a tax than in a suit at law for the recovery of unpaid taxes.

Recoupment, counter claim or set-off are not available to a party sued by a town for taxes.

Town of Milo *v.* Water Company, 372.

It is not necessary that a legal guardian or a guardian ad litem *should be appointed in order that a minor should prosecute a suit at law or in equity. In such cases, actions may be brought, entered in court, and pursued to judgment on behalf of the minor by a next friend.*

A next friend or person authorized to represent a minor has full authority to settle or discharge a right of action on his behalf and to consent to an entry of judgment, provided that such action is approved by the Court.

Ayer *v.* Railway Company, 381.

A provision in a deed poll of real estate, in form an agreement, that a fountain, aqueduct and tub should be kept in repair, to afford a source of water supply for property the title to which the grantor retained, does not create a right, for the violation of which, in the period of his ownership, the plaintiff, an owner by purchase from the grantor's heirs, can take advantage at law.

Generally, where there is no personal duty, obligations of this nature are protected, beyond the immediate contracting parties, in equity. Equitable relief, when appropriate, looks to the future, and ascertains as well the damages accrued in the past.

Mayo *v.* Dearborn, 455.

Where services are performed in pursuance of a valid contract for the disposition of property by will to a particular person and the promisor fails to comply with the agreement, if recovery is not barred by the Statute of Frauds, an action will lie for damages for breach of the contract or upon a quantum meruit, *or, if the requisite equities attend, by a bill to impress a trust.*

The remedy is at law, however, unless the promisee has changed his or her condition or relation so that, his claim being in no way inequitable, a refusal to complete the contract would be a fraud upon him and no adequate remedy at law is afforded.

Pelletier *v.* Deering, 462.

See Tuttle, Appellant, 475.

ADOPTION.

The decree of adoption duly entered in a Probate Court is a record that proof was offered of the written consent of the mother, and the recital therein controls until overthrown by evidence. The fact that such written consent is not found in the files of the court is not evidence that it was not given.

Gauthier, Appellant, 316.

ADMISSIONS.

See Criminal Law.

ASSESSORS.

Assessors of taxes are public officers; when acting as assessors they are not agents of the town of which they are inhabitants.

Over the assessors, when acting officially, and over their acts, the inhabitants of a town have no control.

Service of legal process on the clerk of a town, or on the chairman of the board of its selectmen, is not service on the assessors, and is not notice to the assessors, of pending litigation.

Telegraph Company *v.* Town of Cushing, 333.

Assessors are not subject to the direction and control of the municipality; their duties and authority are imposed by law. A town has no power to abate a tax.

Town of Milo *v.* Water Company, 372.

ATTACHMENTS.

See Smith *v.* Davis, French, Trustee, 9.

See Plywood Co. *v.* Verrill, 469.

AUTOMOBILES.

See Motor Vehicles.

BAILMENTS.

The owner of a public garage for the storage of automobiles is bound under the implied conditions of his contract to store, safely keep and redeliver the car to the owner on demand.

He is liable for damages to the car resulting from the negligence of any of his officers, agents or employees in the performance of any duty in regard to his care or custody which is within the general scope of their employment.

In such a bailment for hire the contract is in its nature a direct and personal obligation by which the bailee undertakes personally to safely keep the property committed to his care.

If the performance of this obligation is delegated to a servant, the bailee remains liable for breach of it although it be unauthorized and outside the scope of the servant's employment.

Walters *v.* Garage, Inc., 222.

When a bailee sells his bailor's property under an honest and well-founded belief that he has the right to do so, the necessary felonious intent is lacking to sustain an indictment for statutory larceny, and a verdict of guilty in such instance is not warranted.

State *v.* Morin, 349.

BANKRUPTCY.

There can be no enforceable judgment against a defendant debtor who, after suit is brought, receives a discharge in bankruptcy.

A special judgment, however, can be entered for the purpose of perfecting a right of action against one secondarily liable, or in order to charge a garnishee, or to establish the right to levy on attachable property of the bankrupt, the title to which may not have passed to the trustee in bankruptcy.

The fact that a principal defendant has received his discharge in bankruptcy does not affect the right of a plaintiff creditor to enforce his lien when no trustee in bankruptcy has claimed the principal defendant's property in the hands of the defendant trustee.

Smith *v.* Davis, French, Trustee, 9.

Upon the bankruptcy of a tenant, provided that by the terms of his lease the tenancy is not thereby terminated, the leasehold interest of the bankrupt passes to the Trustee if he elects to accept it as an asset of the estate to be reduced into money for distribution among the creditors.

If the Trustee does not within a reasonable time accept the property of the bankrupt as an asset of the estate, he is deemed to have elected to reject it and the title thereto remains in the bankrupt.

If the Trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his lessor are not disturbed.

If the Trustee once makes his election to renounce the lease as an asset of the bankrupt estate, his interest in it is terminated and a subsequent attempt to assign it is a nullity.

Holding Company *v.* Bangor Veritas, 421.

Prior to the 1910 *amendment of the Bankruptcy Act the trustee had only such rights as the bankrupt had. The amendment of* 1910, *however, as to property "in the custody" or "coming into the custody" of the bankruptcy court placed the trustee in the position of a creditor holding a lien on the property and as to property "not in the custody of the bankruptcy court" in the position of a judgment creditor holding an execution duly returned unsatisfied.*

If the property in question is subject to claims or liens valid against creditors, it is not to be regarded as property "in the custody of" or "coming into the custody" of the bankruptcy court as contemplated by the provision of this section,

so that the trustee would have a lien thereon. As before the passage of the amendment the trustee takes the bankrupt's title subject to equities good as against general creditors.

The purpose of the amendment to the Bankruptcy Act is to place the trustee not in the position of an attaching creditor as to all property held by the bankrupt, but only as to such property over which general creditors at the time of bankruptcy might have asserted a claim by means of attachment or by some similar process. It is not the intent of the Bankruptcy Act to permit the trustee to seize property in the hands of the bankrupt subject to equities in favor of third parties.

Plywood Co. *v.* Verrill, 469.

BANKS AND BANKING.

See Milan *v.* Graham, 220.

See State *v.* Morin, 349.

BILLS AND NOTES.

The holder of a note on which he is endorser, producing it in an action, is deemed to be a holder in due course until the contrary is shown by convincing evidence.

The testimony being that the note was discounted in due course of business, it must be presumed, when, after maturity, an endorser sues on it that it came into the endorser's hands for value.

Milan *v.* Graham, 220.

Town officers have no authority to negotiate loans or execute notes in the name of a town without express authority of the town, given in its corporate capacity.

In order to determine the obligations assumed by those signing a document, the entire contents of the document must be considered.

A note taken with words written on its margin and not essential to it is taken subject to the explanation contained in the words, which bind the signer as firmly as though they were a part of the promise. Such words furnish evidence of the understanding of the promissor and promissee.

In the construction of a note, the intention of the parties is to control if it can be legally ascertained; and it is competent for the Court to determine from the paper itself, in the light of the circumstances in which it was given, what was the actual intention of the parties.

Waldo Co. *v.* Downing, 410.

BOUNDARIES.

BROKERS.

A broker, even though his agency is not exclusive, if in fact the procuring cause of the purchase of his principal's property and otherwise entitled to a commission, will not, as a general rule, be deprived thereof by the fact that the owner, at the time of the sale, did not know of his instrumentality in procuring the purchaser.

There may be circumstances under which the owner's ignorance of the fact that the purchaser was procured by the broker is controlling.

A broker should not be allowed to recover a commission when, having opportunity to inform the owner, he allows him to pay another broker a commission on the sale or accept a lower price for the property through ignorance that the purchaser is the broker's customer.

Jordan *v.* Hilbert, 56.

A real estate agent with whom property is listed for sale or exchange acts in a fiduciary capacity, if he accepts the proffered employment. It is his duty to obtain for his principal the largest price possible, or in case of an exchange the most advantageous trade. A secret agreement for compensation with the other party or his representative is inconsistent with such position of trust, and is a defense to an action by the agent to recover a commission from his own principal. Good faith demands a full and frank disclosure to his principal of any such arrangement.

Devine *v.* Hudgins, 353.

BURDEN OF PROOF.

To sustain an allegation of fraud, there must be more than surmise or conjecture which can not stand as substitutes for proof.

It is not enough that the relationship of the parties and the circumstances and surroundings involved are such as might tend to arouse suspicion. The burden is upon the defendant to establish the alleged fraud by clear and convincing proof.

Thibodeau *v.* Langlais, 132.

CHARITIES.

CHATTEL MORTGAGES.

See Conditional sales.

CONDITIONAL SALES.

CONFESSIONS.

See Criminal Law.

CONFLICT OF LAWS.

It is a general rule of law that the lex rei sitae *controls the title and disposition of real estate.*

As far as real estate or immovable personal property is concerned, the laws of the state where it is situated furnish the rules which govern its descent, alienation and transfer, the construction, validity and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same.

Whether a person has an equitable interest in land is determined by the law of the state of the situs.

Whether the interest of the beneficiary of a trust of land is to be treated as real estate or whether, because of a direction to sell the land, it is to be treated as personalty, is determined by the law of the state of the situs.

Bates *v.* Decree, 176.

The right of a plaintiff to recover for personal injuries sustained in an automobile accident is governed by the law of the place where the injuries were received.

The law of the jurisdiction where relief is sought determines the remedy and its incidents, such as pleading, practice and evidence.

Winslow *v.* Tibbetts, 318.

CONSTITUTIONAL LAW.

Failing to show that he is or can be injured by the operation of a regulation, a complainant has no right to be heard in an attack upon its constitutionality.

Chapman *v.* City of Portland, 242.

In the exercise of its police power, the State of Maine has full power and authority to prescribe uniform regulations necessary for public safety and order in respect to the operation of motor vehicles on its highways.

It has the right to require licenses for the operation of motor vehicles on its ways and to charge a fee therefor reasonably required to defray the expense of administering the regulations or constituting a fair contribution to the cost of constructing and maintaining the public highways.

The power to require licenses for the operation of motor vehicles on its ways and to charge a fee therefor extends to nonresidents as well as residents.

If the Legislature had seen fit, it could have rightfully required all nonresidents to obtain a license from the State before operating their motor vehicles

upon its ways and granted exemption to none. The absence of such a provision in favor of nonresidents does not render the law discriminatory.

In extending the privilege of using its highways without obtaining a local license, the State did not exceed its power in limiting that concession to residents of other states or countries, the laws of which require operators' licenses and have been complied with.

The fact that a nonresident has not obtained an operators' license in the state of his residence (the same being not there required) and, therefore, is unable to bring himself within the class benefited by such an exemption does not create a discrimination against him. He is and remains on an equal footing with the residents of Maine.

The State is not bound to make a special classification with respect to exemption for him and those similarly situated.

State *v.* Chandler, 262.

By virtue of the Federal Constitution, Article One, Section Eight, full power to establish Post Offices is in the Congress. Delegation by Congress to the head of a governmental department of powers which the Congress may itself rightfully exercise gives to proper regulations regularly issued by a head of a department the force of law.

Spiegel, May, Stern Company *v.* Waterman, 342.

CONTRACTS.

There can be no contract for the sale of property, no meeting of the minds of the owner and prospective purchaser, unless there is first an offer or proposal of sale. Mere statements made with intent to open negotiations which might later lead to a sale do not constitute an offer.

Owen *v.* Tunison, 42.

One's agreement to do that which an existing contract binds him to do, cannot constitute a consideration for a new promise, on the part of him whom performance would benefit.

Box Machine Makers *v.* Wirebounds Co., 70.

Contracts can not change statutory laws. It is, therefore, a general principle of construction that statutory provisions which are applicable to, consequently enter into, and form a part of the contract, as much as if incorporated therein.

There is in every contract of life insurance an implied obligation on the part of the insured that he will do nothing wrongfully to hasten its maturity.

Sullivan *v.* Insurance Co., 228.

CONTRIBUTORY NEGLIGENCE.

CONVICTS.

Civil death is the state of one who, although possessing natural life, is on account of commission of crime for which he has been convicted, incarcerated, in execution of sentence for so long as he shall live — and thereby lost all civil rights; he is considered, in law, dead. His capacities among his fellow members of society are extinct. He can no longer perform any legal function. It is not that he is in fact deceased, but dead in the law.

From the moment of his imprisonment the statute operates as to personalty clearly enough to deprive the person civilly dead of his property.

His rights and responsibilities are transferred to his legal representatives as would be done had he really died. After administration charges are paid and debts satisfied, distribution of his estate should follow.

Sullivan *v.* Insurance Co., 228.

CORPORATIONS.

An order dissolving a corporation may be set aside when it appears that the decree was obtained by fraud or when it is in the interests of substantial justice to do so.

Elston, Jr. et als *v.* Elston and Co., 149.

A cemetery corporation is not an educational, charitable, religious or benevolent institution within the meaning of the statute.

Estate of James N. Hill, 211.

COUNTY COMMISSIONERS.

The Statute governing appeals from a location of a way by county commissioners is mandatory and strict compliance with its terms is necessary.

The provisions of the Statute as to appeals from the decision of county commissioners in the matter of estimating damages resulting from the laying out of ways are also mandatory and are to be strictly construed.

Tuttle, Appellant, 475.

COURTS.

State courts have jurisdiction of a contract of which a patent is the subject matter when the issue does not arise under the patent laws.

Machine Makers *v.* Patents Company, 356.

CRIMINAL LAW.

It is the duty of a person entrusted with preparing a complaint or indictment charging a violation of the prohibitory law to specifically allege a former conviction for a similar offense if he has knowledge of the fact.

Such an allegation, being a material part of the complaint or indictment, must be sustained by proof beyond a reasonable doubt.

Before respondent can be found generally guilty on a complaint or indictment charging a former conviction, his guilt on the principal charge must be proved and also the fact of the former conviction.

It is not sufficient to merely introduce the record of a person bearing the same name as defendant. The identity of the person named in the record and the prisoner must be shown.

It is not error to submit the question of former conviction to the jury. On the contrary, it would be error not to do so.

State *v.* Beaudoin, 31.

An indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.

Chapter 21, *Section* 15, *R. S.* 1930, *prescribing the terms and conditions under which the prefix "Dr." may be used, provides for an exercise by the state of its police power.*

State *v.* Corriveau, 79.

It is the right of a party seeking to attack the credibility of a witness for the state to elicit by cross examination facts and circumstances which tend to prove the existence and extent of possible bias or hostility. The extent to which examination shall be permitted rests in the sound discretion of the trial Court and no rule governing the exercise of such discretion can be laid down more definitely than to say that only so much and no more of the facts and circumstances should be admitted as are necessary to give a fairly intelligent understanding of the cause, nature and extent of the supposed improper motive or influence.

When a witness denies any feeling of hostility or unfriendliness toward the party against whom he has testified injuriously, it is the party's right to inquire, on cross examination, as to the existence of any fact, including previous relationship, which in the light of human experience might reasonably engender hostility towards the party, or affect the witness with partisan feeling, and thus impair the trustworthiness of his testimony.

Entire exclusion of testimony which might tend to disclose bias or prejudice is not an exercise of sound discretion.

State *v.* Salamone, 101.

A party is not permitted to take his chance of a favorable verdict, and then, if it is adverse, interpose an objection to it based on facts which were known to him before it was rendered.

State *v.* Rheaume, 260.

An automatic vending machine which produces metal tokens or checks in varying numbers to be played back into the machine one by one, is a device producing things of value by chance, and in violation of the provisions of Sec. 18, *Chap.* 136, *R. S.*

A thing of value to be the subject of gaming may be anything affording the necessary lure to indulge the gambling instinct.

State *v.* Baitler, 285.

After a verdict in a criminal cause a general motion for a new trial must be addressed to the presiding Justice.

Filing such motion operates as a waiver of exceptions to the refusal to direct a verdict.

When, considered as a whole, circumstantial evidence leads to a conclusion of guilt, with which no material fact is at variance, it is not, as a matter of law, inferior to direct evidence, and neither the court nor the jurors can conscientiously disregard it.

Confessions elicited by any expectation of favor or by menaces are not permissible in evidence, not because of having been extorted illegally, but because the party making them is supposed to be liable to be influenced, by the hope of advantage, or fear of injury, to state things which are not true.

A confession is the voluntary acknowledgment of the criminal act charged, or of participation in its commission. Incriminating admissions may be made without any intention of confession.

Failure of a respondent to testify at his trial presents no evidence of his guilt.

State *v.* O'Donnell, 294.

The false testimony on which a charge of perjury is based must be material to the issue. Previous conviction of a witness of crime could be shown to affect his credibility as a witness, and such evidence is material.

State *v.* Crabb, 341.

Exception will lie, where error appears on the face of the record, notwithstanding that the question might have been sooner raised in a different way.

An indictment must define the particular wrongful act with such certainty that a presumptively innocent man, seeking to know what he must meet, may

ascertain fully therefrom the matters laid against him. Every element of the offense intended to be charged should be set out in the indictment.

In a criminal statute the word "design" means "intendment" or "purpose."

The use of the word "feloniously" is not a sufficient allegation of criminal design. "Feloniously" describes the grade of the act rather than the act which constitutes the offense. It does not imply a specific design; it is not a distinct element of a crime.

State *v.* Navarro, 345.

When a bailee sells his bailor's property under an honest and well-founded belief that he has the right to do so, the necessary felonious intent is lacking to sustain an indictment for statutory larceny, and a verdict of guilty in such instance is not warranted.

In prosecutions for embezzlement against a party to a written contract, parol evidence is admissible to show the belief under which the accused acted, although it tends to alter or contradict the terms of the instrument.

State *v.* Morin, 349.

When the accused in a criminal case voluntarily becomes a witness in his own behalf he accords to the State's Attorney the right to inquire of him, in cross-examination, fully and in detail as to any fact, the existence of which renders probable or improbable the main fact sought to be proved. To some extent, more can be elicited from him than from a common witness, because his statements are admissions as well as testimony.

State *v.* Taylor, 438.

The Law Court has no jurisdiction of a special motion for a new trial not presented to the trial Judge but sent to it directly.

In criminal cases, a motion for a new trial based on any ground must be directed to the Justice presiding at the trial. If it is denied in a case involving a felony, the respondent may appeal to the next law term. If the offense is a misdemeanor only, the ruling of the trial Judge is final.

State *v.* Hume, 458.

DAMAGES.

The difference between the real value of property, immediately before and after alteration of a way, measures the exact equivalent for damage, and constitutes just compensation for net injuries to the property holder.

In determining diminution in value of property as a consequence of raising a street, the jury may properly consider what expense a prudent man would

reasonably incur in putting the property, in reference to the new grade, in as good position as it was before.

Simoneau *v.* Town of Livermore Falls, 165.

In a suit by the injured person against the original wrongdoer, his cause of action is single and indivisible and includes all damages which naturally result from the original injury or any part of it.

If he obtains judgment, acceptance of satisfaction of it extinguishes his cause of action against other tort-feasors liable for the same injury and bars action against them.

This rule applies though the wrongdoers are severally rather than jointly liable for the injury.

Wells *v.* Gould and Howard, 192.

The owner of a public garage for the storage of automobiles is bound under the implied conditions of his contract to store, safely keep and redeliver the car to the owner on demand.

He is liable for damages to the car resulting from the negligence of any of his officers, agents or employees in the performance of any duty in regard to his care or custody which is within the general scope of their employment.

If the performance of this obligation is delegated to a servant, the bailee remains liable for breach of it although it be unauthorized and outside the scope of the servant's employment.

Walters *v.* Garage, Inc., 222.

Evidence limited to the showing of injury known in law as permanent, unless such injury is specially pleaded, is not admissible.

In order, however, for the jury to determine what sum, if anything, plaintiff should recover for suffering at the time of the accident and up to the day of trial, it is permissible to allow a doctor to testify as to the condition of a fractured bone at the time of trial, although the answer might show permanent injury.

Hall *v.* Crosby et als, 253.

A married woman is only entitled to recover for loss of wages or diminution of earning capacity when there is an allegation in the declaration covering such claim.

Collins & Poland *v.* Dunbar, 337.

In an action to recover damages for injuries resulting in instantaneous death an important factor in determining the amount which may be properly awarded is the earning capacity of the deceased.

DECEIT.

DEEDS.

delivered at the grantor's death, it is a present deed and a quitclaim by the grantee, intermediate, would pass his estate.

Delivery to a third person, to be delivered to the grantee after grantor's death, without any reservation by the grantor of a right to recall it, is sufficient in law and effects a complete transfer of the title to the property and such delivery may be sufficient although no prior authority has been given by the grantee to receive the deed if the grantee subsequently assents.

But to constitute delivery, the grantor must part with the possession of the deed and the right to recall. It must pass beyond the control or dominion of the grantor. He can not transfer his property after his decease by deed. The statute of wills or of descent governs all property not disposed of during the lifetime of the owner. So far as the grantor is concerned, acts or words, either or both, whereby he in his lifetime parts with all right of possession and dominion over the instrument with the intent that it shall take effect as his deed and pass to the grantee, constitute delivery of a deed and nothing less will suffice.

To make the delivery good and effective, the power of dominion over the deed must be parted with. Until then the instrument passes nothing and gives no title. It is nothing more than a will defectively executed and void under the statute. So long as it is in the hands of a depository subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none, and if the grantor dies without parting with his control over the deed, it has not been delivered during his lifetime and after his decease no one can have the power to deliver it.

Whether or not delivery to a third person is absolute and irrevocable, or qualified and revocable, depends in the first instance upon the intention of the grantor, and is to be gleaned from his words and acts at the time, the attendant circumstances, and his subsequent conduct.

While the possession and production of a deed by the grantee is prima facie *evidence of its having been delivered, when it is ascertained that the possession was acquired after the grantor's death the presumption disappears.*

The possession and production of a deed by the grantee is prima facie *evidence of delivery, but the presumption is the other way where it remained in the possession of the grantor during his lifetime though it has been recorded since his death.*

The delivery is good only when the grantor parts with all dominion over the deed, reserving no right to recall it or alter its provisions. On such delivery title passes immediately to the grantee, the right of possession and enjoyment being delayed. The situation of the parties is exactly as though grantee had received her deed and grantor had received from her a life lease of the property.

The evidence must show that the owner intended to divest himself of the right to withdraw, revoke or control the instrument as completely as though he were

delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention.

The fact that the grantor handed a deed to the depositary, with instructions to the latter to keep the same and give it to the grantee when he (grantor) was dead, which instructions were followed by the depositary, would not alone necessarily lead to the conclusion that it was the intention of the grantor to vest a present title in the grantee.

Eddy et al *v.* Pinder, 139.

A particular, specific and definite grant by metes and bounds can not be enlarged or diminished by a later general description.

Nor is parol evidence, even if admitted without objection, competent to vary the terms of the instrument.

Elwell *v.* Borland and Sexton, 189.

When a deed is found in the possession of the grantee, delivery is presumed.

Only clear and convincing evidence can overcome the presumption.

Evidence admitted without objection must be considered even though it would have been excluded on objection, but the weight to which it is entitled is determined by established legal rules.

Hearsay evidence, not within any exception to the general rule, has no probative force and will not sustain a verdict lacking other support.

Declarations of a predecessor in title, offered for the purpose of invalidating a duly recorded deed which appears to be sufficient in all respects and which bears the insignia of genuineness, are not admissible.

The rule is the same, whether the present holder of the title acquired it by purchase, by gift, by inheritance or by devise, and may properly be invoked when the sole issue is the delivery of the deed on which the predecessor's title rests.

Shaw *v.* McKenzie, 248.

A provision in a deed poll of real estate, in form an agreement, that a fountain, aqueduct and tub should be kept in repair, to afford a source of water supply for property the title to which the grantor retained, does not create a right, for the violation of which, in the period of his ownership, the plaintiff, an owner by purchase from the grantor's heirs, can take advantage at law.

Mayo *v.* Dearborn, 455.

DELIVERY AND ACCEPTANCE.

See Deeds.

DEMURRER.

See Pleading and Practice.

DESCENT.

A widow may, by accepting the specific provision of her husband's will, preclude herself from any right of interest by descent in realty respecting which her husband died intestate. She may not hold under the will, also take by descent, unless the testator's intention that she should is plainly apparent.

No statute or rule of law, however, inhibits a widow from claiming her share in intestate personal estate, though she has accepted her husband's will.

Davis et als *v.* McKown et als, 203.

DEVISE AND LEGACY.

See Wills.

DIVORCE.

Under our laws a libel for divorce is regarded as a proceeding in a civil case. Such a suit is a civil suit.

The right of a libellant is similar to the right of a plaintiff in a regular civil action when voluntary nonsuit is sought.

The granting or withholding of a nonsuit is within the discretion of the Court.

To dismiss the libel, without prejudice, or to enter up judgment on the merits of the case after the evidence is heard is within the judicial discretion, and hence, not subject to exceptions. The decision of the Court on the facts presented to him, without jury, must be sustained where the record presents any evidence to sustain his findings.

Harmon *v.* Harmon, 171.

See Grant *v.* Grant, 499.

DOMICIL.

To abandon domicil of origin and establish domicil of choice, three facts must appear, (1) *abandonment of domicil of origin,* (2) *selection of a new locus,* (3) *the animus manendi.*

The burden of proving change of domicil is on the one alleging change.

Gilmartin *v.* Emery, 236.

EASEMENTS.

In determining the existence of an easement or prescriptive right of one to use in a certain way land of another, the record of the judgment must show, by its wording, logical inference therefrom, or by reference to other records, the exact portion of land of the servient tenement that is encumbered.

An encumbrance upon a man's estate, if established by record, must be clearly defined by the record memorial.

Noyes *v.* Levine, 88.

ELECTRICITY.

The maintenance by a power company of high tension wires, within three to four feet from telephone wires, held not to be negligence as a matter of law, in a case involving injuries to a telephone linesman.

Telephone Co. *v.* Power Co., 158.

EMINENT DOMAIN.

See Simoneau *v.* Town of Livermore Falls, 165.

ENCUMBRANCES.

See Easements.

EQUITY.

It is within the discretionary power of the Equity Court to grant leave to intervene after final decree although such action is unusual.

Leave should only be granted at such a stage of the proceedings when the interest of the intervenor is direct and immediate, when justice may not otherwise be done, or when it is necessary to take such action to preserve some right which can not be protected by any other course of procedure.

An order dissolving a corporation may be set aside when it appears that the decree was obtained by fraud or when it is in the interest of substantial justice to do so.

To hold any different doctrine than that a Court in Equity, misled by the fraud of one party into entering a decree, final or otherwise, which worked injury to another, could when apprised of the fact, annul its decree and in so far as possible correct the wrong, would violate every principle not only of equity but of common honesty. If fraud once having gained a temporary advantage

must retain it permanently, courts would so fail of their purpose as to merit contempt.

Elston, Jr. et als *v.* Elston & Co., 149.

A person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he has actual or imputed knowledge of his rights.

Where there is a relation of trust and confidence between the parties, in the absence of actual knowledge, the law will not impute constructive knowledge and permit the perpetrator of a fraud to stand upon the defense of delay which is induced by lulling his victim into a sense of security while his confidence is being betrayed.

Irrespective of whether the injured party has an adequate remedy at law or for want of equitable remedy will suffer an irreparable loss, fraud is one of the fundamental grounds of equitable jurisdiction.

Jensen *v.* Snow, 415.

Cases which hold that it is necessary for the petitioner to establish his title before proceeding with partition proceedings are instances where relief is sought in equity.

Hoadley *v.* Wheelwright, 435.

An equity decree, not shown on appeal to be manifestly wrong, must stand.

Meader *v.* Cummings, 445.

Where, because of fundamental difference in their points of view, testamentary trustees apply to a judicial court for the advice they think they need, they must bring in all necessary parties.

A general equity rule requires that all persons interested in the object of the suit, and within the jurisdiction, and capable of being made parties, must be made such, else their rights will not be bound.

When, however, they are required to be parties merely as owners and protectors of certain interest, then the proceedings may take place, if that interest receives an effective protection from others. In such case the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree.

Chaplin, Appellant, 446.

A provision in a deed poll of real estate, in form an agreement, that a fountain, aqueduct and tub should be kept in repair, to afford a source of water supply for property the title to which the grantor retained, does not create a right, for the violation of which, in the period of his ownership, the plaintiff, an owner by purchase from the grantor's heirs, can take advantage at law.

ESCROWS.

ESTOPPEL.

EVIDENCE.

The fact that a car is on the wrong side of the road at the time of a collision is strong evidence of carelessness, and when unexplained and uncontrolled such evidence is conclusive.

Brown *v.* Sanborn, 53.

It is the right of a party seeking to attack the credibility of a witness for the state to elicit by cross examination facts and circumstances which tend to prove the existence and extent of possible bias or hostility. The extent to which examination shall be permitted rests in the sound discretion of the Trial Court and no rule governing the exercise of such discretion can be laid down more definitely than to say that only so much and no more of the facts and circumstances should be admitted as are necessary to give a fairly intelligent understanding of the cause, nature and extent of the supposed improper motive or influence.

When a witness denies any feeling of hostility or unfriendliness toward the party against whom he has testified injuriously, it is the party's right to inquire, on cross examination, as to the existence of any fact, including previous relationship, which in the light of human experience might reasonably engender hostility towards the party, or affect the witness with partisan feeling, and thus impair the trustworthiness of his testimony.

Entire exclusion of testimony which might tend to disclose bias or prejudice is not an exercise of sound discretion.

State *v.* Salamone, 101.

To sustain an allegation of fraud, there must be more than surmise or conjecture which can not stand as substitutes for proof.

Thibodeau *v.* Langlais, 132.

While the possession and production of a deed by the grantee is prima facie *evidence of its having been delivered, when it is ascertained that the possession was acquired after the grantor's death the presumption disappears.*

The possession and production of a deed by the grantee is prima facie *evidence of delivery, but the presumption is the other way where it remained in the possession of the grantor during his lifetime though it has been recorded since his death.*

The evidence must show that the owner intended to divest himself of the right to withdraw, revoke or control the instrument as completely as though he were delivering it to the person named as grantee, and by words or act expressly or impliedly acknowledged his intention.

Eddy et al *v.* Pinder, 139.

In determining diminution in value of property as a consequence of raising a street, the jury may properly consider what expense a prudent man would rea-

sonably incur in putting the property, in reference to the new grade, in as good position as it was before.

Proof that the road commissioner, or other person authorized, had elevated the physically established way of the street, injuriously in a legal sense, to the complainant, would make a primae facie *case for him.*

No exception lies to the admission of evidence unless prejudice results.

Simoneau *v.* Town of Livermore Falls, 65.

A particular, specific and definite grant by metes and bounds can not be enlarged or diminished by a later general description.

Nor is parol evidence, even if admitted without objection, competent to vary the terms of the instrument.

Elwell *v.* Borland and Sexton, 189.

Evidence admitted without objection must be considered even though it would have been excluded on objection, but the weight to which it is entitled is determined by established legal rules.

Heresay evidence, not within any exception to the general rule, has no probative force and will not sustain a verdict lacking other support.

Declarations of a predecessor in title, offered for the purpose of invalidating a duly recorded deed which appears to be sufficient in all respects and which bears the insignia of genuineness, are not admissible.

The rule is the same, whether the present holder of the title acquired it by purchase, by gift, by inheritance or by devise, and may properly be invoked when the sole issue is the delivery of the deed on which the predecessor's title rests.

Shaw *v.* McKenzie, 248.

Evidence limited to the showing of injury known in law as permanent, unless such injury is specially pleaded, is not admissible.

In order, however, for the jury to determine what sum, if anything, plaintiff should recover for suffering at the time of the accident and up to the day of trial, it is permissible to allow a doctor to testify as to the condition of a fractured bone at the time of trial, altho the answer might show permanent injury.

Rule XXXV of the Rules of Court, that cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of Court, does not bar cross-examination by counsel of a co-defendant where their interests are actually and actively adverse.

Where several are sued as joint tort-feasors a defendant, or witness introduced by him, may be subjected to cross-examination by a co-defendant whose interest is adverse to that of the principal who introduced the witness.

Hall *v.* Crosby et als, 253.

In an action of deceit for fraudulent representations in the sale of certain shares of corporation stock where the issue was restricted to a charge that the plaintiff was induced to buy the shares of stock by the false representation of the defendant that the corporation was sound financially, when in truth it was insolvent, evidence as to the amount that defendant had herself invested in the enterprise, her alleged guarantee of the payment of dividends, the salaries that she and her husband drew as officers of the company, and the facts as to the management of the corporation after the purchase of the stock by the defendant is irrelevant and inadmissible.

Shine *v.* Dodge, 277.

When, considered as a whole, circumstantial evidence leads to a conclusion of guilt, with which no material fact is at variance, it is not, as a matter of law, inferior to direct evidence, and neither the court nor the jurors can conscientiously disregard it.

Confessions elicited by any expectation of favor or by menaces are not permissible in evidence, not because of having been extorted illegally, but because the party making them is supposed to be liable to be influenced, by the hope of advantage, or fear of injury, to state things which are not true.

A confession is the voluntary acknowledgment of the criminal act charged, or of participation in its commission. Incriminating admissions may be made without any intention of confession.

Failure of a respondent to testify at his trial presents no evidence of his guilt.

State *v.* O'Donnell, 294.

The decree of adoption duly entered in a Probate Court is a record that proof was offered of the written consent of the mother, and the recital therein controls until overthrown by evidence. The fact that such written consent is not found in the files of the court is not evidence that it was not given.

Gauthier, Appellant, 316.

See Winslow *v. Tibbetts*, 318.

See Spiegel, May, Stern Company *v.* Waterman, 342.

In prosecution for embezzlement against a party to a written contract, parol evidence is admissible to show the belief under which the accused acted, although it tends to alter or contradict the terms of the instrument.

State *v.* Morin, 349.

See Bowley *v.* Smith, 402.

When the accused in a criminal case voluntarily becomes a witness in his own behalf he accords to the State's Attorney the right to inquire of him, in cross-examination, fully and in detail as to any fact, the existence of which renders probable or improbable the main fact sought to be proved. To some extent, more can be elicited from him than from a common witness, because his statements are admissions as well as testimony.

State *v.* Taylor, 438.

See Fitzmaurice *v.* McGinn, 496.

The extent to which a cross-examination concerning matters collateral to the issues being tried may be carried is within the discretion of the presiding Justice.

State *v.* Hume, 458.

If the only bearing of evidence offered is to prove a collateral fact, it is not relevant and should be excluded. But if any circumstance, which tends to make the premises set up in the pleadings more or less improbable, is offered in evidence it should be admitted.

Perlin *v.* Rosen, 481.

EXCEPTIONS.

On exceptions to ordered verdict the entire evidence is to be considered although not specifically included in the bill of exceptions.

Brown *v.* Sanborn, 53.

See Jordan *v.* Hilbert, 56.

The discharge of a member of the panel, and the substitution of another in his place after the opening of the case, constitutes a valid ground of exceptions.

Beaudoin *v.* Mahaney, Inc., 118.

Exceptions lie to the acceptance of a report of Referees when any issue included in the submission is left undecided.

Chaput *v.* Lussier, 145.

No exception lies to the admission of evidence unless prejudice results.

Simoneau *v.* Town of Livermore Falls, 165.

Exceptions do not lie to the refusal of a nonsuit.

FALSE REPRESENTATIONS.

See Deceit.

FEDERAL EMPLOYERS' LIABILITY ACT.

Contributory negligence of the employee under the Federal Employers' Liability Act affects damages, not liability of the employer.

Ward *v.* Railroad Company, 396.

FELLOW-SERVANTS.

See Master and Servant.

FINDINGS OF FACT.

Findings of fact by a single Justice sitting without a jury are final so long as they find support in evidence.

Ayer *v.* Railway Company, 381.

FIRES.

An owner about to burn over his land for any lawful purpose must select a time and a condition of weather that to the reasonably prudent man would seem unlikely to endanger nearby properties. He must in addition exercise reasonable care in controlling the flames so that they will not do damage to others.

Hill *v.* Lehtinen, 129.

FORCIBLE ENTRY AND DETAINER.

See Holding Company *v.* Bangor Veritas, 421.

FORECLOSURE.

See Mortgages.

FRAUD.

See Thibodeau *v.* Langlais, 132.

An order dissolving a corporation may be set aside when it appears that the decree was obtained by fraud or when it is in the interest of substantial justice to do so.

To hold any different doctrine than that a Court in Equity, misled by the fraud of one party into entering a decree, final or otherwise, which worked injury to another, could when apprised of the fact, annul its decree and in so far as possible correct the wrong, would violate every principle not only of equity but of common honesty. If fraud once having gained a temporary advantage must retain it permanently, courts would so fail of their purpose as to merit contempt.

Elston, Jr. et als *v.* Elston and Co., 149.

See Shine *v.* Dodge, 277.

A mistake as to facts based on a fraudulent concealment is ground for rescission and cancellation.

A mistake as to the legal effect of a transaction is sufficient for that purpose if a confidential relation exists and the mistake occurs under such circumstances that fraud, imposition or undue influence can be inferred.

Where there is a relation of trust and confidence between the parties, in the absence of actual knowledge, the law will not impute constructive knowledge and permit the perpetrator of a fraud to stand upon the defense of delay which is induced by lulling his victim into a sense of security while his confidence is being betrayed.

Irrespective of whether the injured party has an adequate remedy at law or for want of equitable remedy will suffer an irreparable loss, fraud is one of the fundamental grounds of equitable jurisdiction.

Jensen *v.* Snow, 415.

See Pelletier *v.* Deering, 462.

FRAUDULENT CONVEYANCES.

Fraud is never to be presumed. It must always be proved. Fraud is not to be lightly assumed to exist but must be proved by trustworthy evidence consistent with undisputed circumstances.

To sustain an allegation of fraud, there must be more than surmise or conjecture which can not stand as substitutes for proof.

It is not enough that the relationship of the parties and the circumstances and surroundings involved are such as might tend to arouse suspicion. The burden is upon the defendant to establish the alleged fraud by clear and convincing proof.

Thibodeau *v.* Langlais, 132.

GAMBLING.

An automatic vending machine which produces metal tokens or checks in varying numbers to be played back into the machine one by one, is a device producing things of value by chance, and in violation of the provisions of Sec. 18, *Chap.* 136, *R. S.*

A thing of value to be the subject of gaming may be anything affording the necessary lure to indulge the gambling instinct.

State *v.* Baitler, 285.

HIGHWAYS.

Acceptance by a town of a way as laid out by municipal officers, can not be deemed acceptance of a previously dedicated way.

Simoneau *v.* Town of Livermore Falls, 165.

The Statute governing appeals from a location of a way by county commissioners is mandatory and strict compliance with its terms is necessary.

The provisions of the Statute as to appeals from the decision of county commissioners in the matter of estimating damages resulting from the laying out of ways are also mandatory and are to be strictly construed.

Tuttle, Appellant, 475.

HUSBAND AND WIFE.

A husband cannot recover for loss of the consortium of his wife or for moneys expended in her behalf, occasioned by her injuries to which his own negligence contributes.

Kimball *v.* Bauckman, 14.

At common law, no right or cause of action existed between the spouses while the marriage relation continued.

As to third persons, the joinder of the husband was required in all actions by or against a married woman, unless he was an alien who had always resided abroad or was regarded as civilly dead.

Chapter 112 *of the Acts and Resolves of* 1876, *authorizing a married woman to prosecute and defend suits at law or in equity, either in her own name without the joinder of her husband, or jointly with him, is in derogation of the common law and has been construed strictly.*

The statute authorizes suits by the wife against third persons, but not against her husband.

INDICTMENT.

INDUSTRIAL ACCIDENT COMMISSION.

INFANTS.

If the language of an insurance policy is ambiguous, or susceptible of interpretations differing in import, construction should be most strongly against the insurer, on whom the obligation of the contract rests, and who is supposed to choose the wording.

If the terms of the policy, however, present no ambiguity, they are to be taken and understood according to their plain and ordinary sense.

Parties contracting in writing are supposed to have the intentions which their agreement effectually manifests.

A contract should be so construed as to give it only such effect as was intended when it was made.

The phrase "while being used with the consent of the assured," in the additional coverage clause in a motor vehicle liability insurance policy, has been construed as referring to the time of the casualty, and not to the time of granting consent.

The terms of a policy cannot be enlarged or diminished by judicial construction. The function of the court is not to make a new contract, but to ascertain the meaning and intention of that actually made.

Johnson *v.* Insurance Company, 288.

INTOXICATING LIQUORS.

See State *v.* Beaudoin, 31.

INVITED GUESTS.

See Motor Vehicles.

JAILS AND JAILORS.

See Poor Debtors—Putnam *v.* Fulton, 232.

JURY.

The discharge of a member of the panel, and the substitution of another in his place after the opening of the case, constitutes a valid ground of exceptions.

Beaudoin *v.* Mahaney, Inc., 118.

Negligence and contributory negligence are as a general rule questions of fact for the jury. The Court cannot say as a matter of law that there was contribu-

tory negligence on the part of the plaintiff unless it be that any other inference could not reasonably be drawn from the evidence.

White *v.* Michaud, 124.

It is only when the case is doubtful and different conclusions might reasonably be drawn from the evidence that the facts should be submitted to the jury.

Johnson *v.* Terminal Company, 311.

JURY FINDINGS.

Whether, in a particular case, where the testimony is conflicting, liability has been shown, is generally a question to be determined by the jury. A verdict, which a preponderance of the evidence reasonably supports, is not disturbable on motion.

But where, as in the case at bar, on the whole record, no weight of evidence, adequate to satisfy the minds of reasonable men, fairly tended to support the jury's finding, the verdict can not be allowed to stand.

Walker *v.* Norton, 69.

When testimony is conflicting a jury finding based upon reasonably sufficient evidence will not be set aside.

Bowley *v.* Smith, 402.

LACHES.

Laches can not be predicated on passage of time alone. There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. The cases on laches proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum.

Elston, Jr. et als *v.* Elston and Co., 149.

A person can not be deprived of his remedy in equity on the ground of laches unless it appears that he has actual or imputed knowledge of his rights.

Where there is a relation of trust and confidence between the parties, in the absence of actual knowledge, the law will not impute constructive knowledge and permit the perpetrator of a fraud to stand upon the defense of delay which is induced by lulling his victim into a sense of security while his confidence is being betrayed.

Jensen *v.* Snow, 415.

LANDLORD AND TENANT.

Upon the bankruptcy of a tenant, provided that by the terms of his lease the tenancy is not thereby terminated, the leasehold interest of the bankrupt passes to the Trustee if he elects to accept it as an asset of the estate to be reduced into money for distribution among the creditors.

If the Trustee does not within a reasonable time accept the property of the bankrupt as an asset of the estate, he is deemed to have elected to reject it and the title thereto remains in the bankrupt.

If the Trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his lessor are not disturbed.

If the Trustee once makes his election to renounce the lease as an asset of the bankrupt estate, his interest in it is terminated and a subsequent attempt to assign it is a nullity.

Holding Company *v.* Bangor Veritas, 421.

LAST CLEAR CHANCE.

See Sawyer *v.* Androscoggin Elec. Co., 60.

LAW COURT.

When, for the reason that the jury verdict is contrary to evidence, the Law Court sets the verdict aside and grants another trial, the decision of the appellate tribunal becomes the law of the case to be followed by the Trial Court on the new trial, unless the facts appearing on such trial are essentially different from those which were before the Law Court when it rendered its decision.

Byron *v.* O'Connor, 35.

The Law Court will render no decision in a cause reported to it upon an agreed statement, which it holds to be but a partial statement of the facts essential to determination.

State *v.* Corriveau, 79.

The Law Court does not, under a bill of exceptions, determine controverted matters of fact.

Harmon *v.* Harmon, 171.

The Law Court has no jurisdiction of a special motion for a new trial not presented to the trial Judge but sent to it directly.

The Law Court has jurisdiction and can hear and determine only those matters authorized by statute and brought to it through the established course of procedure.

State *v.* Hume, 458.

MARRIED WOMEN.

A married woman is only entitled to recover for loss of wages or diminution of earning capacity when there is an allegation in the declaration covering such claim.

Collins & Poland *v.* Dunbar, 337.

MASTER AND SERVANT.

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 was 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.

Chaput *v.* Lussier, 145.

MISTRIAL.

The mere fact that a jury may know that an insurance company is defending is not in itself a ground for ordering a mistrial, nor must a new trial be granted in every case where there is such knowledge.

Beaudoin *v.* Mahaney, Inc., 118.

A motion for a mistrial is addressed to the discretion of the presiding Justice and, unless there is a clear abuse of such discretion, no exception lies to his ruling.

State *v.* Rheaume, 260.

The granting or refusal of a motion to direct a mistrial is within the properly exercised discretion of the presiding Justice.

Collins & Poland *v.* Dunbar, 337.

MONEY HAD AND RECEIVED.

An action for money had and received lies when one has in his possession money which in equity and good conscience belongs to another, or if, having had the money, he has paid it out with knowledge of the plaintiff's right to it.

Ketch *v.* Smith, 275.

MORTGAGES.

The mere fact that, after the year for redemption has expired, payments are made on account of the mortgage debt, will not work a waiver of foreclosure. Such payments, it has been said, may have been made because the premises were not adequate to satisfy the debt. The intention of the parties to waive the foreclosure should be shown by other evidence.

A grantee after foreclosure may take a title subject to redemption by the mortgagor. But a quitclaim deed by a mortgagee after foreclosure, for a sum equal to the mortgage debt, is not, of itself, enough evidence of a waiver of the foreclosure.

Shaw *v.* Merrill, 441.

MOTOR VEHICLES.

Care and vigilance must depend on surrounding conditions, and be proportioned to known danger. A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous.

When a highway and a railroad cross at a grade, the highway traveler should look, listen, and should stop, if there is room for doubt. Besides, he should be attentive to make such acts reasonably effective. A greater degree of precaution must be exercised when darkness obscures vision.

Witherly *v.* Bangor & Aroostook Ry., 4.

The supreme rule of the road is the rule of mutual forbearance and, if a situation indicates a collision, although it arises from the fault of another, ordinary prudence requires the driver of a motor vehicle to seek to avoid a collision even though this involve the waiver of his right of way.

The law will not allow a plaintiff to recover for an injury to which his own negligence contributed as a proximate cause.

The law will not charge a plaintiff with lack of due care for a failure to do that which would have been futile.

It is when dangers become either reasonably manifest or known to a passenger in an automobile and he, with adequate opportunity to control or influence the situation for safety, sits by without warning or protest to the driver and permits himself to be driven carelessly to his injury that his negligence will bar his recovery for injuries received.

A passenger in an automobile is not obliged to assume control of the car when disaster is imminent, and, if warning or protest would not have averted the disaster, his silence is not the proximate cause of his injuries.

Kimball *v.* Bauckman, 14.

Drivers of automobiles must come to realize that because they are on their right side of the road they are not thereby absolved from their responsibility to use due care toward others who may themselves be on the wrong side.

It is a well recognized principle of law that the negligence of one engaged in a joint enterprise is imputable to the other in a suit against a third party.

Bonefant et al *v.* Chapdelaine, 45.

The fact that at the time of the accident the plaintiff's truck was to its left of the middle of the way convicts the plaintiff's agent of negligence as a matter of law, unless the prima facie *evidence of his negligence is explained away by evidence.*

The fact that a car is on the wrong side of the road at the time of a collision is strong evidence of carelessness, and when unexplained and uncontrolled such evidence is conclusive.

Brown *v.* Sanborn, 53.

The negligence of a prospective purchaser of an automobile, driving it for purposes of trial and unaccompanied by any representative of the owner, is not imputable to the owner of the car who has permitted him so to operate it. Control of it has been surrendered, and the relationship of principal and agent has not been established between the parties, who are rather in the respective positions of bailor and bailee.

If, however, the purchaser is accompanied by the owner or his agent, who retains the right to direct the operation of the car, negligence of the driver may be charged to the owner.

Beaudoin *v.* Mahaney, Inc., 118.

The driver of a motor vehicle intending to cross the street in front of another vehicle should so watch and time the movements of the other vehicle as to reasonably insure himself of safe passage.

White *v.* Michaud, 124.

See Chaput *v.* Lussier, 145.

See Berthiaume *v.* Usen, 195.

The owner of a public garage for the storage of automobiles is bound under the implied conditions of his contract to store, safely keep and redeliver the car to the owner on demand.

He is liable for damages to the car resulting from the negligence of any of his officers, agents or employees in the performance of any duty in regard to his care or custody which is within the general scope of their employment.

In such a bailment for hire the contract is in its nature a direct and personal obligation by which the bailee undertakes personally to safely keep the property committed to his care.

If the performance of this obligation is delegated to a servant, the bailee remains liable for breach of it although it be unauthorized and outside the scope of the servant's employment.

Walters *v.* Garage, Inc., 222.

Necessity of nonresident operator's license, see State *v.* Chandler, 262.

The operator of an automobile owes a duty to his invited guest to exercise in his own 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.

The driver of an automobile attempting to pass another is liable for injuries to a guest in that car if he fails to observe the law of the road, provided such failure is found to have been a proximate, contributing cause of the accident, or if it is proven that some act of his, which the ordinarily prudent man would not have done, contributed to the guest's injury as the proximate cause thereof.

A driver, experienced in operating on a gravelled road, must be charged with knowledge that swerving, at speed, into loose coarse gravel, is with risk of loss of control; to swerve at marked angle, with great risk.

Overtaking and passing an automobile calls for caution, and a driver of the overtaking automobile proceeds to pass at his peril, and does not attempt to pass, if ordinarily prudent, unless the situation facing him is such as to reasonably assure an ordinarily prudent driver that the passing can be accomplished with safety to himself and to the leading automobile and all occupants of the road, who are also in the exercise of due care.

Levesque *v.* Pelletier and Thibodeau, 266.

See Sacknoff *v.* Sacknoff, 280.

The omission of warning signals by trainmen will not relieve the driver of a motor vehicle from the imputation of negligence when he fails to look in both directions before crossing a railroad track.

Johnson *v.* Terminal Company, 311.

The right of a plaintiff to recover for personal injuries sustained in an automobile accident is governed by the law of the place where the injuries were received.

The law of the jurisdiction where relief is sought determines the remedy and its incidents, such as pleading, practice and evidence.

Under the law of Massachusetts, a person riding in an automobile, upon invitation of the driver, to recover for personal injuries sustained while so riding, must establish the gross negligence of the driver. The definition of gross negligence accepted in Massachusetts as the law of these cases is that stated in Altman *v.* Aronson, 231 Mass., 588.

Res ipsa loquitur *is a rule of evidence which warrants, but does not compel, an inference of negligence.*

The rule does not apply unless the unexplained accident is of a kind which does not, according to the common experience of mankind, occur if due care has been exercised.

The basis of the inference is the doctrine of probabilities. Facts proven must, in their very nature, indicate such an unusual occurrence as to carry a strong inherent probability of negligence. Mere conjecture and surmise will not suffice.

It is common knowledge that automobiles, when operated with ordinary care, do not usually leave the surface of the road wrought for their travel, ride onto the shoulder and plunge into a telephone pole nine feet away. When they do, it is the extraordinary and not the ordinary course of things and an inference, drawn therefrom, that the accident was the result of ordinary negligence would not be clearly wrong.

The same facts do not carry inherent probability of gross negligence.

In accidents in which gross negligence is involved, there is almost invariably convincing evidence, outside the unexplained accident itself, of utter forgetfulness or heedless and palpable violation of legal duty or other essential elements which characterize the greater wrong.

Winslow *v.* Tibbetts, 318.

Sounding a warning signal — where there is no apparent necessity of such warning, and the obligation to give such signal is not imposed by statute — does not in itself constitute negligence. The question is one of fact for the jury.

The parents of a child not capable of exercising care for his own safety, must exercise reasonable care for the child's protection. Failure in such regard, that is, negligence of the parents, if contributory to injury, is chargeable to the child, and constitutes a bar to recovery.

Parents are holden only to the exercise of reasonable care — and what is reasonable care depends upon the facts and circumstances, and sometimes, in part, even upon the financial condition of the family. None of the cares devolving upon the parents are to be ignored. Small children need not be constantly watched.

Gravel *v.* LeBlanc, 325.

The operator of a motor vehicle intending to cross a street must use reasonable care in ascertaining the presence of cars attempting to pass from behind.

Notice of an intention to cross a way must be given to the drivers of cars behind in order to charge them with negligence in pursuing their course.

As in the case of cars coming from the opposite direction, the law charges the driver of a car crossing a highway with the duty of so watching and timing the movements of a car coming from behind as to reasonably insure himself of a safe passage either in front or rear of such car, even to the extent of stopping and waiting if necessary.

Verrill *v.* Harrington, 390.

The negligence of the driver of an automobile is not imputable to a passenger who does not fail to do what an ordinarily prudent passenger would have done in the face of similar conditions.

Davis *v.* Tobin, 426.

MUNICIPAL CORPORATIONS.

See State *v.* Goldberg, 1.

When a vacancy occurs in the office of town treasurer and the municipal officers, in accordance with the provisions of Sec. 25, Chap. 5, R. S., appoint a person to fill the vacancy, the term of office of such appointed treasurer will be to the next annual town meeting.

In the case at bar, there was no "vacancy" when the petition to call a special town meeting was presented to the selectmen of the town of Old Orchard Beach; they therefore did not "unreasonably refuse" as expressed in Sec. 4, Chap. 5, R. S. Reason would not justify the expenditure to summon the inhabitants to vote when their action would effect nothing. Petitioner was not, therefore, elected, and had no standing in court.

Googins *v.* Kilpatrick, 23.

See Jonesport *v.* Beals, 37.

A bequest to a municipality for the purpose of erecting or maintaining public buildings or works, or otherwise lessening the burdens of government, is for a charitable use.

A municipality may be regarded as a charitable institution, within the meaning of the statute, for the purpose of receiving and administering a bequest to be expended in the erection of a public building.

Such a bequest is exempt from an inheritance tax.

Estate of Lena A. Clark, 105.

MUNICIPAL OFFICERS.

Town officers have no authority to negotiate loans or execute notes in the name of a town without express authority of the town, given in its corporate capacity.

Waldo Co. *v.* Downing, 410.

NEGLIGENCE.

It is not in itself negligence for a railroad company to allow a train of cars to remain across a highway. Negligent obstruction of a highway by a standing train is determined by whether, under all the circumstances, it is reasonable or otherwise.

Care and vigilance must depend on surrounding conditions, and be proportioned to known danger. A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous.

When a highway and a railroad cross at a grade, the highway traveler should look, listen, and should stop, if there is room for doubt. Besides, he should be attentive to make such acts reasonably effective. A greater degree of precaution must be exercised when darkness obscures vision.

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The supreme rule of the road is the rule of mutual forbearance and, if a situation indicates a collision, although it arises from the fault of another, ordinary prudence requires the driver of a motor vehicle to seek to avoid a collision even though this involve the waiver of his right of way.

The law will not allow a plaintiff to recover for an injury to which his own negligence contributed as a proximate cause.

A husband can not recover for loss of the consortium of his wife or for moneys expended in her behalf, occasioned by her injuries to which his own negligence contributes.

The law will not charge a plaintiff with lack of due care for a failure to do that which would have been futile.

It is when dangers become either reasonably manifest or known to a passenger in an automobile and he, with adequate opportunity to control or influence the situation for safety, sits by without warning or protest to the driver and permits himself to be driven carelessly to his injury that his negligence will bar his recovery for injuries received.

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Drivers of automobiles must come to realize that because they are on their right side of the road they are not thereby absolved from their responsibility to use due care toward others who may themselves be on the wrong side.

It is a well recognized principle of law that the negligence of one engaged in a joint enterprise is imputable to the other in a suit against a third party.

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The fact that at the time of the accident the plaintiff's truck was to its left of the middle of the way convicts the plaintiff's agent of negligence as a matter of law, unless the prima facie *evidence of his negligence is explained away by evidence.*

The fact that a car is on the wrong side of the road at the time of a collision is strong evidence of carelessness, and when unexplained and uncontrolled such evidence is conclusive.

Brown *v.* Sanborn, 53.

For one, intending to become a passenger on a car, to stand so near the rail as to be within reach of the ordinary overhang of the car is presumptive negligence.

Sawyer *v.* Androscoggin Elec. Co., 60.

The negligence of a prospective purchaser of an automobile, driving it for purposes of trial and unaccompanied by any representative of the owner, is not imputable to the owner of the car who has permitted him so to operate it. Control of it has been surrendered, and the relationship of principal and agent has not been established between the parties, who are rather in the respective positions of bailor and bailee.

If, however, the purchaser is accompanied by the owner or his agent, who retains the right to direct the operation of the car, negligence of the driver may be charged to the owner.

Beaudoin *v.* Mahaney, Inc., 118.

When it is pleaded in defense that negligence of the plaintiff is the proximate cause of his injury, the exercise of due care by plaintiff must be shown.

Negligence and contributory negligence are as a general rule questions of fact for the jury. The Court can not say as a matter of law that there was contributory negligence on the part of the plaintiff unless it be that any other inference could not reasonably be drawn from the evidence.

White *v.* Michaud, 124.

An owner about to burn over his land for any lawful purpose must select a time and a condition of weather that to the reasonably prudent man would seem

unlikely to endanger nearby properties. He must in addition exercise reasonable care in controlling the flames so that they will not do damage to others.

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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 was incompetent, or in failing to supervise such an assignment, 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.

Chaput *v.* Lussier, 145.

The maintenance by a power company of high tension wires, within three to four feet from telephone wires, held not to be negligence as a matter of law, in a case involving injuries to a telephone linesman.

Telephone Co. *v.* Power Co., 158.

It is the duty of a person injured through the negligence of another to use reasonable diligence in securing medical or surgical aid and, if he exercises due care in the selection of a physician or surgeon, their negligence, mistakes or lack of skill, which aggravate or increase his injury, are regarded by the law as a part of the original injury, for which the original wrongdoer is responsible.

Wells *v.* Gould and Howard, 192.

See Walters *v.* Garage, Inc., 222.

The operator of an automobile owes a duty to his invited guest to exercise in his own 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.

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Levesque *v.* Pelletier and Thibodeau, 266.

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The omission of warning signals by trainmen will not relieve the driver of a motor vehicle from the imputation of negligence when he fails to look in both directions before crossing a railroad track.

Johnson *v.* Terminal Company, 311.

"Massachusetts Rule" as to invited guests—see Winslow *v.* Tibbetts, 318.

Negligence is the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situation, or under like circumstances.

The care which ordinarily prudent and careful persons take is commensurate with the necessity of care and the dangers of the situation.

Where the evidence admits of only one logical inference, the question is one of law; where reasonable men might differ as to the inferences that could be drawn, the question is one of fact.

Sounding a warning signal—where there is no apparent necessity of such warning, and the obligation to give such signal is not imposed by statute—does not in itself constitute negligence. The question is one of fact for the jury.

The parents of a child not capable of exercising care for his own safety, must exercise reasonable care for the child's protection. Failure in such regard, that is, negligence of the parents, if contributory to injury, is chargeable to the child, and constitutes a bar to recovery.

Parents are holden only to the exercise of reasonable care—and what is reasonable care depends upon the facts and circumstances, and sometimes, in part, even upon the financial condition of the family. None of the cares devolving upon the parents are to be ignored. Small children need not be constantly watched.

Gravel *v.* LeBlanc, 325.

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NEW TRIAL.

The Law Court has no jurisdiction of a special motion for a new trial not presented to the trial Judge but sent to it directly.

In criminal cases, a motion for a new trial based on any ground must be directed to the Justice presiding at the trial. If it is denied in a case involving a felony, the respondent may appeal to the next law term. If the offense is a misdemeanor only, the ruling of the trial Judge is final.

State *v.* Hume, 458.

NOTICE.

The giving of notice of the meeting of a board of arbitrators in a case involving division of the property of a town is required. But, in such case, actual notice will suffice.

The rule of definite notice does not extend to mere routine or detail proceedings, the performance of which ex parte *could not possibly prejudice the rights of either party.*

Jonesport *v.* Beals, 37.

PARENT AND CHILD.

The parents of a child not capable of exercising care for his own safety, must exercise reasonable care for the child's protection. Failure in such regard, that is, negligence of the parents, if contributory to injury, is chargeable to the child, and constitutes a bar to recovery.

Parents are holden only to the exercise of reasonable care—and what is reasonable care depends upon the facts and circumstances, and sometime, in part, even upon the financial condition of the family. None of the cares devolving upon the parents are to be ignored. Small children need not be constantly watched.

The law recognizes, and does not disregard, individual variations in capacity among children of the same age.

Gravel *v.* LeBlanc, 325.

PARTITION.

R. S. 1930, *Chap.* 102, *Sec.* 1, *which provides that one having a right of entry into real estate may bring a petition for partition, recognizes that the petitioner may not be seised and that his title may be in dispute.*

The purpose of this statute being to provide a simple and inexpensive procedure for the partition of land held in common or joint tenancy such end would be thwarted if one owner by merely filing an answer denying the petitioner's title could force him to establish his title at law before proceeding with the partition.

PARTNERSHIP.

PATENTS.

PERJURY.

See Criminal Law.

PHYSICIANS AND SURGEONS.

Chap. 21, *Sec.* 15, *R. S.* 1930, *prescribing the terms and conditions under which the prefix "Dr." may be used, provides for an exercise by the state of its police power.*

State *v.* Corriveau, 79.

It is the duty of a person injured through the negligence of another to use reasonable diligence in securing medical or surgical aid and, if he exercises due care in the selection of a physician or surgeon, their negligence, mistakes or lack of skill, which aggravate or increase his injury, are regarded by the law as a part of the original injury, for which the original wrongdoer is responsible.

Wells *v.* Gould and Howard, 192.

PLEADING AND PRACTICE.

There can be no enforceable judgment against a defendant debtor who, after suit is brought, receives a discharge in bankruptcy.

A special judgment, however, can be entered for the purpose of perfecting a right of action against one secondarily liable, or in order to charge a garnishee, or to establish the right to levy on attachable property of the bankrupt, the title to which may not have passed to the trustee in bankruptcy.

Smith *v.* Davis, French, Trustee, 9.

It is the duty of a person entrusted with preparing a complaint or indictment charging a violation of the prohibitory law to specifically allege a former conviction for similar offense if he has knowledge of the fact.

Such an allegation, being a material part of the complaint or indictment, must be sustained by proof beyond a reasonable doubt.

State *v.* Beaudoin, 31.

Amendments to judgments can only be allowed for the purpose of making the record conform with the truth, not for the purpose of revising and changing the judgment.

Noyes *v.* Levine, 88.

In interpretation of lien statutes courts will construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute. Even though the writ is unskillfully framed, if the meaning of the allegations may be easily understood, it is sufficient.

Otis Elevator Co. *v.* Finks, 95.

In this state a Referee has no authority to allow an amendment to the declaration except with the consent of both parties.

Bailey et al *v.* Laughlin, 113.

When it is pleaded in defense that negligence of the plaintiff is the proximate cause of his injury, the exercise of due care by plaintiff must be shown.

White *v.* Michaud, 124.

Exceptions lie to the acceptance of a report of Referees when any issue included in the submission is left undecided.

Chaput *v.* Lussier, 145.

It is within the discretionary power of the Equity Court to grant leave to intervene after final decree although such action is unusual.

Leave should only be granted at such a stage of the proceedings when the interest of the intervenor is direct and immediate, when justice may not otherwise be done, or when it is necessary to take such action to preserve some right which can not be protected by any other cource of procedure.

An order dissolving a corporation may be set aside when it appears that the decree was obtained by fraud or when it is in the interests of substantial justice to do so.

Elston, Jr. et als *v.* Elston & Co., 149.

The granting or withholding of a nonsuit is within the discretion of the Court.

Exceptions do not lie to the refusal of a nonsuit.

To dismiss the libel, without prejudice, or to enter up judgment on the merits of the case after the evidence is heard is within the judicial discretion, and hence, not subject to exceptions. The decision of the Court on the facts presented to him, without jury, must be sustained where the record presents any evidence to sustain his findings.

The Law Court does not, under a bill of exceptions, determine controverted matters of fact.

Harmon *v.* Harmon, 171.

A probate appeal may not properly be the subject of a reference. Probate appeals are of statutory origin, and must be conducted strictly according to the statute.

Chaplin *v.* Decree, 187.

See Bouthot *v.* Bouthot, 199.

In a suit by a judgment creditor against a jailer for damages because of his not having received the debtor into custody, a declaration alleging that the debtor offered to so deliver himself but not alleging that he did deliver himself nor that he accompanied the offer with evidence of the authority of the jailer to receive him, is bad on demurrer.

Putnam *v.* Fulton, 232.

See Hall *v.* Crosby et als, 253.

A party is not permitted to take his chance of a favorable verdict, and then, if it is adverse, interpose an objection to it based on facts which were known to him before it was rendered.

A motion for a mistrial is addressed to the discretion of the presiding Justice and, unless there is a clear abuse of such discretion, no exception lies to his ruling.

State *v.* Rheaume, 260.

An action for money had and received lies when one has in his possession money which in equity and good conscience belongs to another, or if, having had the money, he has paid it out with knowledge of the plaintiff's right to it.

Ketch *v.* Smith, 275.

After a verdict in a criminal cause a general motion for a new trial must be addressed to the presiding Justice.

Filing such motion operates as a waiver of exceptions to the refusal to direct a verdict.

State *v.* O'Donnell, 294.

The right to except as to matters of law in cases submitted to reference can only be preserved by the following procedure; namely, when the Referee's report is offered at nisi prius *for acceptance, the aggrieved party must file his objections in writing for the consideration of the presiding Justice. If the objections are overruled and the motion to accept the report granted, exceptions to the ruling will lie.*

Lincoln *v.* Hall, 310.

Assessors of taxes are public officers; when acting as assessors they are not agents of the town of which they are inhabitants.

Over the assessors, when acting officially, and over their acts, the inhabitants of a town have no control.

Service of legal process on the clerk of a town, or on the chairman of the board of its selectmen, is not service on the assessors, and is not notice to the assessors, of pending litigation.

Telegraph Company *v.* Town of Cushing, 333.

See Dobson *v.* Chapman, 336.

The granting or refusal of a motion to direct a mistrial is within the properly exercised discretion of the presiding Justice.

A married woman is only entitled to recover for loss of wages or diminution of earning capacity when there is an allegation in the declaration covering such claim.

Collins & Poland *v.* Dunbar, 337.

See Ayer *v.* Railway Company, 381.

In poor debtor proceedings under Revised Statutes, Chapter* 124, *Section* 51, *a justice of the peace must affix a seal to his citation to the creditor.

Although under Section* 52 *of Chapter* 124, *R. S., service of such a citation must be by attested copy, it is not necessary that a seal be affixed thereto or a reproduction of the seal on the citation be made.

A seal is necessary to authenticate the citation, but it is not a part of it so as to make it necessary to set it forth in the copy served.

Beaupre *v.* Schlosberg, 407.

See Klopot *v.* Scuik and Augusta Trust Company, 499.

The Law Court has no jurisdiction of a special motion for a new trial not presented to the trial Judge but sent to it directly.

In criminal cases, a motion for a new trial based on any ground must be directed to the Justice presiding at the trial. If it is denied in a case involving a felony, the respondent may appeal to the next law term. If the offense is a misdemeanor only, the ruling of the trial Judge is final.

State *v.* Hume, 458.

The Statute governing appeals from a location of a way by county commissioners is mandatory and strict compliance with its terms is necessary.

The provisions of the Statute as to appeals from the decision of county commissioners in the matter of estimating damages resulting from the laying out of ways are also mandatory and are to be strictly construed.

When a bill of exceptions is silent as to whether the ruling complained of was made as a matter of law or as a matter of discretion, it is to be presumed that the Trial Court ruled as a matter of discretion.

Exceptions do not lie to the exercise of discretion in allowing and disallowing amendments.

Tuttle, Appellant, 475.

See Perlin *v.* Rosen, 481.

PLEDGOR AND PLEDGEE.

While it is a familiar rule of law that a pledgee, without losing his lien, may return the pledged property to the pledgor as a special agent to sell it and pay the debt secured, the evidence in the case at bar did not support this contention. The defendant had neither property in nor possession of the car and no power to dictate as to its disposal. It was Capitelle's car and his promise to sell it was a mere nudum pactum. *His use of the car thereafter was as its owner, not as agent of the defendant. The plaintiffs' failure to establish that Capitelle was the defendant's agent bars their recovery in these actions.*

Berthiaume *v.* Usen, 195.

POOR DEBTORS.

The keeper of a county jail is under no obligation to receive a debtor who offers to deliver himself into custody in compliance with the requirements of a six months' bond unless there is filed with the jailer either an attested copy of the execution on which the debtor was arrested or of the bond.

PRINCIPAL AND AGENT.

A real estate agent with whom property is listed for sale or exchange acts in a fiduciary capacity, if he accepts the proffered employment. It is his duty to obtain for his principal the largest price possible, or in case of an exchange the most advantageous trade. A secret agreement for compensation with the other party or his representative is inconsistent with such position of trust, and is a defense to an action by the agent to recover a commission from his own principal. Good faith demands a full and frank disclosure to his principal of any such arrangement.

Devine *v.* Hudgins, 353.

No principal of law is better settled than that which requires an agent in all dealings concerning the subject matter of his agency to act with utmost good faith and loyalty and disclose all facts within his knowledge which bear materially upon his principal's interests.

The rule that withholding information, when good faith and honest dealing require that it shall be given, is as culpable as misrepresentation as to facts concerning which good faith and honest dealing require the truth to be spoken is fully applicable to the relation of principal and agent.

A mistake as to facts based on fraudulent concealment is ground for rescission and cancellation.

A mistake as to the legal effect of a transaction is sufficient for that purpose if a confidential relation exists and the mistake occurs under such circumstances that fraud, imposition or undue influence can be inferred.

Jensen *v.* Snow, 415.

PROBATE COURTS.

One who seeks to set aside a decree of the Probate Court on the ground that the jurisdictional facts recited therein are incorrectly stated must establish his position by clear, positive and convincing evidence.

In the absence of such evidence, the decree stands.

Gauthier Decree, 28.

A probate appeal may not properly be the subject of a reference. Probate appeals are of statutory origin, and must be conducted strictly according to the statute.

Consent cannot confer jurisdiction where the law has not given it.

Chaplin *v.* Decree, 187.

The decree of adoption duly entered in a Probate Court is a record that proof was offered of the written consent of the mother, and the recital therein controls until overthrown by evidence. The fact that such written consent is not found in the files of the court is not evidence that it was not given.

Gauthier, Appellant, 316.

When jurisdictional allegations are sufficient, the Probate Court has authority, at any stage, to the close of the proceedings, on finding the necessary facts to exist, to allow amendment of merely formally incorrect pleading.

Chaplin, Appellant, 446.

PUBLIC UTILITIES.

Under Revised Statutes, Chap. 62, Sec. 16, a public utility is entitled to demand and collect for any service rendered reasonable and just rates, taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk and depreciation.

It is the general rule that the enforcement of rates which are not sufficient to allow a fair return on the value of the property devoted to the public service at the time it is being used deprives a public utility of its property in violation of the Fourteenth Amendment to the Constitution of the United States.

Rates, however, may in no event be prohibitive, exorbitant or unduly burdensome to the public.

The public is entitled to demand that no more be exacted from it for the services of a public utility in the form of rates or charges than the services rendered are reasonably worth.

Findings of fact by the Commission on the issue of the reasonable worth of the hydrant service rendered by the Company, if supported by any substantial evidence, are final.

A mere difference of opinion between the Court and the Commission in deductions from the proof or inferences to be drawn from the testimony will not authorize judicial interference.

If the rates charged by a utility represent the maximum reasonable value of the service to the consumer, they can not be held, as a matter of law, unreasonable or confiscatory as to the Company, whatever may be the result upon its returns.

Gay *v.* Water Company, 304.

RAILROADS.

It is not in itself negligence for a railroad company to allow a train of cars to remain across a highway. Negligent obstruction of a highway by a standing train is determined by whether, under all the circumstances, it is reasonable or otherwise.

Care and vigilance must depend on surrounding conditions, and be proportioned to known danger. A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing approaches it, is careless unless he approaches it as if it were dangerous.

When a highway and a railroad cross at a grade, the highway traveler should look, listen, and should stop if there is room for doubt. Besides, he should be attentive to make such acts reasonably effective. A greater degree of precaution must be exercised when darkness obscures vision.

Witherly *v.* Bangor & Aroostook Ry., 4.

The omission of warning signals by trainmen will not relieve the driver of a motor vehicle from the imputation of negligence when he fails to look in both directions before crossing a railroad track.

Johnson *v.* Terminal Company, 311.

A railway engineer in operating his train is under a duty to look ahead and see if the track is clear. If he sees a person on the track it is his duty to warn him; and if, because of interfering noises or any other reason, it is impracticable to convey a warning by use of bell or whistle, it may become his duty to bring his train to a stop.

Ward *v.* Railroad Company, 396.

REAL ACTIONS.

In an action brought by plaintiff to recover a parcel of land which he claimed to own; Held the evidence in the case justified judgment for the plaintiff on the ground that the triangular strip claimed by the defendant belonged to the plaintiff.

Harrington *v.* Parlin and Hussey, 66.

In a real action to recover possession of land, the burden is upon the demandant to show that he had legal title to the demanded premises at the date of his writ. Failing in this, he can not have judgment, even though the defendants show no title in themselves.

Elwell *v.* Borland and Sexton, 189.

REFEREES.

In references of cases by rule of court under Rule XLII of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final.

Under the rule, the decisions of a Referee on questions of law are also final unless the right to except thereto is specifically reserved and so entered on the docket.

Neither a finding of fact by a Referee nor his decision based thereon, if otherwise sound in law, is exceptionable if there is any evidence to support the finding of fact.

Jordan *v.* Hilbert, 56.

In this state a Referee has no authority to allow an amendment to the declaration except with the consent of both parties.

Bailey et al *v.* Laughlin, 113.

Exceptions lie to the acceptance of a report of Referees when any issue included in the submission is left undecided.

Chaput *v.* Lussier, 145.

The right to except as to matters of law in cases submitted to reference can only be preserved by the following procedure; namely, when the Referee's report is offered at nisi prius *for acceptance, the aggrieved party must file his objections in writing for the consideration of the presiding Justice. If the objections are overruled and the motion to accept the report granted, exceptions to the ruling will lie.*

Lincoln *v.* Hall, 310.

Review may be granted when a judgment has been rendered on a report of Referees in an action referred by rule of court.

Dobson *v.* Chapman, 336.

RES IPSA LOQUITUR.

Res ipsa loquitur *is a rule of evidence which warrants, but does not compel, an inference of negligence.*

The rule does not apply unless the unexplained accident is of a kind which does not, according to the common experience of mankind, occur if due care has been exercised.

The basis of the inference is the doctrine of probabilities. Facts proven must, in their very nature, indicate such an unusual occurrence as to carry a strong inherent probability of negligence. Mere conjecture and surmise will not suffice.

It is common knowledge that automobiles, when operated with ordinary care, do not usually leave the surface of the road wrought for their travel, ride onto the shoulder and plunge into a telephone pole nine feet away. When they do, it is the extraordinary and not the ordinary course of things and an inference, drawn therefrom, that the accident was the result of ordinary negligence would not be clearly wrong.

The same facts do not carry inherent probability of gross negligence.

In accidents in which gross negligence is involved, there is almost invariably convincing evidence, outside the unexplained accident itself, of utter forgetfulness or heedless and palpable violation of legal duty or other essential elements which characterize the greater wrong.

Winslow *v.* Tibbetts, 318.

REVIEW.

Exceptions lie to the refusal of a single Justice to grant a petition of review when the decision involves a ruling of law.

Review may be granted when a judgment has been rendered on a report of Referees in an action referred by rule of court.

Dobson *v.* Chapman, 336.

RULES OF COURT.

In references of cases by rule of court under Rule XLII of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final.

Under the rule, the decisions of a Referee on questions of law are also final unless the right to except thereto is specifically reserved and so entered on the docket.

Jordan *v.* Hilbert, 56.

Rule XXXV of the Rules of Court, that cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of Court, does not bar cross-examination by counsel of a co-defendant where their interests are actually and actively adverse.

Hall *v.* Crosby et als, 253.

SALES.

In a sales contract, in figuring the time within which the shipment should have been made, the day of the receipt of the shipping instructions is to be excluded.

Mente & Co., Inc. *v.* Robinson and Mitton, 173.

SEALS.

SET-OFF AND COUNTER CLAIMS.

STATE GOVERNMENT.

STATUTES, CONSTRUCTION OF.

TELEPHONE AND TELEGRAPH COMPANIES.

TENANTS IN COMMON.

TITLE TO REAL ESTATE.

TOWNS.

See Municipal Corporations.

TROVER.

In an action of trover a plaintiff, regardless of the allegations in his writ, is limited in his recovery by his testimony as to the number of articles converted.

Bouthot *v.* Bouthot, 199.

TRUSTEE PROCESS.

Trustee process is simply a form of attachment, the purpose of which is to place a lien on goods, effects or credits of the principal defendant in the hands of the trustee. The enforcement of such lien must of necessity await the entry of final judgment against the principal defendant.

Smith *v.* Davis, French, Trustee, 9.

TRUSTS.

A direction in a will to trustees to pay sums annually from income to a designated beneficiary "so long as this trust continues," creates in the beneficiary a vested interest in the income of the trust fund throughout the whole term of the trust that the testator created.

Davis et als *v.* McKown et als, 203.

The duties and liabilities of co-trustees are joint and not individual. They form, as it were, one collective trustee, and must execute the duties of their office in their joint capacity.

Where, because of fundamental difference in their points of view, testamentary trustees apply to a judicial court for the advice they think they need, they must bring in all necessary parties.

Chaplin, Appellant, 446.

See Pelletier *v.* Deering, 462.

VERDICTS.

When, for the reason that the jury verdict is contrary to evidence, the Law Court sets the verdict aside and grants another trial, the decision of the appellate tribunal becomes the law of the case to be followed by the Trial Court on the new trial, unless the facts appearing on such trial are essentially different from those which were before the Law Court when it rendered its decision.

Byron *v.* O'Connor, 35.

WAIVER.

were not adequate to satisfy the debt. The intention of the parties to waive the foreclosure should be shown by other evidence.

A grantee after foreclosure may take a title subject to redemption by the mortgagor. But a quitclaim deed by a mortgagee after foreclosure, for a sum equal to the mortgage debt, is not, of itself, enough evidence of a waiver of the foreclosure.

Shaw *v.* Merrill, 441.

WATER RATES.

Under R. S., Chap. 62, Sec. 16, a public utility is entitled to demand and collect for any service rendered reasonable and just rates, taking into due consideration the fair value of all its property with a fair return thereon, its rights and plant as a going concern, business risk and depreciation.

It is the general rule that the enforcement of rates which are not sufficient to allow a fair return on the value of the property devoted to the public service at the time it is being used deprives a public utility of its property in violation of the Fourteenth Amendment to the Constitution of the United States.

Rates, however, may in no event be prohibitive, exorbitant or unduly burdensome to the public.

The public is entitled to demand that no more be exacted from it for the services of a public utility in the form of rates or charges than the services rendered are reasonably worth.

Findings of fact by the Commission on the issue of the reasonable worth of the hydrant service rendered by the Company, if supported by any substantial evidence, are final.

A mere difference of opinion between the Court and the Commission in deductions from the proof or inferences to be drawn from the testimony will not authorize judicial interference.

If the rates charged by a utility represent the maximum reasonable value of the service to the consumer, they can not be held, as a matter of law, unreasonable or confiscatory as to the Company, whatever may be the result upon its returns.

Gay *v.* Water Company, 304.

WILLS.

A direction in a will to trustees to pay sums annually from income to a designated beneficiary "so long as this trust continues," creates in the beneficiary a vested interest in the income of the trust fund throughout the whole term of the trust that the testator created.

An unqualified gift to beneficiaries following the death of a life tenant constitutes an absolute bequest to be possessed in the future.

A condition subsequent may properly be annexed to an equitable vested fee.

An executory devise does not vest at the death of the testator, but only on the happening of some future contingence. Estates of this character require no prior particular estate for their support. An executory devise may be limited over a defeasible fee — something that can not be effected by a remainder.

Where the devisees of the residue take in common, a lapsed devise of a portion of the residue does not inure to the survivors, but presumptively becomes intestate property.

The intention of the testator, if consistent with the rules of law, is the governing guide for the construction of wills. It may be implied, even if not expressed. But so far only as the testator has communicated, by his will, either in terms or by implication, his intention to the disposal of his estate after his death, can his intention control or have influence.

A widow may, by accepting the specific provision of her husband's will, preclude herself from any right of interest by descent in realty respecting which her husband died intestate. She may not hold under the will, also take by descent, unless the testator's intention that she should is plainly apparent.

No statute or rule of law, however, inhibits a widow from claiming her share in intestate personal estate, though she has accepted her husband's will.

Davis et als *v.* McKown et als, 203.

Where services are performed in pursuance of a valid contract for the disposition of property by will to a particular person and the promisor fails to comply with the agreement, if recovery is not barred by the Statute of Frauds, an action will lie for damages for breach of the contract or upon a quantum meruit, *or, if the requisite equities attend, by a bill to impress a trust.*

The remedy is at law, however, unless the promisee has changed his or her condition or relation so that, his claim being in no way inequitable, a refusal to complete the contract would be a fraud upon him and no adequate remedy at law is afforded.

Pelletier *v.* Deering, 462.

WITNESSES.

When a witness denies any feeling of hostility or unfriendliness toward the party against whom he has testified injuriously, it is the party's right to inquire, on cross examination, as to the existence of any fact, including previous relationship, which in the light of human experience might reasonably engender hos-

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

An accident can not arise out of the employment if it does not occur in the course of it, although an accident may occur in the course of it and still not arise out of it.

An injury suffered by an employee on his way to or from work, while entering or leaving the premises of his employer on a way maintained by the employer to provide ingress to or egress from the premises, or which the employee has a right to use for such purpose, is received in the course of the employment, and if arising out of the employment is compensable.

John D. Wheeler's Case, 91.

Petition for further compensation, authorized under Sec. 37, Chap. 55, R. S. 1930, should not be confused with petition for review authorized by another paragraph of the same section. The two proceedings are entirely distinct.

The Commission has no authority, statutory or inherent, to grant a rehearing on the merits of a case because of newly discovered evidence.

So long as the facts on which the awarding of compensation was predicated continue to be the facts in the case, so long does that which was established continue to be the law of the case.

The statutory provision relating to petition for further compensation may be invoked in cases where disability appears to have ended and the case finally closed if the injured employee suffers a recurrence of his former troubles traceable to the original injury or where it is discovered that compensatory injury exists which, at the time final decree was entered, was unknown and therefore not considered by the Commission.

Comer's Case, 386.

When a hearing has been had on the merits and a decree either awarding or denying compensation has been entered, the Commission is without power to reopen the case and modify its finding because of error.

The statutory enactment providing that after compensation has been discontinued by decree or approved settlement receipt, additional compensation may be given for a further period of incapacity does not modify the above principle.

The intent of the statutory provision is to permit the making by the parties of a settlement discontinuing compensation, or the entry of a decree to the same effect without thereby foreclosing the right of the employee to recover further compensation if he suffers a recurrence of trouble due to the injury, or if it is discovered that compensatory injury exists, which at the time the final decree was entered, was unknown to the parties and therefore not considered by the Commission.

Devoe's Case, 452.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES.

STATUTES OF THE UNITED STATES.

STATUTES OF GREAT BRITAIN.

STATUTES OF MASSACHUSETTS.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Seventh line of paragraph three, page 282, change "hunsband" to "husband."

Eighth line of paragraph two, page 311, change "XXII" to "XXI."