MAINE REPORTS

133

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 19, 1934, TO AUGUST 13, 1935

EDWARD S. ANTHOINE

REPORTER

PORTLAND, MAINE

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PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. WILLIAM R. PATTANGALL, CHIEF JUSTICE[1]

HON. CHARLES J. DUNN, CHIEF JUSTICE[2]

HON. GUY H. STURGIS

HON. CHARLES P. BARNES

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER[3]

[1] Resigned effective July 16, 1935

[2] Appointed July 18, 1935

[3] Appointed July 18, 1935

JUSTICES OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

HON. GEORGE H. WORSTER

HON. ARTHUR CHAPMAN

HON. HARRY MANSER[1]

HON. GEORGE L. EMERY

HON. HERBERT T. POWERS

HON. HERBERT E. HOLMES[2]

HON. EDWARD P. MURRAY[3]

HON. ALBERT BELIVEAU[4]

[1] Resigned July 18, 1935

[2] Died May 6, 1935

[3] Appointed July 18, 1935

[4] Appointed July 18, 1935

ATTORNEY GENERAL

HON. CLYDE R. CHAPMAN

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

JOANNA T. LYNCH *vs.* CHESTER A. MORRIS ET AL.

York. Opinion, June 14, 1934.

JURY FINDINGS. EVIDENCE. MOTOR VEHICLES.

Where evidence, both direct and circumstantial, in a case is sharply conflicting, it is for the jury to determine where the truth lies, and the proper deductions from the facts as they find them.

In the case at bar, there was a square conflict in the testimony. On the all important point as to the position of the Morris car there was a surprising disagreement among the witnesses. That the defendants' automobile was at the time of the collision on its own right of the highway, did not necessarily prove, that prior to the impact it was not on the wrong side of the road, and did not seasonably turn to its right.

On exception and general motion for new trial. An action on the case to recover damages for personal injuries sustained by the plaintiff, a guest of the defendants, while riding in their automobile. Trial was had at the October Term, 1933, of the Superior Court, for the County of York. The jury rendered a verdict for the plaintiff in the sum of $4523.95, against both defendants. To the refusal of the presiding Justice to grant certain requested instructions, defendant seasonably excepted, and after the jury verdict filed a general motion for new trial. Motion overruled. Exception overruled. The case fully appears in the opinion.

Louis B. Lausier,

William P. Donahue, for plaintiff.

Willard & Willard, for defendants.

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

THAXTER, J. This is an action for personal injuries. The plaintiff was the passenger in an automobile driven by the defendant, Mary Morris, whose husband, Chester A. Morris, is joined as a defendant, on the ground that he directed and controlled the operation of the car. After a verdict for the plaintiff against both defendants, the case is before us on their motion for a new trial and on an exception by them to the refusal of the presiding Justice to give a requested instruction.

The defendants' car was proceeding in a southerly direction on the Limerick Road so called. Mr. Morris was seated beside his wife on the front seat, and according to the plaintiff's testimony was giving her instructions in the management of the car. It was about midnight on April 30, 1932. The plaintiff was sitting alone on the rear seat. As the defendants were entering a left-hand curve in the road, an automobile driven by one Albert Neveux approached proceeding in the opposite direction. On the curve a collision took place. Two occupants of the Neveux car were killed, and the plaintiff and Mr. and Mrs. Morris were severely injured.

It seems reasonably clear that the impact took place while the defendants' car was on its own right-hand side of the road. The contention of the plaintiff, however, is that as Mrs. Morris rounded the curve she pulled her car toward the left of the road, that when the other automobile appeared she, with the aid of her husband, managed to pull her car back to its own proper side, but too late to indicate to Neveux that she was not going to continue on in his path, and that Neveux to avoid her swung violently to the left at the same time that she bore to the right. The defendants contend that at all times they were on their own side of the road, and that the accident took place because of the excessive speed of the other car and the consequent inability of the driver to hold it on his right side of the road as he pursued his course on the short side of the turn.

Neveux testified that as he rounded the turn he was on his own side of the road, that he suddenly came on the defendants' car proceeding directly toward him on the wrong side, and that to avoid

an accident he cut across the road to the left. Miss Lynch testified that as they rounded the turn Mrs. Morris bore to the left and was a little to the left of the center of the road. Counsel for the defendants claim that this testimony is inconsistent with her deposition used in a previous case brought by Pelletier's administratrix against the defendants. In this deposition she stated that the Morris car was in the middle of the road. Her two statements are not necessarily inconsistent. In her present testimony she does not claim that the whole body of the car was on the left side of the highway, and if it was in the middle, at least one-half of it would of necessity have been on the left of the center line. She stated that as the Neveux car appeared, Mr. Morris grabbed the wheel and pulled their car sharply to the right. On the other hand Mr. and Mrs. Morris both testified that at no time was their car turned from their own side of the road. There is here a square conflict in the testimony. Defendants' counsel tries, however, to draw conclusions from the supposed position of the cars after the accident. It is conceded that the Neveux car went off the road on its left side of the highway. But on the all important point as to the position of the Morris car there is a surprising disagreement among the witnesses. Those offered by the plaintiff claim that it was in the middle of the road, those of the defendants state that it was on the extreme right. That the defendants' automobile was at the time of the collision on its own right of the highway does not, however, necessarily prove that prior to the impact it was not on the wrong side of the road and did not seasonably turn to its right.

The evidence both direct and circumstantial in the case is sharply conflicting. It was for the jury to determine where the truth lay, and the proper deductions to be drawn from the facts as they found them. If they believed the testimony of the plaintiff and of Neveux, they were fully justified in finding as they did for the plaintiff.

The defendants requested the following instruction which the Court refused to give.

> "If you find the defendants were driving on their own right hand side of the center line of the highway, just before the accident, and at a reasonable rate of speed, and that they had no chance to avoid the accident, your verdict must be for the defendants."

The case was tried by the plaintiff on the theory that the Morris car was being driven on the wrong side of the highway and did not turn soon enough to the right. It seems to have been assumed by counsel and by the Court, and from a careful reading of the evidence and the judge's charge the jury must have clearly understood that if they believed the testimony of Mr. and Mrs. Morris, there was no negligence on their part. To have given the requested instruction under such circumstances would only have confused the jury, for the question at issue was not whether just before the accident the defendants' car was on its own right of the highway, but whether, if it was being driven on the left of the center line, it seasonably turned to the right.

Motion overruled.
Exception overruled.

MILO WATER COMPANY *vs.* INHABITANTS OF TOWN OF MILO.

Kennebec. Opinion, June 14, 1934.

PUBLIC UTILITIES COMMISSION. CONTRACTS. TAXATION.

In an action on a contract between a water company and a town for supply of water to the town wherein the town agreed to pay a fixed sum per annum, and "such further sum each year as shall equal the amount of tax, if any, assessed against said company by the said town during said year," such rental sum having been several times changed by the Public Utilities Commission and wherein the company claimed a balance due on account of increased taxes not compensated for by increased rental:

HELD

The provisions of the contract between the town and the company remained binding and in force after the passage of the act establishing the Public Utilities Commission, but the commission had authority, if such rates were unjust or unreasonable, to modify them or, if necessary, to abrogate the contract altogether.

The commission by permitting the increase in the rates did modify the contract and all concerned regarded the contract as in this respect abandoned, and had submitted to the administrative commission set up by the statute the question of the rates to be charged the town for water.

The water company, if it considered the order of the commission entered October 26, 1928, was erroneous in law in not giving to it the revenue to which it was entitled, had its remedy by exception. Its right to recover under the contract was gone.

The fact that the order of the commission was not effective to reimburse the company for the taxes which it was obliged to pay for the period prior to the time when the order became effective is immaterial. Such decrees are intended to cover conditions as they are expected to be in the future and not to compensate for the past.

On report. An action of assumpsit for moneys alleged to be owed for "fire protection service" or "hydrant rental." The action was based on a quantum meruit for hydrant service rendered by the plaintiff to the defendant town, between October 1, 1927, and November 1, 1928, during which period the plaintiff claimed it had received compensation in part only for the services rendered. Payment had been made the plaintiff at the rate of $60.00 per annum per hydrant, whereas plaintiff claimed it was entitled to $140.00 per annum per hydrant. The issue involved the construction of a contract made in 1909 between the plaintiff and the defendant in which the defendant agreed to pay a fixed sum per year together with "such further sum each year as shall equal the amount of tax, if any, assessed against said company by the said town of Milo during said year."

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

McLean, Fogg & Southard, for plaintiff.

Ryder & Simpson,

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

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

THAXTER, J. In 1909 the parties to this action entered into a contract under the terms of which the plaintiff company agreed to supply water to the defendant. This contract was to run for twenty years. The town agreed to pay $1500 per year for the use of forty hydrants, and for certain other services enumerated in the 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." Rates to be charged private consumers were also established. In 1920 on petition of the company the Public Utilities Commission entered a decree increasing the rates for all classes of service, and the annual hydrant rental was raised from $37.50 to $40.00 per hydrant. On February 13, 1926, the water company filed another petition with the commission asking for a further increase in rates. September 30, 1927, an order was entered providing for numerous modifications in rates and increasing the annual hydrant rental from $40.00 to $60.00. In promulgating this the commission made the following statement: "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." Obviously what the commission meant was that in figuring the operating expenses of the company no consideration was given to the item of taxes, for it was assumed that these would be remitted to the company as provided for in the original contract. April 1, 1928, the town assessed a tax on the water company, the part of which applicable to the water system amounted to $3,837.93. On August 1, 1928, the company again petitioned the Public Utilities Commission for an increase in rates to meet this additional operating cost. October 26, 1928, the commission filed a decree directing the company to charge $140 for hydrant rental in place of $60; and it is perfectly clear that this modification was authorized to compensate for the taxes which the company was then forced to pay. To an action of debt brought to collect this tax the company entered a defense. The case was reported to this Court, and it was held that the town was under no legal obligation to refrain from taxing the water company. *Inhabitants of Town of Milo* v. *Milo Water Co.*, 131 Me., 372. The present suit is brought to recover the sum of $5,269.33, an amount claimed to be due for hydrant rental to November 1, 1928, amounting to $4,160 and $1,109.33 for interest. It is before us on report.

The plaintiff's contention is that the order of the Public Utilities Commission which became effective October 1, 1927 and increased the hydrant rental to $60 was based on the assumption that the water company would not have to pay taxes, that by reason of the assessment the town thereafter received a benefit from

the plaintiff for which it has not paid, and that consequently it is liable to the plaintiff either in an action on an account annexed or on a quantum meruit for the service rendered to it. The plaintiff contends that it is entitled to receive for the period in question the extra sum of $80 per hydrant, the amount which the Public Utilities Commission fixed as necessary to compensate the company for the increase in taxes.

The Town of Milo could not constitutionally have exempted the water company from the payment of taxes even in return for the services rendered. *Brewer Brick Company* v. *Inhabitants of Brewer*, 62 Me., 62; *Inhabitants of the Town of Milo* v. *Milo Water Co.*, supra. It was lawful, however, for the town as consideration for water supplied to contract to pay the company each year a sum equivalent to the taxes assessed provided such agreement was reasonable and fair, *City of Belfast* v. *Belfast Water Company*, 115 Me., 234; and the subsequent passage of the act creating the Public Utilities Commission did not alter any of the terms of such contract. All of its provisions remained binding on the parties until the commission found that they were unjust or unreasonable in any particular. *Inhabitants of North Berwick* v. *North Berwick Water Company*, 125 Me., 446. After such determination it became the duty of the commission to modify the unreasonable terms of the contract, or if necessary to abrogate it altogether. *In re Searsport Water Company*, and *In re Lincoln Water Company*, 118 Me., 382.

The plaintiff can recover only on the assumption that that part of the contract providing for reimbursement by the town of taxes paid by the company remained in force in spite of the jurisdiction taken by the Public Utilities Commission over the subject-matter, for the commission had no power to require the town to carry out this provision of the agreement as a part of its order fixing rates. *In re Caribou Water, Light and Power Company*, 121 Me., 426. It becomes necessary, therefore, to determine whether this part of the contract was in effect at the time when the taxes were assessed in 1928.

On two separate occasions the commission on petition of the plaintiff had made substantial increases in the rates fixed by the contract. In fact very little was left of its provisions in respect to rates. At the time of entering the second order, the commission

implied that its continuance was contingent on the remission of the taxes to the water company as provided for in the contract. The commission did not intend to infer that this part of the contract was then enforcible; it only stated that the rates were established on the assumption that the policy of the town in remitting or paying back the taxes would continue. When the tax assessment was made, the company petitioned for an advance in rates to take care of the added burden. The basis for such plea must have been that such tax was lawfully assessed, and that the right of the company to claim reimbursement from the town had been lost. Indeed we feel that, in view of the action taken by the parties to this litigation and by the Public Utilities Commission during the preceding eight years, it is unreasonable to suppose that either the town or the company regarded the provisions of the contract fixing the compensation of the plaintiffs as in force. All concerned had regarded the contract in this respect as abandoned, and had submitted to the administrative commission set up by the statute the question of the rates to be charged the town for water.

It may be argued that the order of the commission of Oct. 26, 1928, was not effective to reimburse the company for the taxes which it was obliged to pay for the period prior to the time when the order became operative. But such decrees are not ordinarily retrospective. They are intended to cover conditions as they are expected to be in the future and not to compensate for the past. *Galveston Electric Company* v. *Galveston*, 258 U. S., 388; *Georgia Railway & Power Co.* v. *Railroad Commission of Georgia*, 262 U. S., 625. No other method of fixing rates is practicable.

The water company, if it considered that the order of the commission entered October 26, 1928, was erroneous in law in not giving to the company the revenue to which it was entitled, had its remedy by exception, as provided in Rev. Stat., 1916, Ch. 55, Sec. 55, as amended. Its right at law to recover the amount of taxes paid to the town was gone.

Judgment for the defendant.

MATILDA BEAN, COMPLAINANT

vs.

CENTRAL MAINE POWER COMPANY.

BINGHAM LAND COMPANY, COMPLAINANT

vs.

CENTRAL MAINE POWER COMPANY.

Somerset. Opinion, June 21, 1934.

EQUITY PLEADING. WATERS AND WATER COURSES. MILL ACT.

WORDS AND PHRASES.

Procedure under the Mill Act is substituted for an action at common law for damages. Though brought at law and not in equity, the process is in the nature of a bill in equity to obtain redress for the injury occasioned by flowage. It is not commenced by a writ but by a bill of complaint.

Viewed in this light, the strict rules of pleading, applicable to suits at law commenced by writs can not apply; but the rules in cases of equity do apply.

Exceptions will lie for impertinence in a bill, answer, or other pleadings.

Impertinence in equity pleading signifies that which is irrelevant, and which does not, in consequence, belong to the pleading. The full significance of the the word is found in the expression "not pertinent."

By this practice matter that is irrelevant to the material issues is pruned away, and the issues stand forth clear to the view and patent in substance.

Exceptions to the ruling of the single justice, sustaining exceptions in equity for impertinence, may be heard by the law court before the cause is carried to the stage of final disposition.

Mill seat, now mill site, and mill privilege, are synonymous terms, used interchangeably to name a location on a stream where by means of a dam a head and fall may be created to operate water wheels.

The right of the owner in his mill privilege is limited. To erect a dam and mill thereon, when thereby no owner above or below is injured, is his right, but he

must so operate his dam as to let the natural volume of the stream pass through, as well as the logs of the river driver.

His right is defeasible and, if it is not asserted and availed by him, he must submit to lower development, on a scale commensurate with the needs of the section benefited, and he may not have damages for the right of which he is deprived, a right which he shared with other riparian owners, and lost when such other made prior appropriation of his site.

The proprietor who first erects his dam for such purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use.

Flowing the lands of another for the purpose of working mills, is a right recognized in this jurisdiction, not as an exercise of the eminent domain, for our mills are not of public use, as the term is understood in law, and our constitution does not authorize taking for the benefit of the public.

At common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below could be recovered. Under the Mill Act a complaint can not be maintained to recover similar damages.

Maine holds that the owner of land flowed by a pond for a water mill is not a part owner in the developed lower privilege. He does not participate in the ownership of the dam and mill below. He is not entitled to share in the profits of the lower developments.

In the case at bar, the court holds that items of alleged damage changing the current to still pond water are not to be included in the evidence for consideration by the commissioners; their statement is not pertinent to process under the Mill Act.

On exceptions by complainants. These actions are flowage complaints. By the complaints plaintiffs seek to recover damages for the loss of inchoate power rights appurtenant to lands flowed. Defendants filed equitable exceptions on the grounds of impertinence, to such portions of the complaints as set up this claim for damages. Defendants' equitable exceptions were sustained and the portions of the complaints excepted to were ordered expunged from the complaints. Plaintiffs took exceptions to these rulings of the Court. Both complaints, exceptions and rulings being the same, both cases were argued together.

Exceptions overruled. The cases fully appear in the opinion.
Locke, Perkins & Williamson, for complainants.
Merrill & Merrill,
Perkins & Weeks, for defendant.

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

BARNES, J. On complaints for flowing under R. S., Chap. 106, Secs. 1-38, bills of exceptions to the ruling of the superior court were argued together before the law court.

The erection and operation of Wyman Dam, between Moscow and Pleasant Ridge, in Somerset County, occasioned a material change in the surface level of the Kennebec River above the dam, and flowing of riparian lands on each side, including such lands of both plaintiffs, the Bingham Company land, at the southerly bound of Carrying Place Plantation, west of the river, and the Bean Land, in Carratunk, east of the river and far above the Bingham Company land.

There is no community of interest in the complainants but the lands of each extend to the mid-thread of the river, and the principles involved are identical in the two cases.

Prior to the erection of the dam, on and opposite complainants' lands, the river flowed, in volume affected by seasonal and climatic variations, down a channel, over no natural pitch and affording no site for a mill, as the term is understood in New England.

The contention of plaintiffs is that by the flowing they have suffered loss of current; that the current of which they are deprived is a valuable incorporeal hereditament, incident to their lands, not to be taken from them by another except upon payment of compensation.

In other words, suspension of the enjoyment of the flow of water in a swift current through complainants' lands and the substitution of flow of the same volume of water by imperceptible current is what is complained of.

The flowing is admitted and the problem is to determine what are the factors that go to make up damages.

The parties agree that time and expense will be saved to all if the

rule of compensation may be determined for the guidance of the commissioners, who, under the law, shall determine the same; and complainants admit that neither they nor any of their predecessors in title had, before the building of the dam, taken any steps toward construction of a dam at any point within their respective bounds.

Defendants' position is that the right of an upper riparian owner to raise a head of water on his land is not absolute, but is contingent upon the fact of steps of construction being taken by the upper owner before a lower owner has built and flowed the upper owner's privilege; that if there are, on the same stream two undeveloped power privileges, construction on the lower, which flows and renders useless as a power privilege the upper site, while entailing on the upper owner what may prove to be a loss, does not make the lower owner liable for such loss as may be based on inability to make a profit from development of the upper power privileges.

Industrial development had not advanced in England, at the time of first New England settlement, to the stage of construction of dams for sawing timber or grinding grain by water power. It is said that saw mills driven by water power were in successful operation in New England more than thirty years before an attempt was made to build such in the mother country.

Permanent settlements in the area, now the State of Maine, were established before enactments of the Massachusetts Bay Colony were accepted and recognized as the law of this locality.

On Captain John Mason's plantation, in what is now York County, in this state, a saw mill was built in 1631. See Ridlon's "Saco Valley Settlements and Families," p. 191.

Such rules of English common law as the early colonists adopted became the common law of the land of the colonists, together with other laws deemed by them to be of prime importance and adapted to the needs of the inhabitants of the new land.

Under the common law of England the bed of a river was the property of the state; a riparian proprietor owned only to low water mark on the shore of a river. At the time of the first settlements in the new world the chief service of a river was as a highway.

Obstructions on a river bed were abatable if proven a nuisance to the public.

In England there was recognized the exception that an obstruction erected by the sovereign was not abatable.

This exception was adopted in New England, with the further exception that dams might be erected, and mills driven by water power might be maintained, as of public use and benefit. Hence the expression mill privilege.

Under the common law as recognized by Massachusetts Bay Colony, a proprietor's land, bounded on a stream extended to the mid-thread of the current.

If one owned the banks on both sides of a river, above the reach of the tide, he owned the bed of the stream, and his dam, on his land, could not be prostrated unless by order of Court for the abatement of a public nuisance.

Under the doctrine of reasonable use, common law rights and duties protected and restricted those who would develop a mill privilege, for examples, they had the right, as against the public, to convert a current, valuable to timber men, to a still pond; and the duty not to obstruct a river below the mark to which the tide of ocean flowed.

Experience showed that raising a head of water sufficient for reasonable operation of a mill frequently flowed river banks and adjoining lands beyond the bounds of what the mill man owned or could control by virtue of grant; and controversies and law suits arose. Wherefore the mother colony, in 1714, enacted legislation, the first Mill Act, so far as Maine is concerned, "That where any person or persons have already, or shall hereafter, set up any water-mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, whereupon such mill or mills is or shall be erected or built, that then such owner or owners shall have free liberty to continue and improve such pond, for their best advantage, without molestation."

Then, in harmony with the common law rule that if one man's property is taken, to another's advantage, the taker shall make good the loss, the Act provided for an impartial, "apprisal of the yearly damage done to any person complainant, by flowing his or their land as aforesaid."

A similar act was passed after the establishment of the Com-

monwealth of Massachusetts, and by the first legislature of Maine, Public Laws, 1821, Chapter 45.

Then, by R. S., 1841, Chapter 126, our legislature provided: "Any man may erect and maintain a water mill and a dam to raise water for working it upon and across any stream that is not navigable upon the terms and conditions and subject to the regulations hereinafter expressed"; and in the regulations provided by Section 2, "No dam shall be erected to the damage of any mill lawfully existing either above or below it, on the same stream; nor to the injury of any mill site *on which a mill or mill dam shall have been lawfully erected and used,* unless the right to maintain a mill on such last mentioned site shall have been lost or defeated by an abandonment, or otherwise."

Subsequent amendments not vital here, have been made, and the present law, R. S., Chapter 106, prescribes: "Any man may on his own land, erect and maintain a water mill and dams to raise water for working it, upon and across any stream, not navigable; . . . upon the terms and conditions, and subject to the regulations hereinafter expressed"; retains the clause of exception, Section 2; by subsequent section provides; "Any person whose lands are damaged by being flowed by a mill-dam . . . may obtain compensation for the injury, by complaint to the superior court" etc.; and, if injury compensable in damages is established, by section 9 provides; "The court shall appoint three or more disinterested commissioners of the same county who shall go upon and examine the premises and make a true and faithful appraisement, under oath, of the yearly damages, if any, done to the complainant by the flowing of his lands . . . described in the complaint. . . . They shall also ascertain, determine and report what sum in gross would be a reasonable compensation for all the damages, if any, occasioned by the use of such dam"; and makes provision for collection of such compensation.

The constitutionality of the act is not questioned.

The fact of its validity is settled. *Brown* v. *DeNormandie,* 123 Me., 535, 541, (1924) 124 A., 697.

It is not denied that lands of complainants are flowed by defendant's mill pond, and it is admitted that damages are to be assessed for flowing the banks and adjacent lands.

But it is urged by complainants that an item of damages to be considered was brought into being because over all that part of the bed of the river that extended to the thread of the current, in its natural state, from lower to upper bounds of each tract described, the level of the river has been raised and the still waters of a mill pond substituted for what was formerly the natural stream, moving "through a narrow valley with a heavy and steady current," to quote from complainant's briefs.

They admit that, "no fall or dam site as the term is usually used" existed on the land of either, and state, "Nor is there any (such) natural head or waterfall at the point where the complainant's land is located above the dam."

In fine, complainants set up what defendant contends is entirely novel, and not maintainable, the inclusion, as an increment of damages, of the flowing of the bed of a non-navigable river where was no mill site, so as to change swift water to pond water.

Obviously the current of the river was stilled.

But defendant contends that this change, if an injury, is not compensable in damages, and further that damages due for flowing lands of complainants are not to be increased because the bed of the river, at some undesignated point in either complainant's land, but not on a mill site, to the thread of the stream, might have served as the site of a dam on which a mill may some day in the future be erected and operated at a profit to the owner.

First, as to procedure.

At the return term, when the complaints were entered in court, defendant challenged them by filing exceptions thereto, alleging that they contain matter impertinent to the issue to be tried.

Defendant contended that in seven particulars the allegations of complaint were not pertinent.

The Court sustained the exceptions and ordered portions of the complaints specified in exceptions expunged; complainants filed bills of exceptions, and, without objection on the part of defendant, demand ruling thereon before proceeding further.

Procedure under the Mill Act is substituted for an action at common law for damages. Though brought at law and not in equity, "the process authorized against them is not as tort feasors, but is rather in the nature of a bill in equity, to obtain redress for

the injury occasioned by the flowage." *Hill* v. *Baker*, 28 Me., 2, 21.

Again, "the process is not an action at law. It is sui generis, in its nature, partaking of some of the elements of a suit at law, but resembling much more a process in equity. It is not commenced by a writ but by a bill of complaint, . . .

"Viewed in this light, the strict rules of pleading, applicable to suits at law commenced by writs can not apply; but the rules in cases in equity do apply." *Moor* v. *Shaw*, 47 Me., 88; *Miles* v. *United Box Board Co.*, 108 Me., 270, 80 A., 706.

Exceptions to allegations in a bill in equity, as other "Exceptions to bills may be filed within twenty days after return day, and to answers, within ten days after notice that they have been filed, and shall be disposed of by reference to a master, or otherwise, as the court may direct." Equity Rules of the Supreme Judicial and Superior Courts, XIX.

In the cases at bar exceptions to portions of the complaints allege such portions to be impertinent.

"By the settled practice exceptions will lie for impertinence in a bill, answer, or other pleadings . . .

"All matters not material to the suit, or if material, which are not in issue, or which, if both material and in issue, are set forth with great and unnecessary prolixity constitute impertinence." *Camden and Amboy Rd. Co.* v. *Stewart*, 19 N. J. Eq., 343.

"Impertinence in equity pleading signifies that which is irrelevant, and which does not, in consequence, belong to the pleading. The word does not include the idea of offending propriety. *The full significance* of the *word* is found in the expression *not pertinent*." *Chew* v. *Eagan*, 87 N. J. Eq., 80, 99 A., 611.

By this practice matter that is irrelevant to the material issues is pruned away, and the issues stand forth clear to the view and patent in substance.

The practice is universal; to test damages improperly claimed, *W. U. Tel. Co.* v. *Morrison*, 15 Ala. Apps., 532, 74 So., 88; to bring the complainant within the conditions prescribed by the law relied upon, and to confine his right to recover to that law, *Mining Co.* v. *Chambers*, 20 Ariz., 54, 176 P., 839; that matter of law be declared by the Court, not set up in pleadings, *Carson* v. *Miami Coal Co.*, 194 Ind., 49, 141 N. E., 810; where evidence of the mat-

ters pleaded was not admissible, *McDowell* v. *Grain Co.*, 177 Iowa, 749, 157 N. W., 173, *Stone* v. *Barr*, 111 Kan., 775, 208 P., 624; where averment is evidentiary only; *Smith* v. *Hutcherson*, 202 Ky., 302, 259 S. W., 364; New York law so interpreted, *De St. Aubin* v. *Guenther*, 232 Fed., 411; to expunge matter that is prejudicial, *Case* v. *Ry. Co.*, 107 S. C., 216, 92 S. E., 472, *Gerlach* v. *Gruett*, 175 Wis., 384, 185 N. W., 195.

The practice is approved in this state; "If equity lends her forms of procedure to effectuate the peculiar provisions of the statute in these (flowage) cases, she should be accorded the privilege of applying her rules of pleading in order to obtain equitable and just results." *Hathorn* v. *Kelley*, 86 Me., 487, 490, 29 A., 1108; *Langdon* v. *Pickering*, 19 Me., 214, 216; *Spaulding* v. *Farwell*, 62 Me., 319, 320.

The "conscientious pleader," may be troubled at the intervention of exceptions in an action in law, but as said in *De St. Aubin* v. *Guenther*, supra, "Courts do not, however, value so much as formerly their logical integrity, and, if the result be convenient, no harm is done."

In regular order an appeal taken from any interlocutory decree, in equity, "shall not suspend any proceedings under such decree or order, or in the cause, and shall not be taken to the law court until after final decree." R. S., Chap. 91, Sec. 55; and subsequent section 58, with other provisions, directs, "In all other respects such exceptions shall be taken, entered in the law court, and there heard and decided like appeals. . . . The allowance and hearing of exceptions shall not suspend the other proceedings in the cause."

It is argued that in justice and fairness to all parties the question whether certain allegations in the complaints are not pertinent should be determined at the present stage of the litigation, for the saving of great expenditure of money on both sides, and because the body which must finally determine the amount of damages, very considerable as claimed, the commissioners, will in all probability be in large part laymen, not trained to disregard prejudicial matter that lies on the surface or may seep into the subsoil.

In former cases, as a method of expediency and equity, the statute rule has been treated as directory.

"A question arises whether a bill of exceptions can be heard in

this court before a case in equity comes up for final hearing. Generally it would be an irregular proceeding.

"But as the peculiar character of the present question hardly admits of postponement, if any benefit is to be derived from it by the moving party, we think it would not be an infraction of the rules usually regulating equity proceedings, to give these exceptions a privileged position on the docket.

"It is authorized by the example furnished in *Spaulding* v. *Farwell*, 62 Me., 319." *Stevens* v. *Shaw*, 77 Me., 566, 1 A., 743.

"The rule laid down in *Stevens* v. *Shaw*, 77 Me., 566, 1 A., 743, is that it is irregular to hear exceptions in an equity case before final hearing, and that such hearings should not be allowed unless the question does not admit of delay until then." *Maine Benefit Ass'n* v. *Hamilton*, 80 Me., 99, 13 A., 134.

"It might be questioned as to whether this bill of exceptions was not prematurely brought forward, as the exception was to an interlocutory order and perhaps should not have been entered until the completion of the case, when it might have become unnecessary to prosecute the exceptions. R. S., Chap. 77, Sections 22, 25 (R. S., 1930, Chap. 91, Sections 55, 58). But as the procedure under the act of 1893 (Law and Equity Act, Chap. 217, P. L., 1893), is somewhat anomalous, and as there has already been considerable delay in the case, we think it more in the interests of justice that the questions involved should now be determined, which course is not without precedent in this state, even if it were clear that the exceptions were prematurely brought forward." *Flint* v. *Comly*, 95 Me., 251, 49 A., 1044.

It is held in *Spaulding* v. *Farwell*, supra, that exceptions to the ruling of the single Justice, sustaining exceptions in equity for impertinence, may be heard by the law court before the cause is carried to the stage of final disposition.

From the "peculiar character" of the issue, *Stevens* v. *Shaw*, supra, and because we agree with counsel for all parties here that decision now will be "more in the interests of justice," *Flint* v. *Comly*, supra, we hold that we may now determine this issue.

The ruling of the learned Justice below takes from the consideration of the commissioners on damages, hereafter to be appointed, matters of greatest importance to complainants.

They appear in the allegations of each complaint; 1st: "that there was inseparably attached to said land of the said complainant as an incorporeal hereditament and appurtenance inseparable from said land, including the area so overflowed, the right to the swift current and falls of the Kennebec River running by, over and along said land of said complainant; that said right to current, inseparable from said complainant's land as aforesaid was very valuable and possessed the characteristics of potential but undeveloped horse power;"

2nd: "said potential and undeveloped horse power possessing the value of Fifteen Dollars at least per horse power;"

3rd: "that prior to the erection of said mills and dams by said Central Maine Power Company the complainant's said land possessed as an inseparable part thereof an element of value consisting of hundreds of potential undeveloped horse power worth at least Fifteen Dollars per horse power for the future production of power, hydro-electric or otherwise,"

4th: "which said amount the said Central Maine Power Company has paid for said right to current appurtenant and attached to other land similarly situated on said Kennebec River as the said land of the said complainant;"

5th: "that the said complainant had a right so to use the current flow and falls of said Kennebec River for this and many other purposes, the said complainant's land being greatly enhanced in value by reason thereof,"

6th: "and this valuable right has been wholly destroyed by the acts of the Central Maine Power Company heretofore described, whereby said Kennebec River theretofore running over, along, and by said land of the said complainant has now become a still lake or pond with the usual characteristics thereof; whereby the aforesaid swift and powerful current no longer exists and said great element of value in the complainant's land has been taken from her,"

7th: "and appropriated by the said Central Maine Power Company and transferred from undeveloped horse power in the possession of the complainants to developed horse power in the possession of the said Central Maine Power Company, for the profit and benefit of the said Central Maine Power Company, its successors and assigns forever."

Instead of discussing seriatim the portions of the complaints excepted to, we may classify them and thus attain clarity and brevity in treatment.

The 1st, 5th, 6th and 7th allegations are pertinent if the owner of an unimproved upper mill site may recover damages for its flowing.

The 2nd and 3rd allegations are to the effect that the usufruct of complainants' two or several mill sites adds great value to their owners; and the 4th that defendant has paid a certain amount per horse power for "right to current" on other lands now submerged by its dam.

If it be held that the allegations of the first group above are not pertinent, the ruling of the Justice below will be sustained.

A mill privilege, as the term is used here, presupposes a mill site, understood when the first Mill Act was passed as a place on a stream where a dam might be seated to furnish power for grist, saw, carding and fulling mills, and it may be mills of other sorts, "serviceable for the public good, and benefit of the town, or considerable neighborhood, in or near to which they may have been erected." Mill seat, now mill site, and mill privilege have been household words of the people served by power dams on streams since the mud-sill of the first dam was seated in the territory now the state of Maine, for full three hundred years.

The terms are synonymous, used interchangeably to name a location on a stream where by means of a dam a head and fall may be created to operate water wheels.

The property right in a mill site has been recognized, and protected by legislation, as an incorporeal hereditament attached to the land of the riparian owner, and since 1841 a proprietor of an upper mill privilege, in this State, can not be deprived thereof if his privilege has been developed and not clearly abandoned, defeated or lost.

Is this incorporeal hereditament, when no dam or mill has been erected, a property right that may not be taken from the riparian owner by the filling and maintaining of a pond for operating a lower water mill, without compensation in damages?

Riparian owners have been deprived of certain rights in rivers and streams as American history has been written, as in New England where exclusive right to the taking of food fish has been

granted to towns, unquestioned to this day in certain Maine towns, or in mineral bearing states where the very water of the stream is appropriated by a first taker for the furtherance of mining, or where irrigation projects are of public benefit, and in all states where for a public use a water district includes a stream.

A riparian owner on a floatable stream has not a monopoly of the use of the stream or its banks. He must yield to the rights of others, at reasonable times to float timber down the stream, and allow necessary use of his banks by the owners of the timber and their servants, as travel up and down the banks is called for; he must allow the passage of boats.

In these and other ways the right of the owner in his mill privilege is limited. To erect a dam and mill thereon, when thereby no owner above or below is injured, is his right, but he must so operate his dam as to let the natural volume of the stream pass through, as well as the logs of the river driver.

Further, it was declared in Massachusetts, when our present state was a part of the former, that if a lower proprietor on a stream shall erect and maintain a dam for furnishing power to water wheels, and the pond created by such dam shall flow a mill site above, never improved, or improved and abandoned, the upper owner can not recover damages of the lower, although, so long as he maintains his dam he deprives the upper proprietor of any right to use his privilege to work a mill.

This follows as a result of the nature and extent of the right in the upper owner. His right is defeasible and if it is not asserted and availed of by him, he must submit to lower development, on a scale commensurate with the needs of the section benefited, and he may not have damages for the right of which he is deprived, a right which he shared with other riparian owners, and lost when such other made prior appropriation of his site. The lower "owners shall have free liberty to continue and improve such pond, for their best advantage, without molestation." Colonial Act of 1714. The lower owners may erect a water mill, and if, "in so doing any land shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner and on the terms hereinafter mentioned." Laws of Maine, 1821, Chap. 45.

These, however, only assure to the lower owner his common law right to flow so far as necessary for reasonable use. The rule that appropriation of an unimproved or abandoned mill site is *damnum absque injuria* originated in Massachusetts and is known as the Massachusetts Rule: "for the owner of a mill site, who first occupies it by erecting a dam and mill, will have a right to water sufficient to work his wheels, if his privilege will afford it, notwithstanding he may, by his occupation, render useless the privilege of any one above or below him upon the same stream." *Hatch* v. *Dwight*, 17 Mass., 288, 296.

It is important to note that this case was tried upon issues raised before the separation of Maine from Massachusetts.

"The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends on the grade of the land over which it runs. The descent may be rapid, in which case there may be fall enough for mill sites at short distances; or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land.

It seems to follow as a necessary consequence from these principles, that in such case, the proprietor who first erects his dam for such a purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use.

It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam and mill on his land, it is *damnum absque injuria*. . . . Such appears to be the nature and extent of the prior and exclusive right, which one proprietor acquired by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any original superior legal right, but from a legitimate exercise of his own common right, the effect of which is, *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right." *Cary* v. *Daniels*, 8 Met., 466, 477.

"This priority of first possession necessarily arises from the

nature of appropriation; where two or more men have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others, the first in time is the first in right." *Gould* v. *Boston Duck Co.*, 13 Gray, 442, 451.

"To the extent to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose of carrying mills, the right of other owners on the same stream, who have not improved their sites for the creation of water power and the driving of mills, is abridged and taken away. In such cases prior occupancy gives priority of title. Although the right to the use of water is inherent in and appurtenant to land, it is nevertheless in a certain sense a right *publici juris*, and subject to the rule of law, which regards the erection of a dam for the purpose of creating mill power a profitable, beneficial and reasonable use of the stream, of which riparian proprietors on the same stream, who have not appropriated the same force and fall of the water on their own land, can not complain.

"It is *damnum absque injuria*. . . . It is in view of the well established doctrine of the common law of this state, that the provisions of the mill act, so called, are to be construed and administered. By the first section of the R. S., Chap. 116, which is substantially a reenactment of S. 1795, Chap. 74, Sec. 1, full power is given to any person to erect and maintain a water mill and dam to raise water upon any stream not navigable, according to the terms and conditions, and subject to the regulations, therein expressed.

"The only limitation on this power, so far as the rights of other owners of mill sites or water powers on the same stream may be effected by its exercise, is found in the second section of the same chapter, and in S. 1841, Chap. 18, which provides that no such dam shall be erected to the injury of any existing mill or of any mill site which shall have been previously used or occupied.

"But no provision is made to protect unoccupied or unimproved mill sites. Nor are they included specifically as a subject of damages in the fourth section of the statutes, which provides for a compensation to parties 'whose land is overflowed or otherwise injured' by the erection and maintenance of a dam. The great purpose of these statutes, as declared in the preamble to S. 1795, Chap. 74, was to prevent the erection and support of mills from

being 'discouraged by many doubts and disputes.' They were not intended to confer any new right, or to create an additional claim for damages, which did not exist at common law.

"They only substituted, in the place of the common law remedies, a more simple, expeditious and comprehensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills. It follows that, as a riparian proprietor could recover at common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below, he can not maintain a complaint under the mill act to recover similar damages." *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray, 43.

And the Court says, in the same opinion; "This is the first case, so far as we know, in which an attempt has been made by a complaint under R. S., Chap. 116, or under the previous statutes enacted for the erection and regulation of mills, to claim damages for injury done to an unoccupied mill site. The fact that there is no precedent for such a claim is not conclusive, but it is strong evidence against the existence of any such right as the complainant sets up in the present case."

Residents in the province of Maine, before separation from the mother state are conclusively held to have adopted the common law, as expressed by the courts of that state and Massachusetts Bay Colony.

The declaration of the common law in *Hatch* v. *Dwight*, supra, is as effective, if not repealed, in Maine, as if it were a declaration of our court, because the plaintiff in that suit acquired an interest in the privilege under litigation in 1807; took possession in 1817; and the writ was brought before Maine became a separate state.

The case was tried at the May term, 1820, and all conditions affecting its decision were existent before the separation.

It happened that an action between owners of mills and dams on a river dividing the states of Massachusetts and Rhode Island, some of the proprietors being residents of either state, was tried in the circuit court six years later, *Tyler* v. *Wilkinson*, 4 Mason, 397.

Expressions of Story J., who delivered the opinion in that case have been used as authority contrary to the Massachusetts rule.

In that case the question at issue was the quantity of water which the proprietors of an upper mill privilege, improved by a dam, were allowed to discharge by means of a penstock from their dam to a trench which diverted the water from the natural channel of the river and returned it thereto at a point below the dam of proprietors of a lower privilege, also improved.

In the opinion, the learned jurist gives expression to some of the many principles of law then limiting the rights of riparian owners whose lands extend to the thread of the same stream.

Several of his observations were but dicta, and in the hundred years that have followed the decision in *Hatch* v. *Dwight*, supra, the Massachusetts court has not abandoned that decision.

Owners of riparian lands on any river, from its source to its mouth have rights in common. They may make reasonable use of its current over rips and falls not appropriated by the local owner, and over or through the obstructions caused by reasonable appropriation by the local owner.

So far as the reasoning has application to the cases at bar, *Tyler* v. *Wilkinson* is not in opposition to the Massachusetts rule. It is held there that as to the right of one of several riparian owners to the flow of a stream, "common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law." *Tyler* v. *Wilkinson*, supra, at 401.

The action above was not brought under the Mill Act. It was not for damages for flowing lands of an upper proprietor.

In cases of the latter class, the Mill Act makes the appropriation by construction on the lower site, before any development is

begun on the upper site, a rightful appropriation, "known and admitted by the law." There is no reason to suppose that Judge Story conceived that his findings on the facts before him, the right by grant or long established user to divert water from a lower proprietor, would be asserted as restricting the right given by the common law to flow the lands of an upper proprietor.

In Maine, litigation over rights in water powers began soon after the establishment of the state, and the principle was announced by our court in 1832 that the right of the owner of an undeveloped mill site is not complete. As against the owner of a lower site, the right to develop and use the upper is suspended, if the lower is first developed and flows the upper site, suspended so long as by the use of the lower site the other is submerged.

"A mill privilege, not yet occupied is valuable for the purposes to which it may be applied. It is property, which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream, although it may be impaired by the exercise of certain lawful rights, originating in prior occupancy." *Blanchard* v. *Baker*, 8 Me., 253, 268.

It can not be said that in preparation of the opinion above quoted the Court lost sight of the principle herein announced, for in the opinion reference is made to the fact that in jurisdictions other than Massachusetts and Maine another rule is announced.

Again in 1835 the same view is expressed. *Butman* v. *Hussey*, 12 Me., 407.

After the Maine mill act was amended so as to prohibit the erection of a dam, to the injury of any mill lawfully existing above or below it on the same stream, cases arose and the law was applied, though none are reported where damages are demanded for flowing an unimproved site.

In 1868 in a case for damages for flowing an improved upper mill site, these words were used: "The plaintiff's dam was originally erected before the defendant's. This is not controverted. In cases of this description *qui prior est in tempore potior est in jure*," and the authority given is *Cary* v. *Daniels* and *Gould* v. *Boston Duck Company*, cases hereinbefore cited. *Lincoln* v. *Chadbourne*, 56 Me., 197.

From the date of that decision the principle has stood, unat-

tacked, and in reports and students' texts Maine is considered as having adopted the Massachusetts rule.

"A mill owner can at any time appropriate for raising and maintaining a head of water for working his mill so much space in the river valley as has not already been appropriated by some other mill owner for his own mill." *Fibre Co.* v. *Electric Co.*, 95 Me., 318, 49 A., 1095.

As against all the world except riparian proprietors, one who owns a mill site may seek damages if deprived of his right.

But because of the right common to riparian proprietors, *publici juris*, to further the public good the doctrine of appropriation of a mill privilege grew up as naturally as the doctrine of appropriation of the water of a stream for mining grew and established itself over this country from the mountains of the west to the plains. It was founded on necessity, based on the conditions of the watershed of Massachusetts and Maine, at a time when a twelve feet head of water was a monstrous power, and what would now be tiny mills were necessities of domestic and industrial life.

In the present era of industrial development, in the few states that have not coal, but have streams in volume and character like ours, there is ever more insistent demand for the development of water power sites; not in separate independent units, however, but in aggregate of head, as the topographical features of the watershed dictate. So that what may have never suggested profitable development as a power site, until a great enterprise was begun, now demands the changing of the river from a stream of strong, swift current to a pond, with the consequence that a recognizable but unprofitable mill site may be flowed by a lower riparian owner, without damages for the appropriation or change.

It is conceivable that on any half mile of the river along Carratunk a dam might be erected, though at such expense as to be an unprofitable venture, if its pond were filled, but none of any economic value if all were built upon.

Construction at the strategic point flows out many possible sites, and the law as understood in this state favors the erection of the great dam, for the good of the greater number.

Flowing the lands of another for the purpose of working mills, is a right recognized in this jurisdiction, not as an exercise of the

eminent domain, for our mills are not of public use, as the term is understood in law, and our constitution does not authorize taking for the benefit of the public as does that of Massachusetts. *Brown* v. *Gerald*, 100 Me., 351, 370, 61 A., 785; *Murdock* v. *Stickney*, 8 Cush., 113; *Bates* v. *Weymouth Iron Co.*, 8 Cush., 548, 553; *Lowell* v. *Boston*, 11 Mass., 454, 464; *Turner* v. *Nye*, 154 Mass., 579, 14 L. R. A., 487, 28 N. E., 1048.

Flowing of riparian lands is an adjustment and regulation to assure development of reasonable use of such lands among riparian owners. See cases cited in *Brown* v. *De Normandie*, 123 Me., at 541, 124 A., 697.

In that adjustment we do not recognize, in theory or in fact, that the owner of land flowed by a pond for a water mill is a part owner in the developed lower privilege. He still owns his flowed land, and may still use it on which to sink a pier or in which to drive piling, *Jordan* v. *Woodward*, 40 Me., 317, 324, or submit it to any reasonable use not detrimental to the maintenance of the pond.

But he does not participate in the ownership of the dam and mill below. He is not entitled to share in the profits of the lower development simply from the fact that his unimproved mill site, or the rocky course of the bed of the river on his land, does its part in upholding the impounded water.

Items of alleged damage for changing the current to still pond water are not to be included in the evidence for consideration by the commissioners; their statement is not pertinent to process under the Mill Act.

The allegations of the first group were properly expunged, and the others fall with this group.

Exceptions overruled.

DISSENTING OPINION

PATTANGALL, C. J. I regret being compelled to disagree with the conclusions reached by the majority of the Court and stated so admirably by Mr. Justice Barnes speaking for them, but the questions involved seem too important to permit a mere noting of non-concurrence unaccompanied by a full statement of the reasons therefor.

The immediate issue is as to the admissibility of certain evidence affecting the value of complainants' land located within the flowage area of defendant's dam. Complainants contend that this value is enhanced by the fact that certain riparian rights attach to the flowed premises, that these are property rights, that they are destroyed by the flowage, and that reasonable compensation should be made therefor. Defendant's position, made clear in the majority opinion and approved by it, is that, even though complainants are able to substantiate the facts upon which their claim is based, no actionable damage is proven; hence, the evidence offered is immaterial and irrelevant.

Defendant's dam was erected by authority of what is commonly known as the Mill Act, and damages are claimed as provided therein. The important statutory provisions involved are Sections 1, 2, 4, 5, 9, and 25 of Chap. 106, R. S., 1930.

"Sec. 1. Any man may on his own land, erect and maintain a water-mill and dams to raise water for working it, upon and across any stream, not navigable; or, for the purpose of propelling mills or machinery, may cut a canal and erect walls and embankments upon his own land, not exceeding one mile in length, and thereby divert from its natural channel the water of any stream not navigable, upon the terms and conditions, and subject to the regulations hereinafter expressed.

"Sec. 2. No such dam shall be erected or canal constructed to the injury of any mill or canal lawfully existing on the same stream; nor to the injury of any mill site, on which a mill or mill-dam has been lawfully erected and used, unless the right to maintain a mill thereon has been lost or destroyed.

"Sec. 4. Any person whose lands are damaged by being flowed by a mill-dam, or by the diversion of the water by such canal, may obtain compensation for the injury, by complaint to the superior court in the county where any part of the lands are; but no compensation shall be awarded for damages sustained more than three years before the institution of the complaint.

"Sec. 5. The complaint shall contain such a description of the land flowed or injured, and such a statement of the dam-

age, that the record of the case shall show the matter heard and determined in the suit.

"Sec. 9. . . . the court shall appoint three or more disinterested commissioners of the same county, who shall go upon and examine the premises, and make a true and faithful appraisement, under oath, of the yearly damages, if any, done to the complainant by the flowing of his lands or the diversion of the water described in the complaint, and determine how far the same is necessary, and ascertain and report for what portion of the year such lands ought not to be flowed, or water diverted, or what quantity of water shall be diverted. They shall also ascertain, determine, and report what sum in gross would be a reasonable compensation for all the damages, if any, occasioned by the use of such dam.

"Sec. 25. No action shall be sustained at common law for the recovery of damages occasioned by the overflowing of lands, or for the diversion of the water as before mentioned, except in the cases provided in this chapter, to enforce the payment of damages after they have been ascertained by process of complaint as aforesaid."

The direct issue is of first impression in this Court, although many of our decisions bear forcibly upon it. It has been passed upon in other jurisdictions and, so far as my research goes, no court with the exception of that of Massachusetts has accepted the view advanced by the defendant. While the findings of that court are entitled to and are certain to receive from this Court high consideration, we have, at times in the past, and doubtless will in the future find ourselves in disagreement with the conclusions reached by it. So far as the instant case is concerned, I shall endeavor to point out a variance in the organic law of this state and Massachusetts which in a measure might warrant a difference of opinion on the issue before us.

There are certain fundamental principles underlying the complainants' contention which must be kept in mind in order to reach an intelligent conclusion. They assert that riparian rights are included in the word "land" as used in our statutes; that such rights are property rights; that they not only add to the value of the

land but constitute a part of it; and that, being property, the owners thereof can not be deprived of them without compensation, even by legislative act.

So far as the first of these suggestions is concerned they rely upon the definition of "land" in the Rules of Construction, Paragraph X, Sec. 6, Chap. 1, R. S., 1930. "The word 'land' or 'lands' and the words 'real estate' include lands and all tenements and hereditaments connected therewith and all rights thereto and interests therein." In *Brown* v. *DeNormandie*, 123 Me., 535, our Court, at page 546, 124 A., 697, adopted this definition in its discussion of the right to flow certain property under the Mill Act, and it has been many times referred to and applied literally in tax cases, *Stevens, Collector* v. *Dixfield and Mexico Bridge Company*, 115 Me., 402, 99 A., 94; *Foxcroft* v. *Straw*, 86 Me., 76, 29 A., 950; *Paris* v. *Norway Water Co.*, 85 Me., 330, 27 A., 143; *Kittery* v. *Portsmouth Bridge*, 78 Me., 93, 2 A., 847; *Hall* v. *Benton*, 69 Me., 346; in condemnation proceedings under the right of eminent domain, *Lime Rock R. R.* v. *Farnsworth*, 86 Me., 127, 29 A., 957; in cases involving easements, *Currie* v. *Railroad*, 105 Me., 529, 75 A., 51; and in various other cases.

All of the authorities agree that riparian rights are to be regarded and protected as property.

"The riparian proprietor may insist that the right to the use of water flowing in a natural stream shall be regarded and protected as property. Such a right is not a mere easement or appurtenance but is inseparably annexed to the soil itself." *Hamor* v. *Bar Harbor Water Co.*, 78 Me., 134, 3 A., 40, 43.

"The plaintiff, as a lower mill owner, had the right to the natural flow of the river, which right is regarded and protected as property, and, before the defendant had a right to take and detain the waters of the river, it was incumbent upon him to take the water in the same manner as it would be required to take other property." *Hubbard* v. *Limerick Water and Electric Co.*, 109 Me., 248, at 250, 83 A., 793, 794.

"All these rights which the riparian owner has in the running stream are as certain, as absolute, and as inviolable as any other species of property and constitute a part of the land as much as the trees that grow thereon or the mill or the house that he builds

thereon. He can be deprived of them only through the power of eminent domain constitutionally exercised." Opinion of the Justices, 118 Me., 507, 106 A., 865, 869.

"The right to have a natural watercourse continue its physical existence upon one's property is as much property as is the right to have the hills or forests remain in place. There is no property right in any particular particle of water or in all of them put together. The advantages resulting from a stream of water uniting in one mass maintain a perpetual course through the land and these particles are therefore regarded as part of the common mass and subject to no man's ownership.

"The extent of the property right is well expressed in *Warder* v. *Springfield*, 9 Ohio, 855, where it is said that no riparian owner has absolute property in the waters of a stream, but each has the use of the flow past his lands for domestic, manufacturing and other lawful purpose. The property therefore consists not in the water itself but in the added value which the stream gives to the land through which it flows. This is made up of the power which may be obtained from the flow of the stream, from the increased fertility of the adjoining fields because of the presence of the water, and of the value of the water for the uses to which it may be put. The right to the continued existence of these conditions is property. *McCoy* v. *Donley*, 57 Am. Rep., 680; *Union Mill and Min. Co.* v. *Ferris*, Federal Cases No. 14371; *Schaefer* v. *Marthaler*, 57 Am. Rep., 73.

"To protect this right, the owner may resort to any or all of the instrumentalities which may be employed for the protection of private property rights. *Crawford Co.* v. *Hathaway*, 60 L. R. A., 889; *McCord* v. *High*, 24 Iowa, 336. And the owner can not be deprived of it without compensation and due process of law. The legislature may not under the guise of protecting the public interest arbitrarily interfere with private rights therein. The advantage of a flowing stream may be considered in fixing compensation for the abutting property when taken under the power of eminent domain.

"The right to the flow of the stream is a property right, and the owner of it has the right to say whether he wishes to maintain its value as such, and in case others attempt to deprive him of it, they

should pay for the injury which would thereby be caused to him. While the water right is incorporeal, it is not personal property but is a parcel of the estate itself.

"The right does not depend upon appropriation but exists as part of the land. It is similar to that of having a highway remain adjacent to property on which it abuts. The first and most important right which the riparian owner has in the stream is to the continued flow of the water in its natural condition. This right is fundamental and one of which the riparian owner can not be deprived; but it is not absolute. Each riparian owner has a right to make such use of the water as he can without materially diminishing the equal rights of the others. It is immaterial whether the owner is making any use of the water or not. A large part of the value of a stream consists in its motion. The lower owner has no right therefore to dam the water back on the upper property." 2 *Farnham Water and Water Rights*, 1565 to 1575.

In *Clark* v. *Cambridge Irrigation Co.*, 45 Neb., 798, 64 N. W., 239, it is held that, except as abrogated or modified by statute, the common law doctrine with respect to the rights of private riparian proprietors prevails in this country, and that such right is property which, when vested, can be impaired or destroyed only in the interests of the general public upon full compensation and in accordance with established law.

"This doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country. *Eidemiller Ice Co.* v. *Guthrie*, 42 Neb., 238, 60 N. W., 717, 28 L. R. A., 581; Black's Pomeroy, Waters, secs. 127, 130, and authorities cited. At the common law every proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purposes of life (3 Kent, Commentaries, 439; Angell, Water Courses, sec. 95; Gould, Waters, sec. 204; Black's Pomeroy, Waters, sec. 8), and any unlawful diversion thereof is an actionable wrong.

"The rights of a riparian proprietor, as such, are property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance

with established law." *Lux* v. *Haggin*, 69 Cal., 255, 10 Pac., 674; *Yates* v. *City of Milwaukee*, 10 Wall., 497, 19 L. Ed., 984; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S., 672, 4 Sup. Ct., 15, 27 L. Ed., 1070; *Delaplaine* v. *Northwestern R. Co.*, 42 Wis., 214, 24 Am. Rep., 386; *Bell* v. *Gough*, 23 N. J. Law, 624.

"The riparian proprietor, say all the books and the authorities, has a right to the flow of the water of the natural stream passing through or by his land; such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass, or trees springing from the earth. Gould on Waters, section 204, and authorities there cited. The riparian right to the use of the water flowing in a natural water course is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally. . . ." *Crawford Co.* v. *Hathaway* (*Neb.*), 93 N. W., 781, at 784 and 786.

"As respects the rights of the land owner to streams, it is to be observed that, while he has a property in the *stream*, he has no property in the *water* itself, aside from that which is necessary for the gratification of his natural or ordinary wants. . . . The right of enjoying this flow without disturbance, interference or material diminution by any other proprietor, is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself, without molestation from his neighbors. The right of property is in the right to use the flow, and not in the specific water. . . . The right to use the water of such streams for milling purposes, is as necessary as the right of transportation. Indeed, it is this consideration that oftentimes imparts the chief value to the estate of the riparian proprietors, and without which it would have no value whatever in many instances." *Lancey* v. *Clifford*, 54 Me., 490.

There are no differences of opinion among the authorities on the point that in fixing the value of land for taxation, riparian rights are to be considered.

"Could it be successfully contended that the land was to be assessed only for its value as land for farming, or for any other use to which it might be put disconnected from the stream? Is land upon which there is a valuable unimproved water privilege, where no power is being developed, to be assessed only for the value of the land without privilege? May it not be the chief value of the land that it had a privilege upon it? . . . We think that in so far as this land was made more valuable by the stream and fall, so far these were property to be considered in the valuation of the land." *Water Power Co.* v. *Buxton*, 98 Me., 295, at 297 and 298, 56 A., 914, 915.

"Land upon which a mill privilege exists is taxable and the value of the land may be greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it and water power thereby created. The capability of the land for such use and the probability or certainty, as the case may be, of its use certainly affects its value." *Fibre Co.* v. *Bradley*, 99 Me., 263, 59 A., 83, 87.

In *Shawmut Mfg. Co.* v. *Benton*, 123 Me., 121, 122 A., 49, the rule of the Buxton case and the Bradley case was affirmed, and in *Power Company* v. *Turner*, 128 Me., 486, 148 A., 799, it was reaffirmed and elaborated in the following language:

"Land upon which a mill privilege exists is taxable at its worth as land enhanced by the value of its capacity for water power development, or to use the language of *Fibre Co.* v. *Bradley*, by the value of 'the capability of the land for such use.' If the privilege is undeveloped or, developed, is not utilized, the capacity of the land for power development, often termed its 'potential development,' is nevertheless an element of value to be considered in its tax valuation. As was said in *Water Co.* v. *Buxton*, the chief value of a parcel of land may be that it has a privilege upon it, and, in so far as the land is made more valuable by the stream and fall within its limits, so far these elements are to be *considered in its valuation.*"

"The value of land depends upon its capacity for improvement. The elements of its value may be its fertility, the minerals in its soil, its location, the configuration of its surface, and many other circumstances one or more of which may be incident to a certain tract of land. In estimating its value for the *purposes of sale* or of

taxation, all of these incidents should be considered and the element or elements of value which lead to the most profitable form of improvement fixes the proper valuation of the land." *Slatersville Finishing Co.* v. *Green et al*, 40 R. I., 410, 101 A., 226, 228.

In *Blackstone Manufacturing Co.* v. *Blackstone*, 200 Mass., 82, 85 N. E., 880, the doctrine set out in *Saco Water Power Company* v. *Buxton*, supra, and *Penobscot Chemical Fibre Company* v. *Bradley*, supra, was accepted and the Court agreed with Judge Emery's dissenting opinion in *Water Power Co.* v. *Auburn*, 90 Me., 67, 37 A., 331, in which it is said, "So far as the land is more valuable by reason of the stream and fall upon it, so far are these to be considered in the valuation of the land and no farther. This consequent increase of value is a question in commercial economics and requires for its determination the consideration of possible revenues to be drawn from the land and the possible price to be obtained for it."

"Water power has been held to be 'a capacity of land for a certain mode of improvement which can not be taxed independently of the land.' Land upon the bank of a river and in its bed where there is a fall and adjacent land adapted for flowage may have a largely increased worth in the market by reason of these characteristics which may be made available for valuable use in different ways. The valuable uses to which the land of the Essex Company could be put, including that of developing the capacity of the river for power, should be considered in estimating its fair cash value." *Essex Co.* v. *Lawrence*, 214 Mass., 79, 100 N. E., 1016, 1018.

The rule that in valuing land taken under condemnation proceedings, riparian rights must be considered as a factor is undisputed.

"One whose land is taken by eminent domain is entitled to be compensated in money for the fair value in the market of that of which he has been deprived. In ascertaining what that value is, all the uses to which the property is reasonably adapted may be considered." *Smith* v. *Commonwealth*, 210 Mass., 261, 96 N. E., 666, 667.

"In order to prove damages occasioned to the land of the petitioner which was not taken, but which formed part of the same parcel, it was competent for him to show the uses to which it might

profitably be applied, before and after the taking. That is one way of showing the diminution in value caused by the taking. It was evidence of the actual capacity of the land for future improvement as a fact affecting its value. When any part of the land is taken, the loss of natural advantages, which give value to the whole parcel, is to be taken into account, although the owner had no exclusive or unconditional right to the same." *Drury* v. *Midland Railroad*, 127 Mass., 571, at 582, 583; *Hanford et al* v. *St. Paul & D. R. Co.* (Minn.), 42 N. W., 596.

We are forced, therefore, to these conclusions: that riparian rights are included in the word "land" as used in our statutes; that they are property; that they are part and parcel of the upland with which they are inseparably connected; that the value of the upland is enhanced by their existence and must be so considered in matters of taxation, condemnation or sale. By what line of reasoning can it be said that they are not to be regarded in arriving at damages sustained by reason of flowage caused by the erection of a dam under the Mill Act?

The Mill Acts originated in Colonial days, the first of which we have record being adopted in Massachusetts in 1714, Chap. 15, 1 Province Laws, 729. They were born of the necessities of a pioneer people to whom water-driven grist mills, saw mills and fulling mills rendered as truly a public service as do the railroad, the telephone and telegraph, the lighting company and the water company of today. Preceding in their enactment written constitutions, either State or Federal, it has been found difficult to reconcile their provisions with certain principles of law which we have learned to regard as the foundation upon which private property rights depend. Their constitutionality has often been attacked on the ground that they authorize the taking of property for other than public use, and in certain jurisdictions this view has prevailed. *Ryerson* v. *Brown*, 35 Mich., 333; *Sadler* v. *Langham*, 34 Ala., 31; *Loughbridge* v. *Harris*, 42 Ga., 500; *Hay* v. *Cohoes Co.*, 2 N. Y., 159; *Tyler* v. *Beecher*, 44 Vt., 648. On the other hand, the courts of Massachusetts, Maine, Connecticut, New Hampshire, Tennessee, Indiana, Kansas and Wisconsin have sustained their validity, and the United States Supreme Court has passed favorably upon them. *Head* v. *Amoskeag Mfg. Co.*, 113 U. S., 9; *Kaukauna Water Co.*

v. *Canal Co.*, 142 U. S., 254; *Otis Co.* v. *Ludlow Mfg. Co.*, 201 U. S., 140. The Act is in full force today in this state. *Brown* v. *DeNormandie*, supra.

In the earlier cases in Massachusetts the Act was sustained under the eminent domain clause of the Bill of Rights and it would seem that the doctrine has been accepted in most of the states where it is now in vogue on the authority of these decisions. *Brown* v. *Gerald*, 100 Me., 351, 61 A., 785. Later on, this theory was abandoned by the Massachusetts court and in *Lowell* v. *Boston*, 111 Mass., 454, at page 467, the court found constitutional justification for the Act in Article IV, Sec. 1, Chapter 1, of the State Constitution, which provides, "And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same."

The Constitution of New Hampshire, Article 5, provides, "Full power and authority are hereby given to the General Court from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, so that the same be not repugnant or contrary to this Constitution, that they may judge for the benefit and welfare of the State." It is on the authority of this clause that the Court in *Mfg. Co.* v. *Fernald et al*, 47 N. H., 444, held the Mill Act constitutional.

There is no provision in the Constitution of Maine similar to that in the Constitutions of Massachusetts and New Hampshire, hence this Court continued to find a basis for the Mill Act in the right of eminent domain, although as early as 1855 doubt began to be expressed as to the theory that private property could properly be taken for use by those desiring to erect and maintain dams for private profit. In *Jordan* v. *Woodward*, 40 Me., 317, the Court, after quoting Sec. 21 of Article I of our Constitution which reads "Private property shall not be taken for public uses, without just

compensation, nor unless the public exigencies require," said, "The Mill Act, as it has existed in this State, pushes the power of eminent domain to the very verge of constitutional inhibition. If it were a new question, it might well be doubted whether it would not be deemed to be in conflict with the provision of the constitution cited above"; but added that "From its great antiquity, and the long acquiescence of our citizens in its provisions, it must be deemed the settled law of the state."

In 1904, however, our Court again asserted that "The principle on which these laws is founded is the right of eminent domain, the sovereign right of taking private property for public use. Their validity implies the power of the legislature to authorize a private right, which stands in the way of an enterprise to improve the water power, to be taken without the owner's consent, if suitable provision is made for his just compensation. The construction which the courts have generally given to the words 'property taken' and in the constitution is that they include permanent damage to property . . . and that an injury to the property of an individual is equivalent to taking it, if it deprives him of its ordinary use, and entitles him to compensation." *Ingram* v. *Water Co.*, 98 Me., 566, at 572, 57 A., 893, 894.

In *Brown* v. *DeNormandie,* supra, this Court agreed that it was too late to challenge the constitutionality of the Mill Act, regardless of whether its validity rested upon great antiquity, eminent domain, or the Massachusetts and New Hampshire doctrine of public welfare. It was not noted in this opinion that Maine's Constitution contained no general welfare clause.

On the whole it appears that in this state the early assumption that the Act conferred the right of eminent domain has never been rejected, even though questioned and apparently inconsistent with the reasoning of *Brown* v. *Gerald,* supra; and it may be noticed in passing that *Smith* v. *Power Co.*, 125 Me., 238, 132 A., 740, somewhat narrows the conclusions and implications of the opinion in the last named case.

"Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other States, maintaining the validity of general mill acts as taking private property for public use, in the strict constitutional

meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of *full compensation* to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall., 16.

"Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to *recover compensation for the injury to the land of the plaintiff in error*, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States." *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S., 9, at 26.

"General objections to Mill Acts as taking property for private use or on other grounds have been disposed of by former decisions of this Court. Such acts have been in force in Massachusetts ever since an Act of 1714, Chapter 15, 1 Province Laws, 729. The practice sanctioned by them would seem from their recitals to have been still older." *Otis Co.* v. *Ludlow Manf. Co.*, supra, at 151.

"A state legislature may authorize the taking of land upon or riparian rights in a navigable stream for the purpose of improving its navigation, and if a surplus of water is created, incident to the improvement, it may be leased to private parties under authority of the State, or retained within control of the State; but so far as land is taken for the purpose of the improvement, either for the dam itself or the embankments, or for the overflow, or so far as water is diverted from its natural course, *or from the uses to which the riparian owner would otherwise be entitled to devote it, such owner is entitled to compensation.*" *Kaukauna Water Power Co.* v. *Canal Co.*, supra.

In *Pumpelly* v. *Green Bay Company*, supra, the Court held that flowing land was equivalent to taking and that unless compensated for was a violation of property rights.

While it has taxed to some extent the ingenuity of jurists, especially in the more recent cases, to sustain the validity of Mill Acts in the face of constitutional prohibitions against taking private property for any but a public use, no Court aside from that of Massachusetts has asserted the right to do so without full compensation for the property taken.

It has been demonstrated that riparian rights are property rights, that flowing land is equivalent to a taking, and that "soil" or "upland" are not synonyms of "land," the latter being a far more comprehensive word. In only one jurisdiction has it been held that the proprietor of a mill dam may destroy the riparian rights of an upper or lower neighbor without making recompense therefor, and I venture to say that had that doctrine been regarded as a necessary corollary to the Mill Act, it would have been unquestionably held invalid by every other Court in the land in spite of its great antiquity.

It is of interest to trace the origin of the Massachusetts theory and the reasons given in support of it. It apparently arose in the first instance from the acceptance by the courts of that state of the doctrine of prior appropriation as stated in the earlier English and a few American cases.

This doctrine was first advanced by Blackstone in his Commentaries and was generally approved by the English courts as late as 1831. "By the law of England the person who first appropriates any part of the water flowing through his own land to his own use has the right to the use of so much as he appropriates, against any other." *Liggins* v. *Inge*, 7 Bing., 682, 693. "It all depends upon the priority of occupancy." *Bealey* v. *Shaw*, 2 Smith, 321, 330.

But in 1827 in *Tyler* v. *Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14, 312, in an opinion by Judge Story, the doctrine was repudiated and the law declared to be that, "the natural streams, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself," and "there may be and must be allowed to all that which is a common, reasonable use. It is not like the case of mere occupancy, where the first occupant takes by force of his prior occupancy."

Chancellor Kent in the third volume of his Commentaries, published in 1828, cites *Tyler* v. *Wilkinson* with approval.

In 1833 in *Mason* v. *Hill*, 110 Eng. Reprint, 692, the English court, notwithstanding the fiat of Blackstone and the cases based upon it, held to the rule laid down by Judge Story. For a time thereafter the law in England appeared unsettled, but in *Wood* v. *Wand*, 154 Eng. Reprint, 1047, the court confirmed *Mason* v. *Hill*, supra, and in *Aubrey* v. *Owen*, 155 Eng. Reprint, 579, the law regarding riparian rights as stated in *Tyler* v. *Wilkinson*, supra, was positively affirmed and accepted unconditionally. That such is the true doctrine of the common law has not been questioned in England since that time, and has been generally accepted in America.

"Prior occupancy, short of the statute term of prescription and without consent or grant, will not confer any exclusive right as between different riparian proprietors to the use of a running stream." 3 Kent's Comm. (12th Ed.), Sec. 447.

The Note at 30 L. R. A., 665, states that "there was a strong tendency on the part of the judges in earlier times to recognize a right to obtain title to water by prior appropriation or occupancy and at one time it seemed that the doctrine would be established, but the later cases with possibly one exception have all been the other way, so that now no such right is recognized" and cites a long list of cases in support of the editorial statement, including *Heath* v. *Williams*, 25 Me., 209, and *Bearse* v. *Perry*, 117 Mass., 211, in which it was held that in the absence of the statute no right will be acquired by the erection of a dam.

A study of the Massachusetts cases indicates that had it not been for a divergence from the generally accepted view of the common law as related to the rights of riparian owners, the courts of that state would not have adopted and maintained a view regarding compensation for their loss contrary to that held in other jurisdictions.

In *Fuller* v. *Chicopee Mfg. Co.*, 16 Gray, 42 (1860), the Court said, "They (the Mill Acts) were not intended to confer any new right, or to create an additional claim for damages, which did not exist at common law. They only substituted, in the place of the common law remedies, a more simple, expeditious and compre-

hensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills. It follows that, as a riparian proprietor could recover at common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below, he cannot maintain a complaint under the mill acts to recover similar damages."

This view of the common law, as has been stated, is contrary to that held in any other jurisdiction since the publication of *Tyler* v. *Wilkinson,* supra.

In *Pugh* v. *Wheeler,* 19 N. C., 50, a case quoted as authority by all of the text writers and affirmed in principle by a long line of decisions in the state of its origin, it is stated that, "We conceive, therefore, that it is the clear doctrine of the common law that all owners of land through which a stream runs may apply it to the purposes of profit. The only question then is, what are the rights of the owners above and below on a stream as against each other? Defendants say that such one of the owners as may first apply the water to any particular purpose gains thereby immediately the exclusive right to that use of the water. That is true, in this sense, that any other proprietor, above or below, can not do any act whereby that particular enjoyment would be impaired, without answering for the damages occasioned by the loss of the particular enjoyment. Whereas before the particular application of the water to that purpose, the damages would have been confined to the uses then subsisting. The truth is that every owner of land on a stream necessarily at all times is using water running through it, if in no other manner, in the fertility it imparts to his land and the increase in the value of it. There is, therefore, no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a particular new application or artificial use of the water does not therefore create the right to that use, but the existence or non-existence of that application at a particular time measures the damages incurred by the wrongful act of another in derogation of the general right to the use of the water as it passes through or from the land of the party complaining."

After quoting *Mason* v. *Hill*, supra, as authority for the above, it is added that, "No person can, for the sake of giving himself a use of the water, justify throwing it back upon the land of another so as to deprive him of any use of his land. . . . The policy of the Act makes it applicable to every case of an injury by the erection of a mill. . . . Consequently, a verdict which finds the actual damages is consistent with the objects of the statute. A person owning land on a stream and thereby entitled to certain beneficial uses of the water, if deprived by means of the acts of another of some of those uses which but for those acts he would enjoy, has sustained injury and is entitled to recover damages."

The courts of New Hampshire have taken what we conceive to be a sound view of the question at issue in this case. "An undeveloped water power is a property right inherent in the ownership of the adjacent riparian land, for the value of which, if any, the owner is entitled to compensation when it is taken under the Flowage Act. *Swain* v. *Pemigewasset Power Co.*, 76 N. H., 498, 502, 85 A., 288. The plaintiff's damage for its taking is measured by the difference between the value of her land after the defendant had flowed it and what it would have been worth on the date of its taking (*Hadlock* v. *Jaffrey*, 75 N. H., 472, 473, 76 A., 123) if the defendant's dam had not been built (*Wright* v. *Pemigewasset Co.*, 75 N. H., 3, 6, 70 A., 290; *Philbrook* v. *Berlin-Shelburne Co.*, 75 N. H., 599, 74 A., 873); that is, the difference between the value of the land free from, and subject to, the rights taken (*Lancaster* v. *Jefferson Electric Light Co.* v. *Jones*, 75 N. H., 172, 182, 71 A., 871; *Swain* v. *Pemigewasset Power Co.*, supra). In the ascertainment of the value of the property invaded, the owner is entitled to have it appraised for the most profitable purpose, or advantageous use, to which it could be put on the day it was taken. *Barker* v. *Publishers' Paper Co.*, 78 N. H., 571, 575, 103 A., 757, L. R. A., 1918 E 709; *Philbrook* v. *Berlin-Shelburne Co.*, supra." *Emmons* v. *Utilities Power Co.* (N. H.), 141 A., 65.

As already noted, the question has not been directly passed upon in Maine, but *Hamor* v. *Bar Harbor Water Company*, supra, quotes with approval from Ex parte Jennings, 6 Cow., 526, the following significant paragraph: "There is no reason why the same requirements should not apply equally to the taking of water from

a stream in which the plaintiffs have valuable riparian rights, as to the taking of land. Both are equally the subjects of property and of compensation."

And the only logical conclusion to be reached from the following quotation from the opinion of this Court in *Brown* v. *DeNormandie*, supra, would be that full compensation must be made for any property or property right destroyed or diminished under the Mill Act.

"Here again we must go to the statute to ascertain what power is given and what exceptions are made. As to the power given, it is to flow the 'lands' of any person, and the only exception is an existing mill or 'any mill site on which a mill or mill dam has been lawfully erected and used, unless the right to maintain a mill thereon has been lost or defeated.'

"The word 'lands' is not confined to field or meadow. Under Rules of Construction, R. S., Chap. 1, Sec. 6, Par. X, 'the word "land" or "lands" and the words "real estate" include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein.' This includes buildings and improvements on the land as well as the land itself. The only exception to this broadly inclusive term is other manufacturing industries on the same stream. This exception did not arise until the revision of 1841, at the same time when the element of necessity dropped out. The evident purpose of both the omission of necessity and the addition protecting other mills on the same stream was the encouragement of manufacturing industries and the injury of none. No other class of private property is exempt from the provisions of the Act. The maxim 'Expressio unius est exclusio alterius' may be pertinently invoked."

The Massachusetts rule, so-called, is based upon a conception of the common law, prevalent up to the publication of *Tyler* v. *Wilkinson*, supra, discarded since by the courts both of England and America, and negatived by Chancellor Kent. Our Court questioned the doctrine in its earliest decisions. In *Blanchard* v. *Baker*, 8 Me., 253 (1832), commenting on the opinion in *Hatch* v. *Dwight*, 17 Mass., 288, the Court said, "The right, however, arising from mere prior occupancy, to this extent, has not been held as exclusive, unless continued for twenty years. *Platt* v. *Johnson*, 15 Johns., 213;

Tyler v. *Wilkinson*, 4 Mason, 397." And in *Butnam* v. *Hussey*, 12 Me., 407 (1835): "A riparian proprietor on one side, or above or below, may use the water, or avail himself of its momentum, and may for this purpose create a head of water; provided he does not thereby impair the rights of other proprietors. If he thereby injure or destroy a privilege previously appropriated, he may be held answerable, although the mill or mills, depending on such privilege, may be out of repair, have gone to decay, or been destroyed by flood or fire, unless the same has been abandoned by the owner. *Hatch* v. *Dwight et al*, 17 Mass., 289. There an action was sustained for impairing a water power, the actual enjoyment of which by the owner had been sometime suspended. It may admit of more question, whether an action could be maintained by the owner of a privilege, which had never been occupied, for the erection of a dam below, which may have impaired or destroyed its value. There are authorities which sanction the doctrine, that the first occupant thereby acquires exclusive rights, which can not be affected by operations upon the stream above or below. Of this opinion was Parker, C. J., by whom the opinion of the court was delivered in the case before cited. At a subsequent period, Story, J., in the case of *Tyler et al* v. *Wilkinson et al*, 4 Mason, 397, after an elaborate view of the authorities in England and in this country, maintains the opinion that such exclusive right is not sustained by occupancy alone, for a period short of twenty years. The weight of authority appears to be with Mr. Justice Story."

That the Mill Act conferred no rights which did not exist at common law, as stated in *Fuller* v. *Chicopee Mfg. Co.*, supra, was expressly denied in *Jordan* v. *Woodward* (1855), supra, in which Justice Rice, speaking for the Maine Court said, "In direct terms the power is conferred upon the mill owner, by the statute, to erect and maintain a dam to raise water for working his mills, and incidental to this power is the right to overflow the lands of other persons, or to speak more accurately, this power of building dams may be exercised, though incident thereto, the lands of other persons be overflowed and injured. This right is in derogation of the common law, and the natural right of the citizen, and should not therefore be extended by implication."

It appears then that neither in 1832, 1835 nor 1855 had our

Court adopted the view that the rule of the court of Massachusetts concerning riparian rights was binding upon the court of Maine.

The assumption that our Court recanted and adopted a different theory in *Lincoln* v. *Chadbourne*, 56 Me., 197, is not borne out when the opinion in that case is analyzed. There was no issue presented in that case which called for any expression of the court as to the common law rights of riparian owners. It is, of course, true that proprietors of the earlier dam, erected under the Mill Act, gain prior rights to the flow of the stream; and it is likewise true that if in the exercise of these prior rights the property of another is destroyed or diminished in value, compensation may be recovered for the injury. If the language of this opinion is construed as negativing the latter proposition, it is pure dictum. There was nothing before the court calling for a decision on that point.

As stated above, the Massachusetts decisions rest not only upon a different view of the common law from that assumed by Story and Kent and now agreed to universally outside of that state but also upon the premise that the Mill Acts are merely declaratory of the common law. Maine, in accordance with the view uniformly adopted elsewhere, holds the Mill Act in derogation of the common law and hence to be strictly construed. Denying that the doctrine of prior occupancy confers prior rights at common law, it is and must be considered that such rights are granted only by the statute and that they can not be extended beyond the terms thereof.

By the terms of the Mill Act, the prior occupant is given the right of eminent domain. He may exercise it. He may take for his use the property of his neighboring riparian owner, if it is necessary for his purposes, but he can not do so without compensating him therefor. He may flow the land of another but he must recompense the owner of the land to the full value thereof, and if that value is enhanced by the fact that inseparably connected with it and part and parcel of it are riparian rights, those rights must be considered in arriving at its value.

The rule of damage must be the difference between the value of the land before the flowing and afterwards. No other rule can be applied without violating every sound principle of law. Under that rule, riparian rights must be considered. Such rights are "as certain, as absolute, and as inviolable as any other species of property

and constitute a part of the land as much as the trees that grow thereon or the mill or the house that he builds thereon. He can be deprived of them only through the power of eminent domain constitutionally exercised." Opinion of the Justices, supra.

The sole duty of commissioners before whom this complaint is to be heard is to determine the diminution in the value of complainants' land, caused by flowage from defendant's dam. In arriving at that conclusion, they must accept the definition of the word "land" according to the statutory rule of construction; in other words, they must include all "hereditaments connected therewith and all rights and interests therein." They must consider its location and keep in mind that its "capacity for power development is an element of value to be considered." They must remember that "the element or elements of value which lead to the most profitable form of improvement fixes the proper valuation."

They must have in mind that "land upon the bank of a river and in its bed where there is a fall and adjacent land adapted for flowage may have a largely increased worth in the market by reason of those characteristics which may be available for valuable use in different ways and that the valuable uses to which the land may be put, including that of developing the capacity of the river for power, should be considered in estimating its fair cash value."

They must be guided by the rule that "one whose land is taken by eminent domain is entitled to be compensated in money for the fair value in the market of that of which he has been deprived and in ascertaining that value, all of the uses to which the property is reasonably adapted may be considered." They must follow the rule of damages that the complainant is entitled to the difference between the value of the property before the building of defendant's dam and afterwards.

They should be reminded of the provision of our State Constitution that "private property shall not be taken for public purposes without just compensation and only when the public exigencies require it"; and that, although our Court has somewhat reluctantly consented to regard the improvement of our rivers by the building of power dams as a public purpose, in view of the long acquiescence in that theory and the vested property rights acquired under it, it has never gone so far as to even intimate that in the face of

the constitutional provision, the owner of the land taken is not entitled to "just compensation."

Unless all of these factors are considered by the commissioners, injustice to the complainants must result. The chief value of the land taken may be "that it has a privilege upon it." Its value may be "greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it and water power thereby created."

The ruling below excludes all evidence on these various matters. It forbids their consideration by the commissioners. If sustained by this Court, it forces one of two conclusions—either that riparian rights are not property, a position never yet taken by any court; or that, under the Mill Act, private property may be taken without just compensation, thus irrevocably stamping that ancient statute as not of doubtful constitutionality but of undoubted unconstitutionality. Apparently the sole excuse for accepting such a theory,—condemned by Story and Kent, rejected by the courts of England and by the courts of every American state which have considered the subject with the exception of Massachusetts, denied by Angell, Gould, Farnham and all other standard text-writers,—is that, based upon an obsolete view of the common law, the Massachusetts court adopted the rule for which defendant contends.

In the face of precedent, logic, reason, and a decent regard for the rights of private property owners, such a ruling should not stand. Complainants' exceptions should be sustained.

DUNN, J., concurring in dissent.

MANUEL S. HOLMES

vs.

CHARLES W. VIGUE, EXECUTOR, ET ALII.

Kennebec. Opinion, July 12, 1934.

HUSBAND AND WIFE. GIFTS. PLEADING AND PRACTICE.

While the question as to what constitutes a gift is ordinarily one of law, the facts in a particular case may make the question one of law and fact, mixed.

That a woman assists her husband in his business, even in caring for money which is the product of their joint labor, does not make any part of the money her property.

The enabling statute does not absolve a wife from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station of life.

As to the documentary facts, the Court on appeal has the same functions as a sitting Justice, and draws the proper inferences for itself. Findings and inferences resting upon the observation of witnesses who have testified orally, are not reversed unless plainly erroneous. This is because of superior opportunity in the court below for judging the weight of evidence.

In the case at bar, the evidence justified the finding that the savings-bank books and stock certificates were in the unqualified possession of the wife, subject to her exclusive control, and would support the finding that the testatrix in virtue of completed gifts, had legal power to dispose of the personalty to take effect at death. The promissory note and annuity certificate, however, belong to the plaintiff.

On appeal. A Bill in Equity seeking to have the defendant Charles W. Vigue, Executor of the Last Will and Testament of Myra E. Holmes, wife of the plaintiff, declared trustee of certain property mentioned in the bill for the benefit of the plaintiff, and that the same be turned over to him. The Justice before whom the case was heard, entered a decree dismissing the bill without costs. From this decree the plaintiff appealed. Findings affirmed in all respects, except as to the promissory note and the annuity con-

tract. These are determined to belong to the plaintiff. Decree to be issued in accordance with this opinion. The case fully appears in the opinion.

Harvey D. Eaton, for plaintiff.

Perkins & Weeks, for executor.

Locke, Perkins & Williamson, for legatees.

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

DUNN, J. In this equity appeal, plaintiff is the appellant. Ultimate question, on the pleadings, proofs, and exhibits, was the ownership of certain bonds, savings bank books, stock certificates, a promissory note, and an annuity contract, in the possession of the executor of a will. The plaintiff contended that these represented or would produce, sundry accumulations of moneys, which, at odd times, over a period of years, he had delivered to the testatrix (his wife,) prior to her death, in 1931, in trust. On the part of the defense, it was submitted that direct evidence and reasonable inferences established voluntary and absolute transfers, distinctly impressed with the character of separate estate. The rights of no creditors of the husband were involved. Decision went on the theory of present gifts. Donative intent, delivery, and acceptance were found to have invested, in the instance of each item, just as good a title as could have been acquired otherwise. The justice hearing the cause ruled that a gift from a husband to his wife might be inferred from circumstances; as when, for example, she received property, managed it, controlled it, for years, with his acquiescence, consonant with owning originally. *Davis* v. *Zimmerman*, 40 Mich., 24; *Gray* v. *Gray*, 111 Me., 21, 87 A., 661.

Only the plaintiff introduced evidence. He himself did not, because, according to common-law rules of evidence governing the situation, he might not, witness.

The factual history is comparatively brief.

Plaintiff was a physician; his practice was begun in his home town (Oakland) in 1879. The following year he married. He had not, to then, been able to repay the cost of his education. Twelve years later his financial condition had improved sufficiently to enable him to be freed from debts, and to own his home. Mrs. Holmes,

who at the time of intermarriage was without material property, engaged in no occupation apart from that devolving upon her as a wife. In 1893, her husband conveyed the homestead to her. The title to other parcels of real estate, or interests therein, he later, directly or indirectly, invested in her. The bill recognizes the realty as hers in fee. Her distributive share from her father's estate, in 1911, amounted to one hundred dollars. She had, besides the real property, at her death,—as her own, concededly,—wearing apparel, two five dollar gold pieces, old-fashioned furniture, silver and plated ware, a watch and jewelry.

One bank book was in the house. Everything else in dispute was in a deposit box in a bank vault. No evidence tends to show that the safety box was, or ever had been, accessible to anybody except Mrs. Holmes. The bonds, of which there were three, each for one hundred dollars, are negotiable to bearer. There are twenty savings bank books, counting a loan and building association as a bank. All are in the name of Mrs. Holmes. Two show closed accounts; eighteen evidence active ones. These accounts, as cast up six months after the depositor's death, amount to $42,602.43. The certificates of stock are for three shares of Central Maine Power Company, twenty shares of Oakland Water Company, two shares of Oakland Improvement Association, and five shares of Oakland Woolen Company. Each certificate stands in the name of the now decedent. No estimate of the value of any stock is given. The promissory note, dated April 1, 1929, is for $400.00; it is payable to plaintiff or his wife, one month after demand. The annuity contract, or certificate, is in favor of the plaintiff and wife, or the survivor of them, in semiannual instalments of $12.25. The note, by its terms, is payable to either of two payees. The plaintiff seems entitled to it. R. S., Chap. 164, Sec. 8. The annuity certificate, too, appears to be his, on its very face.

The next question, on the appeal, is whether the finding as to the bonds, the savings bank books, and the corporate certificates, is manifestly wrong.

The question as to what constitutes a gift is ordinarily one of law; on the facts in the particular case, the question was of law and fact, mixed. 12 R. C. L., 974.

The finding relating to the books and certificates will have con-

sideration first. These themselves tended to prove that Mrs. Holmes was the creditor of the various banks, and the holder of shares in the different corporations. The bill alleged that the deposits were made, and the securities bought, by her, with the full knowledge, consent, and approval of her husband. That allegation was substantiated. The evidence fairly established that all bank deposits, and withdrawals therefrom, were made by her exclusively, without any attempt at control or use on the husband's part. Nor were there acts of dominion by him over the stock certificates. Unqualified possession of them by the wife, to the husband's knowledge, without inquiry or objection, in her safety box, while not conclusive of ownership, was found to count for her, and to overcome any prima facie inclination of evidence toward the plaintiff's side.

If the case stopped here, it would support the finding that testatrix had, in virtue of completed gifts, legal power to dispose of the personalty, to take effect at death.

Plaintiff argues, however, that, in the will itself, and in a note which testatrix wrote and filed with an earlier will, there is evidence rebutting any showing of unconditional delivery.

The will bears date June 7, 1924. A single paragraph contains two minor pecuniary bequests, gives six hundred dollars for the education of certain children, disposes, together with other things testatrix used and wore, of jewelry, wearing apparel and furniture, and makes thirteen bequests, aggregating $14,400.00, to charities.

Then comes this clause:

"The above is my part of the thirty thousand that I have helped earn and save."

Next, testatrix bequeaths fifteen thousand dollars to her husband. Additionally, in the same paragraph, she creates in him a life tenancy in her real estate, and vests remainder over in a charitable institution. Then are these words: "If there is more than thirty thousand at my death my half of what is over thirty thousand is to go to . . . (a charity)."

The earlier will was executed in 1897. This gave the property, whatsoever, except the homestead, to the husband. He was devised one-half the homestead; "my heirs the other half." The note, filed with the will, reads:

"You would not make any provision of the property, that I helped earn, for me saying that I could have my thirds and your relatives would have the rest. That is why I have had my will made as it is, in return for that *kindness* from you."

Of the bank accounts, only one had been opened in 1897. It had been started five years before, by depositing $250.00. The balance in 1897 is not shown. The last deposit was in 1927. Eventually, there was $2467.19. The next account was not begun until 1900. Up to the year 1897, Mrs. Holmes had neither stocks nor bonds. When she first acquired such was not in evidence.

The language of the quoted phrases, and of the note, is claimed to negative gifts, and to evince, on the part of Mrs. Holmes, the attitude that she had an interest in property, which she held as a trustee, by way of reward for personal services rendered her husband.

Fairly interpreted, the note merely recites that the husband's saying his wife should not have beyond her inheritable portion in his property motivated the terms of the will which the wife made. In no aspect does the note seem probative that bank books and other evidences of credits and securities acquired in twenty-four years intervening were held in trust or agency.

A claim for services would be untenable. That a woman assists her husband in his business, even in caring for money which is the product of their joint labor, does not make any part of the money her property. *Monahan* v. *Monahan*, 77 Vt., 133, 59 A., 169. All that Mrs. Holmes did in keeping the house, and assisting her husband, though incidental to his profession, would not alone entitle her to a share of his earnings, or of savings therefrom. *Sampson* v. *Alexander*, 66 Me., 182; *Berry* v. *Berry*, 84 Me., 541, 24 A., 957; *Bird Company* v. *Hurley*, 87 Me., 579, 33 A., 164. The enabling statutes do not absolve a wife from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station of life. *Stevens* v. *Cunningham*, 181 N. Y., 454, 74 N. E., 434.

The majority of the court construe the language of the will, not as a disaffirmance of individual property, but as expressing (the testatrix herself writing the words,) the moral reason why she felt free to will to strangers virtually one-half in amount of her own

property. The evidential showing is that of a woman of mature years, reflecting the journey of matrimonial life, back to where effect and cause meet. She and her husband had long lived and toiled together; substantially all the property that she had had come to her from him.

She began her will on a blank such as stationers sell, by defining purpose to dispose of "my estate." No neutralizing influence, it is the majority view, was afterward exerted on those words.

This suit, let it be observed, was not instituted for the interpretation of a will, but to establish that certain personal estate had been confided to one person, for the use of, or upon a trust for, another. The will was but one piece of evidence, weighed and considered with all the rest. True, as to documentary facts, the court on appeal has the same functions as a single justice, and draws the proper inferences for itself. *Glover* v. *Waltham Laundry Co.*, 235 Mass., 330. But, in the instant case, the appellate court, though divided, infers as did the trial court. Findings and inferences resting upon the observation of witnesses who have testified orally, are not reversed unless plainly erroneous. This is because of superior opportunity in the court below for judging the weight of evidence.

Enough now to say, finally, that the evidence concerning the promissory note and the annuity certificate is not regarded as justifying the finding that was made. As to these, the appeal is sustained, and the decree reversed. As to all things else, the appeal, not having been well taken, is dismissed, and the decree affirmed.

On the effectiveness of mandate, an order may be made in the court below for a final decree which shall accord herewith.

So ordered.

Honorable John A. Morrill, an Active Retired Justice, sat at the argument of this cause, and participated in the consultation, but, at the writing of this opinion, his commission being expired by limitation of time, he takes no part.

S. MARIE DAGGETT *vs.* EUGENE L. SMITH.

S. MARIE DAGGETT *vs.* NELLIE B. SMITH.

Somerset. Opinion, July 12, 1934.

BILLS AND NOTES. JOINT ENTERPRISE.

When endorsers are engaged in a common enterprise and their endorsements are for the sole purpose of furthering that enterprise, it may be sufficient, without any express understanding on which to base a finding by a Court or jury, that the endorsements were joint and not successive.

Under such circumstances, payment by an endorser on account of such joint liability, unless explained, is sufficient to warrant such a conclusion, and in such a case the right to contribution exists.

In the case at bar, plaintiff and defendants, relatives of Sabin, engaged in a common enterprise in which their interests were equal. It was their understanding that they were assuming a joint risk. Plaintiff had no intention when she signed the second note as co-maker to release defendants from the liability which they had incurred by endorsing the first note. She was therefore entitled to contribution.

On report. Two cases brought by the same plaintiff against two separate defendants to obtain reimbursement for money paid by the plaintiff on a judgment recovered by the Augusta Trust Company against one Edward J. Sabin, the plaintiff, and both defendants. Judgment for plaintiff in both cases. Damages to be assessed below in accordance with this opinion. The cases fully appear in the opinion.

Butler & Butler,
Merrill & Merrill, for plaintiff.
Gower & Eames,
James H. Thorne, for defendants.

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

PATTANGALL, C. J. On report. Both cases may be considered in one opinion as the questions involved in each are identical. Assumpsit for money paid out for use of defendants and at their request.

In September, 1924, two judgments were recovered against Edward I. Sabin, son-in-law of plaintiff and whose wife was a cousin of defendant Nellie B. Smith, wife of Eugene L. Smith. Sabin had no property and until 1928 no attempt was made by his creditors to collect the executions issued on the judgments against him. In April of that year, his wife died possessed of certain real estate which descended to him and plaintiff in equal shares.

Immediately following the death of Mrs. Sabin, the interest in the real estate which he had acquired by inheritance was seized on one of the executions and he was arrested on the other. He procured a release from the arrest by giving a statutory bond, the two defendants being sureties thereon. He later surrendered himself on the bond and was again taken into custody, proceedings for his release having failed. It was then arranged that he should settle both claims by giving a demand note, endorsed by the two defendants and the plaintiff, in the order named, which note on May 16, 1928, was discounted by the local bank and the judgments against him satisfied.

On the first of June, the bank demanded payment of the note or security therefor and plaintiff and Sabin gave a new note, secured by a mortgage on the real estate inherited from Mrs. Sabin, and endorsed by defendants.

The matter stood for four years. Plaintiff paid the interest during that period, but the taxes on the real estate were in default and the bank insisted on payment. Suit was brought against Sabin, the plaintiff and both defendants jointly, and judgment rendered by default. On the judgment, Sabin's real estate was sold for a sufficient sum to satisfy so much of the judgment as exceeded $2,391.16; and to protect her real estate, which had been attached in the proceedings, plaintiff paid the remainder and brings these actions to enforce contribution on the part of defendants, joint judgment debtors with her.

On the face of the judgment all of the parties were equally liable and subject to contribution to one who paid the amount

thereof, but it is admitted that it is proper to go behind the judgment and determine the equitable rights of the parties before contribution can be enforced. So far as Sabin was concerned, it is of course apparent that the liability of all of the other parties was secondary to his. Plaintiff and both defendants came into the transaction for his accomodation. But defendants take the position that they are excused from contribution to plaintiff because on the second note plaintiff signed as co-maker with Sabin, while they signed as endorsers and that, as their signatures were procured after plaintiff had so signed, they can not be held by plaintiff for any part of the money paid out by her, relying upon *Wescott* v. *Stevens*, 85 Me., 325, 27 A., 146.

Without questioning in the slightest degree the authority of that case, the rule therein laid down does not, we think, apply here. There is no conflict between the law as stated in *Wescott* v. *Stevens*, supra, and that in *Holston* v. *Haley*, 125 Me., 485, 135 A., 98, 100. In the latter case, a modification of the rule appears:

> "The general principle is that when the endorsers are engaged in a common enterprise and their endorsements are for the sole purpose of furthering that enterprise in which each one's interest is equal with that of each of the others, it may be sufficient without any express understanding on which to base a finding by a court or jury that the endorsements were joint and not successive. Under such circumstances payment by an endorser on account of such joint liability, unless explained, is surely sufficient to warrant such a conclusion."

This seems applicable. Plaintiff and defendants, relatives, or at least family connections, of Sabin, engaged in a common enterprise in which their interests were equal. They acted together to protect him from arrest and imprisonment. There is sufficient in the case to satisfy us that their understanding was that they were assuming a joint risk. Certainly plaintiff had no intention, when she signed the second note as co-maker, to release defendants from the liability which they had incurred by endorsing the first note.

Had plaintiff paid the first note, on which it appears that her name stood last, it would have been inequitable that she should have been permitted to collect the entire debt from defendants. On

the other hand, her right to demand contribution could not have been questioned. Had she, instead of paying cash for the first note, taken it up by giving the bank her own note, she would have been entitled to contribution. It would not be argued that merely because defendants endorsed the second note they escaped a liability which would have unquestionably existed had they not done so. Such a position would be patently absurd. Yet that is what defendants' claim really resolves itself into when analyzed.

The action is equitable in its nature. The equities are plainly with plaintiff and her right to contribution rests upon sound legal principles. The cases being on report, the mandates in both must be

Judgment for plaintiff in both cases. Damages to be assessed below in accordance with this opinion.

KING'S CASE.

Kennebec. Opinion, July 12, 1934.

WORKMEN'S COMPENSATION ACT. WORDS AND PHRASES.

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.

The case at bar falls within the rule laid down in Johnson's Case, 125 Me., 443, wherein at the time the injury occurred the relation of employer and employee was suspended.

The decision of the Commission was correct.

A Workmen's Compensation Case. Appeal from decree of a sitting Justice affirming decree of Industrial Accident Commission denying petitioner, the dependent widow of the deceased employee, compensation. The issue involved the question whether or not the

deceased was an employee of Wyman & Simpson Inc., and if so whether the accident occurred in the course of employment. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

F. Harold Dubord, for petitioner.

Locke, Perkins & Williamson, for respondent.

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

PATTANGALL, C. J. Workmen's compensation case. Appeal from decree denying compensation to the dependent widow of Albert King. Two questions were involved at the hearing before the Commission—first, whether deceased was an employee of the defendant or an independent contractor; second, whether the accident which caused the injury occurred in the course of his employment and arose out of it. On the first issue, the Commission found for the petitioner and on the second against her.

It appeared that King entered into a contract with the defendant to furnish, for its use in connection with the construction of a section of State highway, five automobile trucks with drivers, the compensation therefor being partly on a per diem basis and partly on a price per yard for gravel hauled. There was nothing in the contract compelling King to perform any personal service or even to be present where the work was being performed, nor to indicate any particular length of time that his contract should be in force or that he should move any definite quantity of material.

As a matter of fact, he was about the job practically every day, going from place to place on the construction work, watching his trucks and drivers, causing necessary repairs to be made, checking the loads and time and generally supervising the portion of the work which concerned him, although the pay for the trucks and drivers would have been the same had he been absent. All expenses of repairs and operation of the trucks were paid by him.

He arranged for quarters for his drivers and himself and for parking space for his trucks at Goose Pond Rest, a wayside stand situated at a point near the middle of the construction job, although no actual construction was in progress near it at the time

of the accident. After working hours, the drivers on their own time did such greasing and repair work in connection with the trucks as was required to put them in condition for operation on the following day.

On the day when the accident occurred, one of King's trucks went into a ditch at a point where the road was under construction and King, accompanied by some of his drivers, undertook to bring the truck back into the highway. They were at first unsuccessful but after having returned to Goose Pond Rest where they had a lunch, they went back to the ditched truck, finally got it into the road and started back to the camping place. After arriving there and while in the process of parking the trucks, an automobile approached and King stepped into the highway with a flashlight in his hand to warn the driver of the oncoming car. The road was slippery, it was snowing, and the car could not, or at least did not, stop until it struck King, inflicting injuries which resulted in his immediate death.

On these facts the Commission found as stated above. Although the entire case is reopened on appeal, we are not particularly concerned with the finding that King was an employee of defendant rather than an independent contractor. The case can be satisfactorily disposed of without discussing that question. If the Commission correctly decided the remaining issue, appellant is not aggrieved by error, if error exists, in the decision of the first proposition. Assuming, therefore, for the sake of brevity, that King was an employee of defendant, we see no reason for disagreeing with the Commission on the proposition that the injury which caused his death neither arose out of, nor occurred in the course of, his 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 upon to perform." *Wheeler's Case*, 131 Me., 91, 159 A., 331, 332.

Certainly it was no part of King's necessary work to stand in the highway, warning approaching automobiles of the danger of collision with the trucks which his men were engaged in parking after the conclusion of their day's work, although it may have been a

perfectly proper thing for him to do under the circumstances. The risk which he assumed had no relation to the work in which defendant was engaged.

The case seems to fall well within the rule laid down in *Johnson's Case*, 125 Me., 443, 134 A., 564, which it resembles very closely in its essential facts. The decision of the Commission must stand.

Appeal dismissed.
Decree below affirmed.

E. L. CLEVELAND COMPANY

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion, July 19, 1934.

RAILROADS. CONTRACTS. R. S. 1930, CHAPTER 65, SECTION 63.

In an action for fire loss based on Section 63 of Chapter 65, R. S. 1930, providing "When a building is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury," and wherein plaintiff under written permit maintained a potato warehouse which was destroyed by fire communicated to it from defendant's locomotive, and wherein plaintiff in its permit expressly released the railroad from all risk of loss or damage to his buildings or potato warehouse occasioned by fire,

HELD:

That an assumption by the permittee of risk of loss or damage to such building . . . occasioned by fire, whether communicated directly or indirectly from locomotives, or in or by the operation of said railroad or otherwise . . . is not illegal and does not violate said statute, either expressly or impliedly.

Such an assumption of risk of loss from fire so communicated is not contrary to public policy and so illegal.

Even where fire is so communicated by the negligence of a railroad company, such assumption of risk releases it from liability if, as in this case, it enters into such a contract in its private capacity.

A railroad company, though a public carrier, in a contract not involving public carriage, can take a valid release of liability for destruction by fire of the leased property, whether the same be on its right of way or not, if it be along the route.

The words of the statute "along the route" describe buildings being near and adjacent to it so as to be exposed to the danger of fire from engines but without limiting or defining the distance.

The fire release in this permit is lawful and constitutes a valid defense to this action.

Law on brief statement of facts. An action under Chapter 64, Section 63, R. S. 1930, to recover damages for loss of plaintiff's warehouse and contents destroyed by fire communicated by defendant's locomotive. The sole issue involved the validity of a fire release clause in plaintiff's permit. Judgment for the defendant. The case fully appears in the opinion.

J. F. Burns, for plaintiff.

Henry J. Hart,
Frank P. Ayer,
James C. Madigan,
Cook, Hutchinson, Pierce & Connell, for defendant.

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

HUDSON, J. "Law" on brief statement of facts.

Under a written permit from the defendant Company dated July 12, 1932, the plaintiff maintained a potato warehouse "on land of the defendant but not used by it in the operation of its railroad." On May 18, 1933, this warehouse with its contents was destroyed by fire, communicated to it from the defendant's locomotive.

This action to recover fire loss is based on Section 63 of Chapter 64, R. S. 1930, which provides:

> "When a building or other property is injured by fire communicated by a locomotive engine the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. . . ."

The sole defense claimed is the fire release in the permit which is couched in these words:

> "The contractor" (meaning the plaintiff) "hereby assumes all risk of loss or damage to said building, or property stored therein . . . occasioned by fire, whether communicated directly or indirectly from locomotives, or in or by the operation of said railroad, or otherwise, and all damage caused by fire, for which the Company would but for this agreement be liable, so that neither said Contractor nor any person claiming under the Contractor shall have or make any claim against the Company for damages to such property caused by fire communicated as aforesaid, or otherwise, . . ."

The plaintiff contends that this provision of the permit is invalid, because, (1) it violates the statute above quoted, and, (2) is against public policy.

The statute itself is not attacked as unconstitutional. In *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S., 1, Justice Gray, speaking of our Maine statute, after remarking that it was enacted in 1842, said its "validity" had been "upheld" by our highest court, citing *Chapman* v. *Atlantic & St. Lawrence R. R.*, 37 Me., 92; *Pratt* v. *Same*, 42 Me., 579; *Stearns* v. *Same*, 46 Me., 95; *Sherman* v. *Maine Central Railroad*, 86 Me., 422, 30 A., 69. Similar statutes have been held constitutional by United States Courts. *St. Louis & San Francisco Ry.* v. *Mathews*, supra; *Atchison, Topeka & Santa Fe R. R.* v. *Matthews*, 174 U. S., 96; *Aetna Insurance Co.* v. *Chicago, Great Western R. R.*, 180 N. W., 649.

The sole issue in this case is whether or not this release is legal. It is not invalid because of the statute. Neither by express language nor by implication does it forbid such a release, although its language is broad enough to release from liability on account of a fire occasioned through negligence.

> "This language is general and comprehensive and if read literally it includes all cases of fire communicated by locomotive engines, whether by reason of negligence or not." —*Farren* v. *Railroad Company*, 112 Me., 81, 83.

The purpose of the statute was to create a right of action where, except by early English common law, afterwards abrogated by 6 Ann, Chap. 31 (*Farren* v. *Railroad Co.*, supra), there was none unless negligence could be shown. Section 63 aforesaid, while giving a remedy, does not compel its adoption. In spite of the statute, there can be no doubt that one whose property has been destroyed by fire can lawfully refrain from prosecution of his rights, and in the absence of such prosecution, the railroad company can fail to pay without violation of law. We see in the statute no implication that would prevent the giving of such a release in a contract before the loss.

It should now be noted, however, that the fire in this case is not shown by the agreed statement to have been of negligent origin. We can not assume any negligence upon the part of the defendant. If not negligent, the cause of the fire was accidental. We can not conceive of any reason why a contract can not legally include such a provision as to fire accidentally communicated.

But even if the permit contemplates a release of fire negligently communicated, it is still valid in this case.

> "Contracts exempting a railroad company from liability for damages to buildings on its right of way from fire caused by its negligence are not invalidated by laws making carriers liable for damages irrespective of negligence."—51 C. J., 1185, Sec. 1314; *Griswold* v. *Illinois Central Railroad Co.*, 90 Iowa, 265, 57 N. W., 843, 24 L. R. A., 647; *Manchester Marble Company* v. *Rutland Railroad Co.*, 100 Vt., 232, 136 A., 394.
>
> "Such contracts are not in violation of a constitutional provision that 'no common carrier shall be permitted to contract for relief from its common law liabilities.'"—51 C. J., 1185, Sec. 1314; *Greenwich Ins. Co.* v. *Louisville, etc., R. Co.*, 112 Ky., 598, 66 S. W., 411, 56 L. R. A., 477.

The stipulation of facts in this case does not state definitely whether this warehouse was on the railroad right of way or off from it. We think we are justified, however, from the arguments made, in inferring that if not located on the right of way, it was in close proximity thereto. Certainly it was within the reach of loco-

motive sparks. While it is true that some cases have distinguished in the application of the law as to whether the property destroyed is on or off the right of way (see distinction mentioned in *Manchester Marble Co.* v. *Rutland Railroad Co.*, supra,) yet the cases generally hold "that contracts, in consideration of some privilege or concession granted by a railroad company which it would not otherwise be bound to extend, exempting it from liability for the destruction even of buildings not on its right of way, are valid and enforceable."—See Annotation in 48 A. L. R., page 1003, supported by citations of many cases therein.

Furthermore, although the defendant was, at the time of the making of the contract, a common carrier, yet it was not one for carriage of either persons or property, nor pertained to performance of its duties as a carrier or a public utility. *Bartee Tie Co.* v. *Jackson*, 117 N. E. (Ill.) 1007, (holding that the leasing of land by a railroad company to a private corporation for the purpose of storing cross ties is not a lease of a public utility.)

> "While a railroad company may not contract for exemption wholly or partially from liability for damages caused by fire in derogation of its duty to the public as common carrier, in its private capacity as owner of property it may, by a valid contract, be relieved from liability for damages by fire caused by its negligence."—51 C. J., page 1183.

While we find no Maine case in support of the above statement of the law, yet it is overwhelmingly sustained by decisions in Federal as well as State Courts. Perhaps the leading case is *Griswold* v. *Illinois Central Railroad Company*, supra, in which the decision is based on the theory that the company enters into such a contract in its private capacity in which it owes no duty to the public to exercise care. The Court said:

> "It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employ-

ment of workmen in its shops, warehouses, or elsewhere apart from the operation of the road."

The cases so holding are so numerous that we will not attempt to enumerate them. They may be found collected in Foot Notes 20 and 21, 51 C. J., on page 1184; also in annotations in 44 L. R. A., page 1127; 48 A. L. R. Ann. 1003; 51 A. L. R. Ann. 638.

We quote from one of the best reasoned opinions among them, namely *Hartford Ins. Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 175 U. S., 91, in which Justice Gray said, at pages 97 and 98:

> "It is settled by the decisions of this Court that a provision, in a contract between a railroad corporation and the owner of goods received by it as a common carrier, that it shall not be liable to him for any loss or injury of the goods by the negligence of itself or its servants, is contrary to public policy and must be held to be void in the courts of the United States, without regard to the decisions of the courts of the State in which the question arises. But the reasons on which these decisions are founded are, that such a question is one of the general mercantile law; that the liability of a common carrier is created by the common law, and not by contract; that to use due care and diligence in carrying goods entrusted to him is an essential duty of his employment, which he can not throw off; that a common carrier is under an obligation to the public to carry all goods offered to be carried, within the scope and capacity of the business which he has held himself out to the public as doing; and that, in making said contracts for the carriage of such goods, the carrier and the customer do not stand on equal terms."

In that case, the property involved was a warehouse standing on railroad property by the side of its track. The Court said:

> "But it" (meaning the railroad) "is not obliged, and can not even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses or similar structures, for their own benefit, upon the land of the railroad company. *Missouri Pacific Railroad Co.* v. *Nebraska*, 164 U. S., 403. . . .

"The principal consideration, expressed in their contract, for the license to build and maintain the warehouse on this strip of land, was the stipulation exempting the railroad company from liability to the licensee for any such damages. And the public had no interest in the question which of the parties to the contract should be ultimately responsible for said damages to property placed on the land of the corporation by its consent only."

And so the United States Court held the fire release valid.

"The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence 'seeks to put off two essential duties of his employment.' It is recognized that the carrier and the individual customer are not on an equal footing. 'The latter can not afford to higgle or stand out and seek redress in the courts. . . . He prefers, rather, to accept any bill of lading, or sign any paper that the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business.' *Railroad Company* v. *Lockwood*, supra, pages 378, 379. For these reasons, the common carrier in the transaction of its business as such is not permitted to drop its character and transmute itself by contract into a mere bailee with right of stipulation against the consequences of its negligence.

"Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the trans-

portation of persons or things, whose carriage in other circumstances might be within its public obligation."—*Santa Fe R. R.* v. *Grant Brothers,* 228 U. S., pages 184 and 185.

The defendant, then, in the making of this contract, was acting in its private capacity and in so doing had in full the rights of an individual; and as an individual landlord could lawfully enter into such an agreement with his tenant, so a railroad company, though a public carrier, can in a contract not involving public carriage, take a valid release of liability for destruction by fire of the leased property, whether the same be on its right of way or not, if it be "along the route" and the words of the statute "along the route" "describe buildings being near and adjacent to the route of the railroad so as to be exposed to the danger of fire from engines but without limiting or defining the distance."—*Pratt* v. *Atlantic & St. Lawrence R. R. Co.,* 42 Me., 583; *Martin* v. *Grand Trunk Railway Co.,* 87 Me., 411, 32 A., 976; *Pierce* v. *Bangor & Aroostook Railway Co.,* 94 Me., 171, 47 A., 144.

Such an agreement not only does not offend the statute but is not contrary to public policy.

"Agreements are not to be held void as being contrary to public policy unless they are clearly contrary to what the legislature or judicial decision has declared to be the public policy or they manifestly tend to injure the public in some way."—13 C. J., 427, and cases cited in Foot Note 51.

In these days when it would almost seem as though some courts sanction the breach of plainly stated lawful contracts, it is with real satisfaction that we quote the following language from a United States Court decision of former days not only as pertinent but as safe and sound law:

"At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. . . . Public

policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice."—*Baltimore & Ohio R. R. Co.* v. *Voigt*, 176 U. S., 505, 506.

Our decision, then, is that this fire release constitutes a complete defense to this action and so, as stipulated, the entry must be,

Judgment for the defendant.

RANGELEY LAND COMPANY ET AL

vs.

EDWARD E. FARNSWORTH ET ALS, State Highway Commissioners.

Franklin. Opinion, July 19, 1934.

HIGHWAYS. TOWNS. INJUNCTION. STATE HIGHWAY COMMISSION.

R. S., CHAP. 28, SECS. 8 AND 14.

The State Highway Commission has no authority to construct state aid highways on its own motion without preliminary action on the part of a town, plantation or group of municipalities or by municipal officers or county commissioners.

The burden of initiating the construction of state aid highways lies on the interested communities. They can not compel the State to take part in the proposed joint enterprise, nor can the State compel them to do so.

No such highway can be constructed without local consent and cooperation which must be secured before state authorities can act.

In the orderly proceedings provided, the municipal officers propose a plan, the Commission may reject or accept it in part or in whole or return it with modifications. Unless it is rejected, the town at its annual meeting acts upon it. The town may then reject it. If it does so, that ends the matter. If it approves, it must make an appropriation, the amount of which is fixed by statute. The

Commission then, after notice and hearing, opportunity having been given for all interested parties to be heard and for petitioning voters to present their views, renders its final decision. After these requirements are complied with, it may exercise its power by virtue of the provisions of Secs. 8 and 14, Chap. 28, R. S. 1930, to "lay out, establish and construct" a state aid highway. It can not do so until and unless the necessary preliminary steps are taken.

Injunction will lie to prevent construction of state aid highways by state authorities until the statutory requirements have been complied with and any interested taxpayer may properly institute proceedings to secure relief by that means.

In the case at bar, the proposed action of the State Highway Commission was without authority of law.

On report on an agreed statement of facts. A bill in equity brought by plaintiff land owners against the individual members of the State Highway Commission to restrain them from constructing a new State Aid Highway in Franklin County, until proper steps had been taken by the interested towns, municipal officers or County Commissioners and otherwise carrying out the provisions of Chapter 28, R. S. 1930.

Bill sustained. Injunction to issue as prayed for and stipulated. The case fully appears in the opinion.

Bradley, Linnell, Nulty & Brown, for plaintiff.

Clyde R. Chapman, Attorney General,

Sanford L. Fogg, Deputy Attorney General, for respondents.

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

PATTANGALL, C. J. On report. Bill in equity asking for injunction against defendants in their capacity as State Highway Commissioners to prevent them from proceeding with the construction of a state aid highway on and across land of plaintiffs.

The agreed facts are as follows. The Rangeley Land Company and the other plaintiffs named in the bill are owners of real estate in Franklin County, particularly in Rangeley Plantation. The defendants were, on the date of the filing of the bill, members of the State Highway Commission.

On March 7, 1934, the defendants, in their capacity as members

of the State Highway Commission, determined to lay out and establish a new highway as a state aid highway, beginning at Houghton, in the Town of Byron, in the County of Oxford, and extending in a northerly direction into and through Franklin County to the state highway at Oquossoc in that County, in part across land owned by the plaintiffs; and on March 14, 1934, gave notice of the taking of land of plaintiffs for that purpose.

Prior to the action of the State Highway Commission or their agents in purporting to take plaintiffs' land, no way, either public or private, existed along the line described in the bill. Neither the interested towns, plantations, nor the County Commissioners of Franklin County have raised or appropriated money for the construction of the proposed highway, on account of which state aid can be paid; nor have any of them applied for state aid for any way along this route. Neither the municipal officers of such towns or plantations nor the County Commissioners of Franklin County have designated the proposed highway as best suited to serve outlying communities, to connect adjoining towns and villages, or to facilitate travel in reaching markets, railroad connections and state roads, giving consideration to cost as well as distance and volume of travel. Neither the municipal officers nor County Commissioners of Franklin County have presented to the State Highway Commission for its approval any description of any such way.

No town meeting has been held by any of the towns in Franklin County through which said proposed way would pass to determine the question of its desirability. The question of whether or not a necessity or public exigency exists for such a highway has not been determined by hearing. The State Highway Commission, on its own motion, has laid out and attempted to open the proposed highway, wholly without initiative for such action on the part of any interested town, plantation or group thereof, or by the County Commissioners of Franklin County.

The maintenance cost thereof would be borne in part by Rangley Plantation, if said road were constructed according to the provisions of Chapter 28, R. S. 1930. The plaintiffs are substantial taxpayers in Rangeley Plantation and in other towns and plantations in Franklin County, and if maintenance charges are assessed against the towns and plantations in that county, they would be

compelled to bear their share of the necessary resulting increase in taxes.

It is stipulated that if the Court should find the contentions of the plaintiffs to be correct, namely, that the defendants under Chapter 28, R. S. 1930, have acted in an unauthorized manner, the Court shall cause to be issued a permanent injunction restraining them and their successors in office from laying out and constructing the proposed highway in Franklin County, and particularly in Rangeley Plantation, unless and until proper steps have been taken by the interested towns, municipal officers or County Commissioners by appropriating funds for the construction thereof, on account of which state aid shall be given, applying for the same, and otherwise carrying out the provisions of Chapter 28. If the Court shall find the contentions of the defendants to be correct, namely, that the State Highway Commission has acted as authorized by Chapter 28, it shall dismiss the bill.

The definite issue presented is whether or not the State Highway Commission is authorized to construct a state aid highway on its own motion without initiative action on the part of any interested town, plantation or group thereof, by their municipal officers, or by county commissioners. We think not.

Defendants rely upon the provisions of Secs. 8 and 14, Chap. 28, R. S. 1930. Sec. 8 provides that "the commission shall lay out, construct and maintain a system of state highways and state aid highways." Sec. 14 provides that "the Commission may lay out, establish and open a new highway as a state or state aid highway." Taken by themselves, these provisions would seem to authorize defendants' position; but it is necessary to examine and analyze with some care Chapter 28 in its entirety in order to determine the intent of the legislature in regard to the subjects treated therein.

Highways are divided by Sec. 5 of that chapter into three classes — state highways, meaning a system of connected main highways throughout the state; state aid highways, meaning such highways not included in the system of state highways as shall be thoroughfares between principal settlements, or between settlements and their market or shipping point and so far as practicable feeders to the state highway; and third class highways, which include all highways not within either of the other classes.

The expense of construction of state highways is borne wholly by the state (Sec. 8), excepting that under certain circumstances a town may voluntarily, with the permission of the State Highway Commission, join in the cost of constructing a portion of designated state highway within its boundaries (Sec. 23). They are maintained under the direction and control of the Commission at the joint expense of the state and the towns in which they are located (Sec. 9).

Municipal officers are authorized to designate such practicable systems of public ways within their jurisdiction as will best serve outlying communities, connect adjoining towns and villages, and facilitate travel in reaching markets, railroad connections and state roads, due consideration being given to cost as well as distance and volume of travel. A suitable description of each such way shall be presented to the Commission for its approval and, upon being approved and accepted by the Commission, shall be established and known as a state aid highway. Twenty or more voters in any town, by written petition presented within thirty days after the description of such way has been filed with the Commission, shall have the right to be heard on the acceptance thereof and the Commission may accept or reject any part or all of such way and impose terms in respect thereto (Sec. 17).

The expense of construction of state aid highways is borne jointly by the state and municipalities (Secs. 19 and 21), and they are maintained under the direction and control of the Commission at the joint expense of state and towns (Sec. 18).

Towns desiring state aid for building or permanently improving state aid highways may raise and appropriate money for that purpose (Sec. 19).

Between July 15 and August 15 of each year, municipal officers may prepare and file with the Commission suggestions for improvement of state aid highways, during the year following, and before February 20th the Commissioners are directed to report on these recommendations in order that the towns may act upon them in their annual meetings, such action including the appropriation of necessary funds (Sec. 20).

These various enactments are all indicative of a plan which places upon the municipalities desiring state aid in construction of

state aid highways the burden of initiating the proposition and submitting it to the Highway Commission for approval. Towns can not compel the state to take part in the joint enterprise nor can the state compel towns to do so, although such would be the effect if the clauses quoted from Sections 8 and 14 are given the force claimed by defendants.

These sections can only be reconciled with the remaining provisions of Chapter 28 on the assumption that the authority given to the Commission to "lay out, construct and maintain state aid highways" and "to lay out, establish and open a new highway as a state aid highway" becomes effective only after the preliminary action called for in the other sections quoted has been exercised by the interested municipalities.

Our view that such was the intent of the legislature is strengthened by the fact that Sec. 8 provides that before beginning the construction of a state highway, after reasonable notice by publication, all parties interested shall be given a hearing before the Commission, while no provision is made for such hearing with regard to a state aid highway. If this section and Sec. 14 are taken literally, unmodified by the following sections, it would appear that while the Commission could not construct a state highway to be built entirely from state funds without a public hearing at which towns interested in the maintenance of such a way could be heard, it could construct a state aid highway in part at the expense of the towns without such a hearing.

The somewhat elaborate provisions relating to the necessary action on the part of municipal officers and towns and the right of twenty taxpayers to intervene and be heard before a state aid highway should be established would amount to nothing if they could all be dispensed with by summary and arbitrary action of the Commission.

The fair consideration of whether or not a proposed state highway would "best serve outlying communities, connect adjoining towns and villages and facilitate travel in reaching markets, railroad connections and state roads, due consideration being given to cost as well as distance and volume of travel," would be impossible without a hearing and should not be subject to arbitrary decision.

It is not contemplated that the state shall bear the entire expense of construction of a state aid highway. In order to procure state aid the town must make an appropriation for such construction. Certainly it could not be contended that the Commission could compel a town to make such an appropriation. How then could it possibly proceed to construct a state aid highway, in opposition to the wishes of the community served by it?

If the Commission were to be given authority to construct state aid highways on its own initiative, it would be necessary to arrange some method of assessing a portion of the expense against the interested towns. The statute provides none. The act of a municipality in making an appropriation for the construction of a state aid highway must be voluntary. No such highway can be constructed without local consent and cooperation, and that consent and cooperation must be procured before state authorities can act.

In the orderly proceedings provided, the municipal officers propose a plan, the Commission may reject or accept it in part or in whole or return it with modifications. Unless it is rejected, the town at its annual meeting acts upon it. The town may then reject it. If it does so, that ends the matter. If it approves, it must make an appropriation, the amount of which is fixed by statute. The Commission then, after notice and hearing, opportunity having been given for all interested parties to be heard and for petitioning voters to present their views, renders its final decision. After these requirements are complied with, it may exercise its power by virtue of the provisions of Secs. 8 and 14 to "lay out, establish and construct" a state aid highway. It can not do so until and unless the necessary preliminary steps are taken.

Bill sustained.
Injunction to issue as prayed for and stipulated.

MARGARET LEVISTON *vs.* STANDARD HISTORICAL SOCIETY.

Kennebec. Opinion, July 20, 1934.

REVIEW. PLEADING AND PRACTICE. ATTORNEY AND CLIENT.

R. S., CHAP. 103, SEC. 1, PAR. I AND PAR. VII.

On a petition for review under special case VII of Section 1 *of Chapter* 103, *Revised Statutes, where, there is no allegation or proof of fraud, the only question before the Court is whether there has been such a failure of justice through accident, mistake, or misfortune that a further hearing of the cause would be just and equitable.*

The burden of establishing these essential requisites of a review is on the petitioner.

The allowance or denial of the petition rests wholly in the discretion of the Court and its decision can be revised upon exceptions only for erroneous rulings on matters of law.

The words "accident, mistake, or misfortune," as used in case VII of the Statute, ordinarily import something outside of the petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for.

If judgment goes against a litigant by reason of his neglect to appear or by reason of the insufficiency of his evidence or argument, he has not thereby suffered an injustice, but rather the natural consequences of his own neglect.

The negligence of an attorney is the negligence of the party he represents. And if an attorney permits a judgment to be entered against his client on default through inexcusable or unjustifiable neglect, it is not error to refuse to allow a review of the action.

Inexcusable and culpable neglect on the part of the client or his attorney is not "accident, mistake, or misfortune" within the meaning of the Statute.

In the case at bar, the petitioner was not entitled of right to a review under case I, Section 1, Chapter 103, R. S. Review under this provision is a matter of discretion.

The decision of the trial Judge that the culpable neglect of the petitioner's attorney was sufficient ground for denying the review on this petition, presented no erroneous rulings of law.

On exceptions. A petition for review. Petitioner, sued by the respondent, was defaulted through the neglect of her counsel to enter appearance. The sitting Justice denied the petition for review on the ground that the negligence of counsel must be attributed to the petitioner. To his ruling petitioner excepted. Exceptions overruled. The case fully appears in the opinion.

Harvey D. Eaton, for petitioner.

C. A. Blackington, for respondent.

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

STURGIS, J. This is a petition for review of an action in which judgment was entered against the petitioner by default. In the trial Court, the petition was denied on the ground that, although it was alleged and fairly sustained by the evidence that the petitioner had a defense to the action and intended to present it at the trial, the attorney she employed negligently failed to enter his appearance and defend the case. Exceptions to the denial of the petition were reserved.

When judgment is rendered on default against an absent defendant, he is entitled "of right" to a review. R. S., Chap. 96, Sec. 5. If the defendant brings himself within this statute, a writ of review will be issued under R. S., Chap. 103, Sec. 7 without petition. *Jackson* v. *Gould,* 72 Me., 335, 338. This is the review of right referred to as given by R. S. 1858, Chap. 82, Sec. 4, and discussed in *Jones* v. *Eaton,* 51 Me., 386. And we have no doubt that the Court intended to cite the same provision as re-enacted in R. S. 1871, Chap. 82, Sec. 4, in its comments on review of right in *Sherman* v. *Ward,* 73 Me., 29. The reference in that case to R. S., Chap. 89, Sec. 1, case 1st, as authority for a review of right is undoubtedly a clerical error.

The petitioner here, however, was not an absent defendant within the purview of the statute giving a review of right. So far as the record discloses, she resided and was present in the State at all times. She is a petitioner for review under R. S., Chap. 103, Sec. 1, which permits any justice of the superior court to grant one review in civil actions when judgment has been rendered in any judicial

tribunal in that county if petiton therefor is presented within three years after the rendition of judgment, and in the special cases thereinafter enumerated. The petition presented here was, in the first instance, considered by the presiding Justice in the light of the provisions of special case numbered VII of the Statute, which reads:

> "VII A review may be granted in any case where it appears that through fraud, accident, mistake, or misfortune, justice has not been done, and that a further hearing would be just and equitable, if a petition therefor is presented to the court within six years after judgment."

There is no allegation or proof of fraud. The only question before the Court was whether there had been such a failure of justice through accident, mistake, or misfortune, that a further hearing of the cause would be just and equitable. The burden of establishing these essential requisites of review was on the petitioner. *Donnell* v. *Hodson*, 102 Me., 420. The allowance or denial of the petition rested wholly in the discretion of the Court. *Tuttle* v. *Gates*, 24 Me., 397; *Jones* v. *Eaton*, supra; *Austin* v. *Dunham*, 65 Me., 533; *Berry* v. *Titus*, 76 Me., 285. Its decision thereon can be revised upon exceptions only for erroneous rulings on matters of law. *Thomaston* v. *Starret*, 128 Me., 328.

In construing this statute, it has been held that the words "accident, mistake, or misfortune," as used therein to describe the source of injustice which would make a further hearing just and equitable, "ordinarily imports something outside of the petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for." It is the duty of litigants to be diligent in their cases in court. "If judgment goes against a litigant by reason of his neglect to appear or by reason of the insufficiency of his evidence or argument, he has not thereby suffered an injustice, but rather the natural consequences of his own neglect." *Pickering* v. *Cassidy*, 93 Me., 139, 147. A review will be denied "when it appears that the petitioner's predicament is due to his own fault and want of reasonable diligence." *Farnsworth* v. *Kimball*, 112 Me., 239. The negligence of an attorney is the negligence of the party he represents. *Beale* v. *Swasey*,

106 Me., 35; *Harmon* v. *Fagan*, 130 Me., 171. If an attorney permits a judgment to be entered against his client on default through apparent neglect which arises from a mistaken belief as to what has been done in the cause, it may bring the case within the statute, but, if the neglect and resulting default be without valid excuse or justification, it is not error to refuse to allow a review of the action. Such inexcusable and culpable neglect is not accident, mistake, or misfortune as those words are used in the law. *Taylor* v. *Morgan*, 107 Me., 334.

The Bill of Exceptions in this case shows that the petitioner's attorney presented the matter in the trial Court and stated the facts and circumstances which led to the default in the original action. In regard to his own neglect, he said, "Petitioner's attorney offered no excuse for his failure to appear except that he was engaged in other matters which led to oversight and forgetfulness on his part." This frank admission of inexcusable neglect on the attorney's part did not establish "accident, mistake, or misfortune" under Case VII of the statute.

The contention of counsel that a review might have been granted this petitioner under Case I, Section 1, Chapter 103, R. S., has not been overlooked. Under that provision, one review of an action defaulted without appearance may be granted when the petition therefor is presented within three years after an officer, having the execution issued on the judgment thereon, demands its payment of the defendant or his legal representatives. This special provision obviously has reference to defendants who can not excuse their default by proof of absence from the State, and does not apply to absent defendants who are given a review as a matter of right under R. S., Chap. 96, Sec. 5, already considered. Review under Case I, however, is a matter of discretion. It was so provided in the original act granting a review in this class of cases. P. L. 1858, Chap. 40, Sec. 1. Subsequent revisions indicate no change in the legislative intent and have been so construed. *McNamara* v. *Carr*, 84 Me., 299, 303. The petitioner's claim that she is entitled "of right" to review under Case I can not be sustained.

The trial Judge evidently deemed the culpable neglect of the petitioner's attorney sufficient ground for denying a review under

Case I as well as Case VII of the statute. These questions were addressed to his discretion. His decision presents no erroneous rulings of law. It is final.

Exceptions overruled.

MARTHA MITCHELL ET ALII, EXCEPTANTS

IN RE WILL OF EMMA J. LOOMIS.

Somerset. Opinion, July 24, 1934.

WILLS. EVIDENCE.

The law does not undertake to test the intelligence, and define the exact quality of mind which a testator must possess. Soundness is a matter of degree. That a man may make a valid will, it is not necessary that the greatest mental strength shall prevail. The essential qualification for making a will is a sound mind, which is one in which the testator had a clear consciousness of the business he has engaged in; a knowledge, in a general way, without prompting, of his estate, and an understanding of the disposition he wished to make of it by his will, and of the persons and objects he desired to participate in his bounty.

Sound mind comprehends ableness enough to recollect property and beneficiaries, and conceive the practical effect of the will. The expression does not mean a perfectly balanced mind. A mind naturally possessing power, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence, is in legal contemplation, a sound mind.

Intellectual and physical weakness, with partial failure of mind and memory, is said not to be solely an indication of inability to make a will.

Hallucination, temporary in nature, is not, per se, insanity. It is undoubtedly true, that when a hallucination has become permanent, it is to be deemed insanity, general or particular according to the nature of the delusion. To invalidate a will, an insane delusion must be operative on testation. A person whose mind is affected by such a delusion, however unreasonable and absurd, may make a valid will, provided the delusion is not of influence. To affect its soundness, the will must be the direct offspring of delusion controlling the mind.

Findings of fact upheld by any reasonable and substantial evidence, will seldom be disturbed by the Law Court.

In the case at bar, there was ample believable evidence to warrant the conclusion of the Supreme Court of Probate in sustaining the will.

On appellants' exceptions to the decree of the Judge of the Supreme Court of Probate, dismissing an appeal from the Judge of Probate for the County of Somerset, and confirming the decree of the court below, and allowing a certain instrument dated October 3, 1932, offered for probate as the last Will and Testament of Emma J. Loomis, deceased. Exceptions overruled. Decree affirmed. The case fully appears in the opinion.

Butler & Butler, for proponents.

Locke, Perkins & Williamson, for appellants.

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

DUNN, J. The exceptions relate to the matter of the official proof of a writing offered in probate as the last will of Emma J. Loomis, late of Skowhegan, deceased. The Probate Court, from jurisdictional and other evidence, determined that the instrument was what it purported to be. A sister and two nieces, of the next of kin of the decedent, alleging themselves aggrieved, appealed to the Supreme Court of Probate, the Superior Court being, by statute, such tribunal. The reasons of appeal comprised that the document was not the will of the decedent, that it had not been executed as required by law, that the maker was without requisite intellectual capacity to make a will, and that execution had been produced by fraud and undue influence.

Trial of cause was de novo on appeal.

The person named as executor in the will was its proponent; he had the burden of proving, by a fair preponderance of the evidence, that statutory formalities had been observed, and that the woman was of sound mind. *Gerrish* v. *Nason*, 22 Me., 438; *Robinson* v. *Adams*, 62 Me., 369; *Thomson, Aplt.*, 92 Me., 563, 43 A., 511; *American Board of Commissioners, etc., Aplts.*, 102 Me., 72, 66 A., 215. Only touching fraud and undue influence, were contestants obliged to make an affirmative demonstration. *O'Brien, Aplt.*, 100 Me., 156, 60 A., 880; *American Board of Commissioners, etc., Aplts.*, supra. The burden of proof, in its technically proper sense, does not ordinarily shift, but remains as the law originally casts it. *O'Brien, Aplt.*, supra.

The appellate court, on deciding for the proponent, decreed admission of the will to probate. Exceptions were allowed.

Exceptants, in oral argument, at the bar of the present court, urged merely that the evidence was insufficient to show mental soundness constituting testamentary capacity. Their brief makes no other point. This is the sole subject for consideration in the contest.

The will is dated October 3, 1932. It is sensible in its provisions, none sounding in folly. Testatrix, after directing the payment of her debts and charges, and the expenses of administration of her estate, designates where she wishes to be buried, and directs the erection of a headstone on her grave. She discriminates against the children of her sister Aurinda; mentions her sister Mary, and says she gives her nothing, "but if she not be living, I intentionally omit any children she may have." The children of her brother Charles also are specifically omitted. The sum of three hundred dollars is bequeathed, in and upon trust, to accumulate until the death of her sister Martha, to defray her (Martha's) burial expenses, including a monument; any excess is left to a cousin, Fred Loomis. The bequest was conditioned on the sister surviving testatrix. The residuary legatees are Fred Loomis and his wife.

The will was signed (sic) Miss J. Loomis.

Testatrix died January 18, 1933, aged seventy-six years. She had never married. Her most recent occupation had been that of a chambermaid; before that, she had been a shoe factory operative. The amount of her estate was about four thousand dollars.

When the will was written, testatrix' sister Mary, whose exclusion from bounty is of prior instance, was already dead. Her sister Martha, one of the exceptants, was a widow, in needy circumstances, eighty-eight years old. Besides this sister, and the two nieces also exceptants, testatrix had as relatives, a niece, nephews, and several cousins.

There had been a previous will, in 1928, or 1930. The instrument appears to have been destroyed; the draftsman, who also drew the last will, was not certain as to the exact date of the antecedent one. He testified that the clause excluding Mary, or her children, was in the former will; further, that in its provisions, the last differed from the earlier in but two respects; first, an absolute legacy of

three hundred dollars to Martha Mitchell was changed to the trust before mentioned; second, in the stead of Fred Loomis alone, he and his wife were together named as residuary legatees.

The record does not seriously assert that the intellect of Miss Loomis lacked integrity, in testable aspect, when she defined the original dispositions. A will legally made stands until legally revoked. The destruction of a will by a person lacking testamentary capacity would not be a revocation of it. *Rich* v. *Gilkey*, 73 Me., 595. The fact testatrix had made the preceding instrument was admissible, on the question of her ability to execute that in issue, because of similarity, and tendency to show a steady purpose of disposal.

That testatrix did not sign her given name was apparently unnoticed until the paper to which the signature had been set was filed for probate. The error was seemingly regarded as of negligible consequence.

The subscribing witnesses, all whom the proponent swore, testified not only to the ceremony of the execution of the document, but to sanity, in the synonomous sense of soundness of mind, in connection with the dispositive act. Such witnesses may, in addition to facts, give their opinion as to the state of the testator's mentality. *Cilley, Aplt.*, 34 Me., 162; *Wells, Aplt.*, 96 Me., 161, 51 A., 868. Inquiry relates to the precise time of the execution of the will. *Shailer* v. *Bumstead*, 99 Mass., 112.

A physician who had regularly attended Miss Loomis, on being called to the stand, stated, in effect, that she had psychosis, or aberration, yet there was no perversion of judgment or reason. Touching infirmities of the mind, the doctor was not an expert; still he appears to have had adequate opportunity of observing and judging the intellectual faculties of his patient. *Fayette* v. *Chesterville*, 77 Me., 28; *Hall* v. *Perry*, 87 Me., 569, 33 A., 160.

Contestants offered witnesses who gave evidence based on the acts, conduct and language of the testatrix, to show that at the date of the execution of the will she was not of competency to make it.

Pernicious anemia was the attributed cause of Miss Loomis' death. The disease was accompanied by a form of insanity due to senility, and association of a hallucination of hearing. She heard

profane language on the part of two men, and, when she quarreled with the men, laughter on the part of women. There was testimony she had said that she was aware the perception was purely imaginary.

An expert on mental and nervous disorders, sworn by the contestants, expressed, in answer to a hypothetical question, his opinion that, on the day of making the will, Miss Loomis was insane; that she was suffering from senile dementia, paranoiac type.

The analysis and classification of mental diseases is impracticable and unnecessary in legal science. In law, every mind is sound that can reason and will intelligently in the particular transaction; and every mind is unsound that cannot so reason and will. *Johnson* v. *Maine & N. B. Ins. Co.*, 83 Me., 182, 22 A., 107.

"Senile dementia" is, however, as the words indicate, that diminution and weakness of mental endowment which results from old age. *Graham* v. *Deuterman*, (Ill.) 91 N. E., 61. "Paranoia" has been explained as being the synonym of "monomania". *People* v. *Braun*, 158 N. Y., 558.

In the consideration of the testimony of medical experts, the test of consistency and reasonableness, having reference to all the other testimony, which the opinions may corroborate or contradict, should be applied. *American Board of Commissioners, etc., Aplts.*, supra.

Proponent introduced testimony tending to rebut that for the contestants.

The law does not undertake to test the intelligence, and define the exact quality of mind which a testator must possess. Soundness is a matter of degree. That a man may make a valid will, it is not necessary that the greatest mental strength shall prevail. The essential qualification for making a will is a sound mind, which is one in which the testator had a clear consciousness of the business he was engaged in; a knowledge, in a general way, without prompting, of his estate, and an understanding of the disposition he wished to make of it by his will, and of the persons and objects he desired to participate in his bounty. This includes a recollection of those related to him by ties of blood and affection, and of the nature of the claims of those who are excluded from participating in his

estate. A person in such state and condition is capable of willing. "Sound mind", within the statute of wills, comprehends ableness enough to recollect property and beneficiaries, and conceive the practical effect of the will. The expression does not mean a perfectly balanced mind. A mind naturally possessing power, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence, is, in legal contemplation, a "sound mind". *Hall* v. *Perry*, supra; *Wells, Aplt.*, supra; *Randall et al., Aplts.*, 99 Me., 396, 59 A., 552; *Rogers, Aplt.*, 126 Me., 267, 138 A., 59.

Testatrix was advanced in years. But stage of life and resultant weakness of body do not necessarily deprive one of right to make a will. Neither age nor bodily disease is, of itself, a disqualification. *Needham Trust Co.* v. *Cookson*, 251 Mass., 160; *American Board of Commissioners, etc., Aplts.*, supra. Intellectual and physical weakness, with partial failure of mind and memory, is said not to be solely an indication of inability to make a will. *Hall* v. *Dougherty*, 5 Del., 435. Although a testatrix be old and infirm, she may competently will, if she then had intelligence sufficient to understand correctly what she was doing, and did, deliberately, what she meant to do. *In re Eddy*, 32 N. J. E., 701; *in re Koll's Estate*, (Iowa) 206 N. W., 40; *Higbee* v. *Bloom*, (Kan.) 196 Pac., 1080; *Clark* v *Clark*, (Ore.) 267 Pac., 534. See, also, *Richardson* v. *Travelers Ins. Co.*, 109 Me., 117, 82 A., 1005.

Hallucination, temporary in nature, is not, per se, insanity. *Staples* v. *Wellington*, 58 Me., 453. "The state of mind indicated by hallucination is strikingly illustrated by the remarkable story of Nicolai, the Berlin bookseller, who, for a length of time, was visited at his bedside by individual forms that were visible to his sight and addressed him. During all this period he was conscious it was a delusion. Still he transacted his ordinary business with his usual ability, and his contracts were as valid as if the delusion had not existed." Appleton, C. J., in *Staples* v. *Wellington*, supra.

It is undoubtedly true that when a hallucination has become permanent, it is to be deemed insanity, general or particular according to the nature of the delusion. *Staples* v. *Wellington*, supra. Nevertheless, to invalidate a will, an insane delusion must be operative on testation. A person whose mind is affected by such a delusion, however unreasonable and absurd, may make a valid will, pro-

vided the delusion is not of influence. *Dunham's Appeal*, 27 Conn., 192; *Rice* v. *Rice*, (Mich.) 15 N. W., 545; *Rice* v. *Rice*, (Mich.) 19 N. W., 132; *Pidcock* v. *Potter*, 68 Pa. St., 342; *Smith* v. *Smith*, 48 N. J. E., 566; *Blakely's Will*, (Wis.) 4 N. W., 337; *Cole's Will*, (Wis.) 5 N. W., 346. To affect its soundness, the will must be the direct offspring of delusion controlling the mind. *Boardman* v. *Woodman*, 47 N. H., 120; *Robinson* v. *Adams*, supra.

Derangement, to invalidate a will, must usually be of such broad character as to establish inefficacy generally, or some narrower form of insanity under which testator is hallucinated or deluded; and such abnormality must have been of proximate ascendency. *Rogers, Aplts.*, supra. Except in so far as it may tend to show the quality of testator's mind at the time of executing the will, the condition of his mind before or after that time is unimportant. If he was then rational and acting rationally, or, in popular phrase, knew and understood what he was about, the will is valid. Gardner on Wills, p. 89, and supporting cases cited. Although fixed insanity has been established, it may be shown that execution was during a lucid interval. There may, in a case of senile dementia, be such a thing as a "lucid interval," during which the person is qualified to will. *Kerr* v. *Lunsford*, (W. Va.) 8 S. E., 493.

The case is not before this court for consideration anew. The key to the situation here is whether credible evidence supports the decree below. A precedent commonly cited is that findings of fact upheld by any evidence, that is, any reasonable and substantial evidence, will seldom be controlled. *Eacott, Aplt.*, 95 Me., 522, 50 A., 708; *Randall et al, Aplts.*, supra; *Costello, Aplt.*, 103 Me., 324, 69 A., 269; *Palmer, Aplt.*, 110 Me., 441, 86 A., 919; *Gower, Aplt.*, 113 Me., 156, 93 A., 64; *Thompson Aplt.*, 116 Me., 473, 102 A., 303; *Cotting, Aplt.*, 118 Me., 91, 106 A., 113; *Packard, Aplt.*, 120 Me., 556, 115 A., 173; *McKenzie, Aplt.*, 123 Me., 152, 122 A., 186.

The conclusion of the Supreme Court of Probate had ample support in believable evidence.

The mandate will be:

Exceptions overruled.
Decree affirmed.

ANNA SMITH *vs.* EDGAR PAINE.

THEODORE SMITH *vs.* EDGAR PAINE.

Cumberland. Opinion, July 25, 1934.

LANDLORD AND TENANT. REFERENCE.

It is settled law in this State, that so long as a building as a whole, is let to a tenant, with full control, ordinary repairs must be made at the charge and risk of the tenant.

In the case at bar, the record did not justify the finding of the Referee that wood planking "constituted a platform improper and unfitted to be a part of the sidewalk." There being no other basis upon which to predicate negligence of the defendant, his exceptions must be sustained.

On exceptions. Actions on the case brought by the plaintiffs, husband and wife, for injuries sustained by the plaintiff Anna Smith, resulting from falling on a wooden platform on premises owned by the defendant. The actions were tried before a Referee, right of exceptions as to matter of law reserved. The Referee found for the plantiffs. To the overruling of defendant's specifications of objection, and to the allowance of report, defendant seasonably excepted. Exceptions sustained. The care fully appears in the opinion.

Jacob H. Berman,
Edward J. Berman, for plantiffs.
Sherman I. Gould, for defendant.

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

BARNES, J. In these actions Anna Smith sues the owner of premises, on which she suffered injury by the breaking of an ankle; and her husband brings his action "for the loss of services of his wife, due to the fracture."

They were tried before a Referee, in accordance with statutory provision, with a stipulation reserving the right of exception to rulings of law.

The Referee returned into court finding in favor of the plaintiff in each case.

Written objections to the acceptance of the reports were seasonably filed by defendant. The Court accepted the reports, despite the objections, and defendant prosecuted his exceptions.

The defendant, for many years before the accident, was and still is the owner of a building on Fore Street in Portland.

For nearly twelve years, at time of trial, a Mrs. Gordon had rented of defendant the building, as tenant at will, with full control of the entire property.

During her occupancy the tenant had used the ground floor as a store and the upper part of the building as living quarters.

The building is entered from Fore Street by a single door.

The wall of the building is the inner bound of a brick sidewalk, and is perhaps on the margin of the street.

The door is recessed into the building and a person leaving the building would step over the threshold onto a wide granite step that fills the recess and thence down to the sidewalk.

When Mrs. Gordon's tenancy began the mouth of a light well from the cellar, covered by a metal grating flush with the sidewalk, lay directly in front of the door.

The Referee found that at the time of letting to Mrs. Gordon the defendant agreed to make certain repairs, and that these repairs were made; that no other specific agreement between the parties relative to repairs was entered into by them.

From Mrs. Gordon's testimony it is apparent that at the beginning of her tenancy a wooden cover was made for the light well, and that from the time of construction of the wooden well cover to the day of the accident, the only repairs thereon were done by one of her lodgers.

Three planks and a step, four or six inches higher, the step as long as the granite step, and the planks as long as the grating constitute the well cover.

Mr. Paine testified that the wooden cover was never repaired under his instructions.

In the declaration the well cover is termed a "step and platform," and the averment is that both were made of "planks," so we consider the material as about two inches in thickness.

At the end of the cover, where the defect is complained of, the planking and the stone margin of the well appear in the photograph, made an exhibit in the case, to be on a general level with the bricks of the sidewalk.

On the evening of October 27, 1931, the plantiff, Mrs. Smith, with a companion, made a call on Mrs. Gordon, and as she left the building plaintiff was caught by the heel of her left shoe, which penetrated a crack near the end of a plank of the well cover and became wedged firmly in the crevice.

She fell and the ankle was fractured. The crevice is described by a witness as being about three-quarters of an inch wide near the end of the plank, and about eight inches long, its width "diminishing to nothing." It appears in the exhibit that the crevice was caused by a splintering of the end of one or each of the outer planks at their junction.

The heel that caught was testified to as about three-quarters of an inch wide at bottom.

It is settled law in this state that so long as a building as a whole, is let to a tenant, with full control, ordinary repairs must be made at the charge and risk of the tenant. *McKenzie* v. *Cheetham*, 83 Me., 543, 22 A., 469; *Abbott* v. *Jackson*, 84 Me., 449, 24 A., 900; *Whitmore, Admx.* v. *Paper Co.*, 91 Me., 39 A., 1032.

The declaration in the case at bar, as amended, charges that the wooden step and the "platform" or cover constituted an obstruction to travel. In his report the Referee states: "I find that that part of the planking outside of the step, and upon which the plaintiff was walking at the time of the accident, was not at the time it was placed there an obstruction such as to be dangerous to users of the sidewalk. I find, however, that, being of wood, it was not a material which would withstand the weather conditions and wear to which the sidewalk was subjected in that locality, and that it was inevitable that because of such construction it would become unsafe for use. I find that the defendant placed in the sidewalk, constructed of brick, a platform improper in material and unfitted to be a part of the sidewalk."

The record in this case does not justify the finding of the Referee that wood planking constituted "a platform improper and unfitted to be a part of the sidewalk." There being no other basis upon which to predicate negligence of defendant, the entry must be,

Exceptions sustained.

IN RE JOHN M. STANLEY, EXCEPTANT

(Public Utilities Commission).

Kennebec. Opinion, July 27, 1934.

PUBLIC UTILITIES. CARRIERS. CONSTITUTIONAL LAW.

WORDS AND PHRASES. P. L. 1933, CHAP. 259, SEC. 2.

The convenience and necessity, proof of which Section 2, Chapter 259, Public Laws, 1933, requires, is the convenience and necessity of the public as distinguished from that of any individual, or group of individuals.

A law is ex post facto when (1) *it makes a criminal offense of what was innocent when done; or* (2) *it aggravates a crime, making it greater than it was when committed; or* (3) *it inflicts a punishment more severe than was prescribed at the time that the crime was perpetrated; or* (4) *it alters the rules of evidence to the injury of the accused; or* (5) *it, in effect if not in purpose, deprives him of some protection to which he had become entitled. The expression relates solely to crimes and their punishment, and has no application to civil matters.*

The terms "due process of law" and "law of the land" as constitutional terms, are of equivalent import, and interchangeable. Due process of law is another name for governmental fair play. Notice and opportunity for hearing are of the essence of due process of law.

Streets belong to the public, and are primarily for use in the ordinary way. No one has any inherent right to use such thoroughfares as a place of business. Their utilization for the transportation of internal commerce for gain, is not common to all, but springs from sovereignty. Even official license so to use the ways is neither property nor franchise.

Section 2 of Chapter 259 of the Public Laws of 1933 fixes a time limit after which motor vehicular intrastate carriers may not operate, without first having

procured, from the Public Utilities Commission, an authorizing certificate. No discrimination is made for or against anyone as an individual, or as one of a class of individuals, but only against his locality, or occupation, as determined by rule or principle.

Police power of the state is inherent and plenary; its proper exercise is the highest attribute of State government.

State police power is not affected by the Fourteenth Amendment to the Federal Constitution.

Police power is, in its broadest acceptation, power to promote the public welfare though at the expense of private rights.

In the exercise of the police powers, there may be limitations and conditions, and consequent difference between those to whom privilege is granted and refused, provided these are based on some reasonable classification in an existing situation for the public good.

Section 2, of Chapter 259, of the Public Laws of 1933, does not transcend any constitutional provision.

In the case at bar, there was no unfair discrimination against the petitioner.

On exceptions by petitioner. To certain rulings of the Public Utilities Commission under Section 2, Chapter 259, Public Laws of 1933, petitioner took five exceptions. Exceptions overruled. The case fully appears in the opinion.

Charles F. King, for petitioner.

Clyde R. Chapman, Attorney-General for Respondents.

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

DUNN, J. The Public Utilities Commission, on the application of John M. Stanley, granted a certificate of convenience and necessity, authorizing him to operate motor vehicles on public ways, to and fro, between Portland and Lewiston, over a route wholly within the State, and not part of any continuous transit to and from another State, in the common carriage of goods for compensation or hire (i.e., as a business). A certificate for the purpose of operating between Lewiston and Haines Landing was denied.

The Commission determined, after notice and hearing, that on March 1, 1932, and since, to the time of the effectiveness of the Act

of 1933, of later citation, the applicant had, on the Portland-Lewiston division, rendered adequate and responsible intrastate common carrier service, over a regular route, without undue interruption. He was, therefore, of statutory right, entitled to a certificate securing him the privilege of so continuing. 1933 Laws, Chap. 259, Sec. 2.

It was found, as a fact, that the applicant did not begin service beyond Lewiston, as a carrier for all people indifferently, until after the first day of March, 1932. This branch of the case, then, was for consideration on the ground, respecting which only the applicant himself testified, of a need on the part of the public for the new utility. Against the showing by the applicant was evidence of opposite tendency.

The Commission held, and rightly, that the convenience and necessity, proof of which the statute requires, is the convenience and necessity of the public, as distinguished from that of any individual, or group of individuals.

The finding upon the facts, that present utility facilities afforded convenient service, and that the advantage sought was unnecessary in the public interest, was justified.

Exceptions challenge the constitutional validity of the second section of the before-cited statute.

It is claimed that this section contravenes those clauses of the tenth section of the first article of the Constitution of the United States, which prohibits the States passing ex post facto laws or laws impairing the obligation of contracts. It is contended also that the section encroaches upon the specific recital of the Declaration of Rights in the Constitution of Maine, that the Legislature shall pass no such laws. Maine Constitution, Article 1, Section 11.

The scope of the Federal and State provisions has often been the subject of judicial construction. Enough, at this time, to say, in answer to the first contention, that nothing in the record goes to show that the statute affects existing contracts. Concerning the claim that the law is ex post facto, the decisions of the courts are hostile to the position counsel assumes.

A law is ex post facto (after the deed or fact,) when (1) it makes a criminal offense of what was innocent when done; or (2) it aggravates a crime, making it greater than it was when com-

mitted; or (3) it inflicts a punishment more severe than was prescribed at the time the crime was perpetrated; or (4) it alters the rules of evidence to the injury of the accused; or (5) it, in effect if not in purpose, deprives him of some protection to which he has become entitled. The expression relates solely to crimes and their punishment, and has no application to civil matters. *Calder* v. *Bull*, 3 Dall., 386, 1 Law ed., 648; *Cummings* v. *Missouri*, 4 Wall., 277, 18 Law ed., 356; *Kring* v. *Missouri*, 107 U. S., 221, 27 Law ed., 506; *Orr* v. *Gilman*, 183 U. S., 278, 46 Law ed., 196; *State* v. *Tyree*, (Kan.) 78 P., 525; *Murphy* v. *Commonwealth*, 172 Mass., 264, 268, 52 N. E., 505; *State* v. *Vannah*, 112 Me., 248, 91 A., 985.

The point of the next objection to validity seems to be that the section abridges privileges and immunities of the exceptant, deprives him of property, without due process of law, and denies him equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution, and of the last clause of Section 6 of the Maine Declaration of Rights. The latter provides, in short, that deprivation of property shall not be otherwise than by the law of the land.

In the Fifth Amendment to the United States Constitution, the nation is forbidden, among other things, to divest anyone of property, without due process of law. This amendment refers only to powers exercised by the Federal government, and not to those employed by the State. *Barron* v. *Baltimore*, 7 Pet., 243, 8 Law ed., 672; *Eilenbecker* v. *District Court*, 134 U. S., 31, 33 Law ed., 801; *Twitchell* v. *Pennsylvania*, 7 Wall., 321, 19 Law ed., 223; *In re Spies*, 123 U. S., 131, 31 Law ed., 80.

In the Fourteenth Amendment a like command is issued by the people to the State; it also charges that no State shall deny to any person within its jurisdiction, the equal protection of the laws. The amendment erects an additional safeguard for the rights of the individual, and the protection of his property. The liberty thus assured is "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S., 390, 67 Law ed., 1042.

Since the National Constitution, and the laws made in pursuance thereof, are the supreme law of the land (*National Prohibition Cases*, 253 U. S., 350, 64 Law ed., 946), no local or State act,

either of the legislature or the people, may curtail the security which Federal guaranty unites to such as society already had.

The terms "due process of law" and "law of the land" as constitutional terms, are of equivalent import, and interchangeable. *Davidson* v. *New Orleans*, 96 U. S., 97, 24 Law ed., 616; *Murray's Lessee* v. *Hoboken Land etc., Co.*, 18 How., 272, 15 Law ed., 372; *State* v. *Knight*, 43 Me., 11, 122; *Eames* v. *Savage*, 77 Me., 212. Due process of law is another name for governmental fair play. Notice and opportunity for hearing are of the essence of due process of law. *Randall* v. *Patch*, 118 Me., 303, 108 A., 97.

The exceptant had no vested right to use the highways and other roads to carry freight for hire. The streets belong to the public, and are primarily for use in the ordinary way. No one has any inherent right to use such thoroughfares as a place of business. *Packard* v. *Banton*, 264 U. S., 140, 68 Law ed., 596; *Chicago Motor Coach Co.* v. *Chicago*, (Ill.) 169 N. E., 22; *Davis* v. *Massachusetts*, 167 U. S., 43, 42 Law ed., 71. Their utilization for the transportation of internal commerce for gain, is not common to all, but springs from sovereignty. Even official license so to use the ways has been held neither property nor franchise. *Schoenfeld* v. *Seattle*, 265 F., 726; *Public Service Commission* v. *Booth*, 156 N. Y. S., 140; *Burgess* v. *Brockton*, 235 Mass., 95, 126 N. E., 456.

The statute is next assailed as discriminatory, and not uniform, to the degree of being unduly arbitrary, unreasonable, and unjustly interfering with exceptant's right to follow his chosen pursuit. It may be borne in mind that he was not seeking to conduct a lawful employment on his own premises, but the special and extraordinary use of the roads for the purpose of private gain, without the consent of the State.

The statute fixes a time limit after which motor vehicular intrastate carriers may not operate, without first having procured, from the Public Utilities Commission, an authorizing certificate. No discrimination is made for or against anyone as an individual, or as one of a class of individuals, but only against his locality, or occupation, as determined by rule or principle. *State* v. *Mitchell*, 97 Me., 66, 53 A., 887. Proof, to the Commission, of satisfactory operation of a route, on, and continually subsequent to, March 1, 1932, for the requisite period of time, would be evidence establish-

ing that there should be issuance of a certificate. Such evidentiary showing would bring the case of an applicant within the law. The statute confers nothing upon utilities already in the field. For the most, they are only permitted, upon proving identity and serviceableness, to remain as they are. Any applicant desirous of entering, must, in fairness and justice, establish not alone his ability to perform public utility service, but that public convenience and necessity demand that which he is proposing to furnish.

The statute was doubtless enacted in the interest of existing operators, on the theory that a sound public policy dictates that, for devoting their property to use which concerns the body politic, these should be encouraged, and the entry, in competition, of service carriers unnecessary to public convenience, discouraged. Moreover, the regulatory statute was enacted to preserve the ways, to obviate menace to present traffic, and further the safety of travelers generally. The act applies alike, on all persons, under conditions named, in substantially similar circumstances. *Missouri Pacific Railway Company* v. *Mackey*, 127 U. S., 205, 32 Law ed., 107.

The legislation was under what, for lack of a better name, is called the police power of the State. That power is inherent and plenary; its proper exercise is the highest attribute of State government. *Boston & Maine R. R. Co.* v. *County Commissioners*, 79 Me., 386, 10 A., 113; *State* v. *Starkey*, 112 Me., 8, 90 A., 431. The reasonableness of police regulation is not necessarily what is best, but what is fairly appropriate under attendant circumstances. *Sligh* v. *Kirkwood*, 237 U. S., 52, 59 Law ed., 835; *Dirken* v. *Great Northern Paper Company*, 110 Me., 374, 86 A., 320.

State police power is not affected by the Fourteenth Amendment to the Federal Constitution. *Slaughter-House Cases*, 16 Wall., 36, 21 Law ed., 394; *Minor* v. *Happersett*, 21 Wall., 162, 22 Law ed., 627; *United States* v. *Cruikshank*, 92 U. S., 542, 23 Law ed., 588; *State* v. *Phillips*, 107 Me., 249, 78 A., 283.

Police power is, in broadest acceptation, power to promote the public welfare, though at the expense of private rights. A good definition is that given in the case of *New Orleans Gas Light Co.* v. *Hart*, (La.) 8 A. S. R., 544, where it is said that police power is "the right of a state, or of a state functionary, to prescribe regu-

lations for the good order, peace, protection, comfort, and convenience of the community, which do not encroach on the like power vested in Congress by the federal constitution." In *Stone* v. *Mississippi*, 101 U. S., 814, 25 Law ed., 1079, Waite, C. J., says: "It is always easier to determine when a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate." The court of Maine has said: "All laws, for the protection of the lives, limbs, health, and quiet of persons, and the security of all property within the State, fall within the general power of the government." *State* v. *Noyes*, 47 Me., 212. See, also, *Boston & Maine R. R. Co.* v. *County Commissioners*, supra; *Lawton* v. *Steele*, 152 U. S. 133, 38 Law ed., 385; *People* v. *King*, 110 N. Y., 418, 423, 18 N. E., 245; *Commonwealth* v. *Alger*, 7 Cush., 53, 85; *Thorpe* v. *Rutland, etc., R. Co.*, 27 Vt., 146, 149.

There are, indeed, restrictions upon the police power. These are to be found in the limitations upon legislative power. The constitutional provisions which confine the Federal government to that authority expressly delegated to it, and the State and Federal Constitutions, which exclude the State legislatures from the invasion of private rights, impose restraints upon the exercise of the police power. The Fourteenth Amendment does, as asserted in argument, orally and by brief, forbid unjust discrimination between persons, or fixed classes of persons, but not proper discrimination based on the requirement of the commonweal. *State* v. *Bohemier*, 96 Me., 257, 52 A. 643.

In the exercise of the police power, there may be limitations and conditions, and consequent difference between them to whom privilege is granted and refused, provided these are based on some reasonable classification in an existing situation for the public good. *People's Transit Co.* v. *Henshaw*, 20 F. (2d), 87; *Gruber* v. *Commonwealth*, (Va) 125 S. E. 427, 429; *Slaughter-House Cases*, supra; *New Orleans Gas Light Co.* v. *Louisiana Light, etc., Co.*, 115 U. S., 650, 29 Law ed., 516; *New Orleans, etc., Co.* v. *Rivers*, 115 U. S., 674, 29 Law ed., 525.

The distinction made by the legislation among carriers operating on and after a given date, those afterward beginning and those wishing to begin, as to registration and license, is not clearly arbi-

trary; it is based upon variance bearing actual relation to the public purpose sought to be accomplished. With the expediency, wisdom and justice of the statute, this court is not concerned. *State* v. *Mayo*, 106 Me., 62, 75 A., 295. "While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power." *Reinman* v. *Little Rock*, 237 U. S., 171, 59 Law ed., 900; *Standard Oil Co.* v. *Marysville*, 279 U. S., 582, 73 Law ed., 856. To invalidate a statute, unconstitutionality must be shown beyond a reasonable doubt. *Legal Tender Cases*, 12 Wall., 457, 20 Law ed., 287; *State* v. *Poulin*, 105 Me., 224, 74 A., 119; *Laughlin* v. *Portland*, 111 Me., 486, 90 A., 318; *State* v. *Webber*, 125 Me., 319, 321, 133 A., 738.

Statutes analogous in wording have been held valid. *Williams* v. *People*, (Ill.) 11 N. E., 881; *People* v. *Evans*, (Ill.) 93 N. E., 388; *People* v. *Logan*, (Ill.) 119 N. E., 913; *Criswell* v. *State*, (Md.) 94 A., 549; *State* v. *Zeno*, (Minn.) 81 N. W., 748; *Spector* v. *Building Inspector*, 250 Mass., 63, 145; *Gorieb* v. *Fox*, 274 U. S., 603, 71 Law ed., 1228; *State* v. *Bohemier*, supra. The cases of *Euclid* v. *Ambler Realty Co.*, 272 U. S., 365, 71 Law ed., 303, and that of *York Harbor Village Corporation* v. *Libby*, 126 Me., 537, 140 A., 382, are likewise of interest.

The statutory provision under consideration does not transcend any constitutional provision. *Gruber* v. *Commonwealth*, supra; *Capitol Taxicab Co.* v. *Cermak*, 60 F. (2d), 608; *State* v. *Latham*, 115 Me., 176, 178, 98 A., 578.

Exceptions overruled.

BANGOR & AROOSTOOK RAILROAD COMPANY *vs.* WARD C. HAND.

Aroostook. Opinion, August 10, 1934.

CONTRACTS. RAILROADS.

An agreement on the part of a lessee of a warehouse, on land owned by a railroad company but not used by it in connection with its business as a public utility, in which the lessee agrees "to protect and save harmless" the lessor from "all liability for damage by fire" caused by the railroad company to property owned by third parties and stored by them in the warehouse, is valid and binding on the lessee.

Such an agreement is neither in violation of statute law nor against public policy.

The fact that the lessor had not assented in writing to a subletting of the premises by lessee in no way affects lessee's liability under such an agreement, although it contained a clause forbidding such subletting.

The statutory liability of a railroad company for damages caused by fire from its locomotives is co-extensive with the right given by the same statute to insure the damaged property and, therefore, there must be such elements of permanency in its situation as to give reasonable opportunity to procure insurance.

The fact that merchandise in a store or warehouse was from time to time changed, by reason of sale or removal of certain goods and the subsequent purchase of other goods, does not excuse the railroad from liability, it being not only possible but customary to insure stocks of merchandise as such, regardless of changes resulting from sales and purchases.

In the case at bar, the plaintiff might readily have insured the contents of the warehouse and included fertilizer as well as potatoes. The building was used as a storage place for merchandise and its contents could have been insured as such by plaintiff or defendant. Having by its contract with defendant eliminated any possibility of financial loss in case of fire, plaintiff did not deem it necessary to incur the expense of insuring.

On report on an agreed statement of facts. An action to recover from defendant, owner of a warehouse on land of plaintiff, certain sums of money paid by plaintiff to other parties, for goods located in defendant's building, and damaged by fire caused by plaintiff.

The issue involved the validity of a contract between plaintiff and defendant releasing plaintiff from liability on any such fire loss. Judgment for plaintiff for amount stipulated. The case fully appears in the opinion.

Henry J. Hart,
Frank P. Ayer,
Cook, Hutchinson, Pierce & Connell,
James C. Madigan, for plaintiff.
J. F. Burns, for defendant.

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

PATTANGALL, C. J. This case comes forward on an agreed statement of facts. Plaintiff granted permission to defendant to erect and maintain a warehouse on land owned by it, in which defendant stored merchandise owned by other parties. The warehouse and its contents, consisting of potatoes valued at $150 and fertilizer valued at $2,016.25, were destroyed by fire communicated from a locomotive operated by plaintiff.

In the absence of any contract between plaintiff and defendant, plaintiff was liable for the amounts stated, by reason of Sec. 63, Chap. 64, R. S. 1930, which in part provides that "When a building or other property is injured by fire communicated by a locomotive engine the corporation using it is responsible for such injury."

But the permission given to defendant to occupy plaintiff's land contained the following clause:

> "The Contractor hereby assumes all risk of loss or damage to said building, or to property stored therein, and to all property owned by the Contractor, including property loaded in cars, in the vicinity of the same, occasioned by fire, whether communicated directly or indirectly from locomotives, or in or by the operation of said railroad, or otherwise, and all damage caused by fire, for which the Company would but for this agreement be liable, so that neither said Contractor nor any person claiming under the Contractor shall have or

make any claim against the Company for damages to such property caused by fire communicated as aforesaid, or otherwise, and further agrees to protect and save harmless the Company from all liability for damage by fire which in the operation of its railroad or from cars or engines on its road, or otherwise, may be communicated directly or indirectly to the building on said described premises, or to any property therein, whether owned by the Contractor or by any other person or persons whomsoever, or to any property loaded in cars by or for the Contractor in the vicinity thereof, and to any suit against the Company, its successors and assigns, brought to obtain damages caused by fire as aforesaid, this agreement may be pleaded in bar and shall be taken to be and shall be a full and complete defense."

The owner of the potatoes which were burned brought suit against plaintiff and recovered judgment, including costs, for $166.67. Defendant was notified to defend but declined to appear. Later the owner of the fertilizer asserted its claim and, defendant having agreed that the damage involved amounted to $2,016.25, plaintiff paid that sum and called upon defendant to reimburse it therefor.

Defendant denied liability on two grounds, asserting that the contract between him and plaintiff was void; first, because in violation of the provisions of the statute quoted and against public policy and, second, because it contained the following clause:

"This lease cannot be transferred, nor may the buildings constructed or erected on the premises be sold or sublet, in whole or in part, *without the written consent* of the Company, and no consent to any transfer, sale or sublease will be given by the Company unless and until the purchaser or the sublessee shall have agreed in writing to be bound by all the provisions of this agreement with respect to use and care of the premises and the buildings, to liability of the Company and to indemnification of the Company."

and no written consent to the subletting of the storehouse to the owners of the potatoes and fertilizer was given by plaintiff.

The first point raised need not be considered here. It has very recently been fully discussed and decided in *Cleveland* v. *B. & A. R. R. Co.*, 133 Me., 62, 173 A., 813.

There is no merit in the second point. Whether defendant sublet a portion of the premises without the knowledge of plaintiff or, having knowledge, plaintiff waived the formality of consent in writing, is not apparent on the record but in either event defendant was not prejudiced. No advantage was gained by either party and no disadvantage suffered by reason of failure on defendant's part to procure plaintiff's written consent to sublet. Apparently this defense was not seriously urged as the agreed statement closed with the following stipulation:

> "The only question being whether or not the defendant's indemnity contract is valid, the case was submitted to this Court on an agreed statement, the parties stipulating that if the Law Court holds the defendant liable, judgment shall be entered for the plaintiff in the sum of $2,182.92 and interest from the date of the writ, together with costs, otherwise judgment shall be for the defendant."

Notwithstanding this stipulation, however, defendant argued in his brief and orally that even though the indemnity contract was held to be valid, he was not liable for the damage occasioned by the destruction of the fertilizer, claiming that the property was only temporarily stored in the warehouse and invoked the rule, laid down in *Chapman* v. *R. R. Co.*, 37 Me., 92, "that the liability of railroad corporations under the statute extends only to property permanently existing along their route and capable of being insured and that as to movable property, having no permanent location, the liability of such corporation is to be determined by the principles of the common law." Plaintiff's counsel, on this point, waived his rights under the stipulation quoted above and generously agreed that this defense might be considered, although denying that it had application here.

Chapman v. *R. R.*, supra, was affirmed in *Lowney* v. *Railway Co.*, 78 Me., 479, 7 A., 381, and fully discussed and considered by this Court in several other cases, the more important of which are *Thatcher* v. *R. R. Co.*, 85 Me., 502, 27 A., 519, and *Pierce* v. *R. R.*

Co., 94 Me., 171, 47 A., 144, 146. These cases sustain the doctrine of the earlier case, notwithstanding the fact that similar statutes were construed in *Hart* v. *R. R. Co.*, 13 Met., 99; *Bassett* v. *R. R. Co.*, 145 Mass., 129, 13 N. E., 370; *Hooksett* v. *R. R. Co.*, 38 N. H., 244; *Cleveland* v. *R. R. Co.*, 42 Vt., 449, and *Grand Trunk Railway Co.* v. *Richardson*, 91 U. S., 454, to include all property along the route of the railroad whether there temporarily or permanently.

The position taken by the Maine Court is that the liability of the railroad company is co-extensive with the right given to the company, by the same statute, to insure the property and that, therefore, there must be such elements of permanency in the situation of the property as to give reasonable opportunity to procure insurance.

In *Bean* v. *R. R. Co.*, 63 Me., 294, plaintiff recovered for a stock of goods in a store near the railroad track; in *Thatcher* v. *R. R. Co.*, supra, for lumber piled in a mill yard; and in *Pierce* v. *R. R. Co.*, supra, for a quantity of ship knees piled along the track. The line of demarcation drawn between those cases in which liability was found and those in which it was denied, where personal property was destroyed by fire communicated from a locomotive, is clearly stated in the last mentioned case in the following language:

> "The distinction between these two classes of cases is well marked; they are all decided upon the construction of the statute laid down by the court in the first case in which it was considered, that is, that the liability of the company should be co-extensive only with its practical opportunity to insure the property along its route for which it might be liable. For the company to be liable there must be such elements of permanency in the situation of the property that the railroad company may protect itself against its liability, by insurance. Upon this principle a railroad company is not liable for the destruction of property, under the statute, temporarily located along its route and which may be so soon and so easily moved that the company cannot, by the exercise of reasonable diligence, protect itself against liability by insurance; but the company is liable under the statute for merchandise, lum-

ber or other chattels regularly and permanently located along its route.

"It is, of course, unnecessary in any of these cases that the identical articles should remain situated along the route for any particular length of time; these may be constantly changing as do the various articles in a stock of goods, while the stock itself, replenished from time to time, remains permanently in the place designed for it. The permanency here referred to means the permanent use of the particular place for the same kind of articles or goods."

Applying the rule to the instant case, it would seem clear that plaintiff might readily have insured the contents of the warehouse and included fertilizer as well as potatoes had it desired to do so. It is immaterial when the particular property burned was placed in the warehouse. The building was used as a storage place for merchandise and its contents could have been insured as such by plaintiff or defendant. Very naturally, having by its contract with defendant eliminated any possibility of financial loss in case of fire, plaintiff did not deem it necessary to incur the expense of insuring.

Judgment for plaintiff for amount stipulated.

JACOB J. YOUNG *vs.* MADELINE G. POTTER.

JENNIE P. YOUNG *vs.* MADELINE G. POTTER.

Cumberland. Opinion, August 10, 1934.

MOTOR VEHICLES. NEGLIGENCE. NEW TRIAL.

When two arguable theories are presented, both sustained by evidence, and one is reflected in the jury verdict, the Law Court is without authority to act. It is when a verdict is plainly without support that a new trial on general motion may be ordered.

One on a sidewalk who himself is in the exercise of due care has a right to expect that the driver of an automobile will so operate his car as not to endanger his safety.

The fact that an automobile is wrongfully upon a sidewalk does not permit a pedestrian, although rightfully thereon, to be run over as a result of a combination of his own negligent act and that of the car driver and then to recover in an action of negligence in which the plaintiff must prove not only negligence upon the part of the defendant as the proximate cause of the accident, but lack of his own contributory negligence.

Whether or not one is in the exercise of due care is a question of fact for the jury, and if the jury determines, considering all of the material facts attending the accident, that one does that which the ordinarily careful and prudent person would do in the same situation, then there is observance of due care; otherwise, not.

Whether or not an open door of a car extending over a sidewalk calls for caution upon the part of the sidewalk pedestrian depends upon the particular facts attending the situation.

While a pedestrian upon the sidewalk may have a superior right thereon to that of a motor vehicle, yet there is no difference in the degree of care required of each, for each must be in the exercise of due care under the circumstances.

On the civil side, this Court recognizes no difference of degrees of due care.

One whose car door is extending over a portion of the sidewalk may be found negligent if he starts his car in motion either knowing that a pedestrian on the sidewalk will be hit by the door or observing such pedestrian to be in such a position on the sidewalk that it is reasonable to expect that such a person will be hit.

To be in the exercise of due care such a driver before starting his car so situated, must take such observations as a reasonably careful person would take to avoid injuring one on the sidewalk.

A trial judge is not required to single out a part of all the evidence and give an instruction upon that part.

In the case at bar, there was sufficient credible evidence to warrant the jury verdict. There was no error on the part of the presiding Justice in refusing the requested instructions.

Two actions on the case; one brought by the wife for personal injuries and the other brought by the husband for medical expense, loss of services and consortium of his wife, resulting from the striking of the wife by an automobile driven by the defendant.

To the refusal of the presiding Justice to give certain requested instructions plaintiffs seasonably excepted, and after the jury verdict for the defendant in each case, filed general motions for new trials. Motions and exceptions overruled. The cases fully appear in the opinion.

Bernard A. Bove,

Frederic J. Laughlin, for plaintiffs.

William B. Mahoney, for defendant.

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

HUDSON, J. Actions in tort, brought by the wife for personal injuries and by the husband for medical expense, loss of services and consortium of his wife, resulting from an automobile accident on Temple Street in Portland June 17, 1933. The jury's verdicts were for the defendant and now both cases are before us on motions and exceptions.

These actions tried together compelled the jury, it would seem, to pass upon the veracity of the litigants, for their versions of the occurrence were absolutely at variance and hopelessly irreconcilable.

The day before the accident the defendant's mother had purchased a stove in the store of Mr. Young, in which his wife was working. On the day of the accident, the stove was delivered without the pipe, which Mrs. Potter claimed was included in the purchase. This occasioned the fateful visit to the Youngs' store in a Ford two door sedan, driven by the daughter, the defendant, accompanied by her mother. Once in the store, an argument ensued between the mother and Mrs. Young in which a receipt played a part. Mrs. Young insisted on getting her copy of it, the original being at the Potter home, but the Potters, desiring to conclude the interview, Mrs. Potter remarked, "Never mind," and with her daughter went out to get into their sedan, which they had parked by the edge of the sidewalk on the right side of Temple Street.

Here the evidence forks. The defense says that the daughter stepped into the street to get in on the driver's (the left) side; that the door was locked, whereupon the mother, entering from the

sidewalk, released the catch and let the daughter in; that the driver, the daughter, before starting, then observed conditions as to traffic, both rear and front; that while she was thus engaged, the mother proceeded to close the open door on her side and when it was "about half way closed," Mrs. Potter "heard the motor going and saw Mrs. Young right on" them. The mother testified: "It was all in a flash. I had to look around to reach around for the door and when I looked up she was right there almost to the door. . . . She had her arms outstretched with the book in them. I had started to close the door before I saw her at all and had it about half closed when I saw her first;" and that Mrs. Young, although on the sidewalk, was in the path of the closing door which caught her as the car started and caused her injuries.

The plaintiffs state that Mrs. Young left the store with the book in her hand containing a copy of the receipt for the purpose of showing it to Mrs. Potter; that she advanced along the sidewalk toward the car whose door was open and extending over the sidewalk; that she put one foot on the running board, placed the book in Mrs. Potter's lap and had some talk with her in regard to the receipt; that the daughter said, "Never mind the book," and, without warning, started the car with Mrs. Young in her perilous position, hitting and causing her to be thrown to the sidewalk.

The jury, in spite of some corroboration upon the part of plaintiffs' witnesses, did not credit their statement. Some times a case appears to be too strong, and it may well be that this jury, having the advantage of seeing and hearing the parties and witnesses on the stand, decided that this was such a case. It may well have thought that Miss Potter, with full knowledge (for Mrs. Young testified that the daughter engaged in the conversation) that Mrs. Young was in part on, if not partly in, the automobile, would not have started her car, the doing of which almost necessarily would have injured the plaintiff. Such an act knowingly done would have been most culpable, heartless, and with utter disregard to Mrs. Young's rights.

The jury no doubt found, on the other hand, that Mrs. Young, excited as probably she was, and desiring to show the book to the Potters before they drove away, took a chance and hastily in undue manner put herself before the closing door just as the daughter

was in the act of starting the car and that her conduct in so doing constituted contributory negligence.

The jury may well have found that it was negligence upon the part of Miss Potter to start her car away from the curb without learning that Mrs. Young was within the sweep of the closing door, and yet also have found, as above stated, that Mrs. Young herself was contributorily negligent, which alone would bar recovery in both of these cases. These were jury facts and we are not justified in disturbing its finding of them unless the evidence manifestly shows its verdict to be wrong. It does not.

> "No citation of authorities is needed to establish the proposition that when two arguable theories are presented, both sustained by evidence, and one is reflected in the jury verdict, this Court is without authority to act. It is only when a verdict is plainly without support that a new trial on general motion may be ordered." *Mizula* v. *Sawyer*, 130 Me., 428, 430, 157 A., 239. These motions for new trial must be overruled.

EXCEPTIONS

To the refusal of the Trial Judge to give the following instructions to the jury the plaintiffs excepted.

> *Exception* 1: Requested instruction: "That Mrs. Young had a right to be where she was on the sidewalk and had a right to expect that the defendant would so operate her car as not to endanger the safety of the plaintiff."

This request has two elements in it—the first, relating to Mrs. Young's rights on the sidewalk, and the second, as to the expected operation of the car by the defendant. In his charge, the Judge had specifically stated that "she (meaning Mrs. Young) had a right to be upon the sidewalk. She had a right to approach the car and stand anywhere upon the sidewalk." This language covered the first element of the request.

The second element is objectionable. One on a sidewalk who himself is in the exercise of due care has a right to expect that the driver of an automobile will so operate his car as not to endanger his safety. If a sidewalk pedestrian should see an automobile com-

ing toward him on the sidewalk and observe that its driver did not see him, still the duty of due care is his and without its exercise he has no right to rely on an expectation that the automobile would nevertheless be operated so as not to endanger his safety.

The learned counsel for the plaintiff relied on the language in *Crawley* v. *Jermain*, 218 Ill., App., 51, appearing on page 53, namely:

> "*It is idle in the circumstances of this case* to contend that the plaintiff was not in the exercise of due care for her own safety; she had a perfect right to assume that the sidewalk was safe for her to walk upon . . ."

That language pertained to the facts of that particular case. It does not hold as a rule of law that regardless of contributory negligence there is a right of such expectation by the pedestrian on a sidewalk.

Reliance also was placed upon language in *Cole* v. *Wilson*, 127 Me., 317, 319, that "sidewalks are for the exclusive use of pedestrians." True, but even so, the fact that the automobile is wrongfully upon a sidewalk does not permit a pedestrian, although rightfully thereon, to be run over as a result of a combination of his own negligent act and that of the car driver and then to recover in an action of negligence, in which the plaintiff must prove not only negligence upon the part of the defendant but lack of his own contributory negligence.

This request was rightly refused.

> *Exception* 2: Requested instruction: "That if, when Mrs. Young approached the defendant's car, the door was open or partly open and extending over the sidewalk, Mrs. Young had a right to assume that the defendant's car would not be started until the door was closed."

The refusal to grant this request was not error. In it an attempt was made to have the Court declare that certain facts, if they were facts sufficiently proven in the case, constituted or tended to constitute observance of due care upon the part of the plaintiff. Whether or not Mrs. Young was in the exercise of due care was purely a question of fact for the jury and if it determined, con-

sidering all of the material facts attending the accident, that she did that which the ordinarily careful and prudent person would have done in the same situation, then she was in the exercise of due care; otherwise, not. The rights of the plaintiff were sufficiently and correctly placed before the jury, without the granting of this request, when the Court charged.

> "Now what were the duties on the part of Mrs. Young in order that she be in the exercise of due care: She had a right to be upon the sidewalk. She had a right to approach the car and stand anywhere upon the sidewalk. The fact that the car was parked there did not preclude her from occupying any part of the sidewalk or approaching any part of the sidewalk. It was incumbent upon her to take proper precautions and to make proper observations—to take such observations or keep the lookout that the reasonably careful person would, in view of all the circumstances. The fact that the car door was open would call for some caution on her part. If the car were starting or in the immediate operation of starting, that would be a notice to her and she would have to observe such precautions as were proper in order not to step in front of the car just as it started. In fact, she is controlled by that same rule of conduct as to observing the car—what a reasonably careful person would observe under the circumstances."

What was the justifiable effect of the open door upon the conduct of the plaintiff? For her own safety she was bound to do whatever the ordinarily careful and prudent person would do in her then situation. Complaint is made that the Judge said: "It is true that the fact that the car door was open would call for some caution on her part." Even if the Court, however, erred in making this statement (and we do not say that it did), it avails not the plaintiffs here because they took no exception to it. They expected simply to denials of requests.

The effect of the open door was purely a question of fact and depended upon all of the circumstances attending the situation. If a car were parked with its door open and extending over a portion of the sidewalk, with brakes set and no one occupying it, it would be difficult to see how such an open door "would call for some cau-

tion" on the part of the pedestrian. If, on the other hand, a pedestrian saw such a car with its open door then being closed by an occupant of the car beside whom at the wheel sat the driver and also knew or had knowledge of facts from which she should have known, in the exercise of due care, that this car was to be driven away immediately, then it can well be seen that such an open door would call for caution.

It is here to be noted that while Mrs. Young was on the sidewalk, yet she was there for the particular purpose of going to this automobile. Where she had this special knowledge it may be said to be different from as though she had no knowledge of the automobile's presence there or the intention of the driver immediately to depart with it.

The failure to grant this request was not prejudicial to the plaintiffs.

Exception 3: Requested instruction: "That a greater degree of care was demanded of Miss Potter as the operator of the car than was demanded of Mrs. Young, a pedestrian lawfully using the sidewalk, and the degree of care was commensurate with the danger arising from the lack of it."

By this request in effect the Judge was asked to charge the jury that the pedestrian on the sidewalk had a right as a matter of law to be less careful than the operator of the automobile. Throughout its charge, the Court had informed the jury that each had the duty of observing due care under all the circumstances. It seems to us that it should not be laid down as a rule of law that regardless of other attending circumstances that the fact that one is upon a sidewalk necessarily calls for a lesser degree of care upon his part than should be observed by the operator of the automobile. It is not a matter of comparison of the degree of care owed by each. The pedestrian on the sidewalk is guilty of negligence only if he fails to observe ordinary or due care. His conduct is comparable only with that of the ordinarily careful and prudent person who might be in his situation. Likewise, the care of the driver of the car is comparable only with the care required of a careful and prudent driver under like circumstances. This the Trial Court explained most clearly to this jury.

We are aware that cases have held that "a pedestrian has a right upon the sidewalk or other space set aside for the use of pedestrians superior to that of motor vehicles." 42 C. J., 1158, Sec. 931, and cases cited therein. But this particular request as worded did not call for a statement of law as to the relative rights of a pedestrian and a motor vehicle operator on the sidewalk but for a general declaration that the operator of the car had a greater degree of care than the pedestrian using the sidewalk. Neither had a greater degree of care than the other, although the automobile was wrongfully on the sidewalk and the pedestrian rightly there. The law required both to exercise due care under the circumstances.

Of course, the fact that an automobile is wrongfully on the sidewalk is one of the circumstances and has its bearing upon the exercise of care by him. If he has placed his car in a place not provided for cars but for pedestrians and where such pedestrians do not reasonably expect automobiles to be, then while the degree of care as such has not been affected, (for it is still due care required of him) yet to exercise such care requires an increased vigilance in the operation of his car. Why? Because the ordinarily careful and prudent person under those circumstances would be more vigilant.

On the other hand, the pedestrian, reasonably not expecting to be molested by an automobile on the sidewalk, in the exercise of due care need not take the same precaution for his own safety as against an automobile accident as though he were walking in the middle of the street.

In spite of these differences, however, the degree of care required of each as a matter of law is the same, for each is required, whether on the sidewalk or in the street, to observe the care that the ordinarily careful and prudent person would observe in his particular place under all the circumstances attending him. There is no difference of degrees of due care.

While the law of negligence on the civil side of the Court in this State knows only one degree of care, namely due or ordinary care, yet in the observance of due care differing facts necessarily change the rule of conduct of one who would perform his duty as to such care. The practice of distinguishing degrees of negligence, such as gross, ordinary and slight, tends to confusion. *Avery* v. *Thompson*, 117 Me., 120, 123, 103 A., 4; *Raymond* v. *Portland R. R. Co.*, 100

Me., 529, 62 A., 602; *Wilkinson* v. *Drew*, 75 Me., 363; *Pomroy* v. *B. & A. R. R. Co.*, 102 Me., 497, 67 A., 561; *Bacon* v. *Casco Bay Steamboat Co.*, 90 Me., 46, 37 A., 328.

"... In the ordinary case of negligence, involving no statutory regulation or contractual obligation with respect to the degree of care, there is a strong trend of judicial opinion against recognizing any classification of care into degrees, corresponding to the tendency to refuse to recognize the existence of degrees of negligence, the view being taken that whatever degree of vigilance, caution, and skill the circumstances may demand, the exercise thereof is merely ordinary care." 45 C. J., Sec. 50, page 680.

In *Murray* v. *Liebmann*, 231 Mass., 7, on pages 8 and 9, 120 N. E., 79, it is stated:

"The sidewalk where the plaintiff was standing engaged in conversation with a friend when he was struck and injured by the slightly overhanging spare tires carried in the defendant's motor car in an upright position on the running board formed part of the highway *in the concurrent use of which each party owed to the other the duty of due care.*" Also see *Forzley* v. *Bianchi*, 240 Mass., 36, 37, 132 N. E., 620.

The plaintiff takes nothing by this exception.

Exception 4: Requested instruction: "That it was negligence for Miss Potter to start her car with the right door open or partly open and extending over the sidewalk unless, at the time she did so, she observed that the sidewalk was clear of pedestrians who were in danger of being hit by the door."

The Court did not err in refusing to give this instruction because it was given sufficiently in the general charge when the Court said (after referring to the fact that the car door was open and extended to some extent over the sidewalk and stating that that called for an added precaution on her part) that:

"If she started the car, and Mrs. Young was in a position upon the sidewalk so that it was reasonably to be expected

that she would be affected by the starting of the car, and the driver of the car did not take such observations as a reasonably careful person would take in order to see what the situation was, and started the car, and by reason thereof Mrs. Young was struck by the car, then the driver was negligent. If she saw Mrs. Young there in a position, the natural result of which would be to strike her or injure her if the car was started, and she started the car, then, also, she would be negligent. But if Mrs. Young were not in such a position that her presence would be disclosed and made known to a person making the proper observation, then the failure to see her, of course, would not be negligence on the part of the driver."

Exception 5: Requested instruction: "That Miss Potter was bound to exercise so high a degree of diligence in observing foot passengers on the sidewalk as would enable her to control her machine or stop, if necessary, in time to have avoided a collision with Mrs. Young."

This request was rightly refused.

The Judge in his charge has stated sufficiently favorably to the plaintiffs the duty of the defendant in the operation of her automobile.

Furthermore, the request as to location of the "foot passengers on the sidewalk", together with an entire omission of attending circumstances, was too indefinite to constitute a proper instruction for the jury.

"The trial judge was not required to single out a part of all the evidence and give an instruction upon that part." *Jenkins* v. *North Shore Dye House, Inc.*, 277 Mass., 440, 444, 178 N. E., 644; *Lounsbury* v. *McCormick*, 237 Mass., 328, 337, 129 N. E., 598; *Ayers* v. *Ratshesky*, 213 Mass., 589, 593, 101 N. E., 78.

Motions and exceptions overruled.

CLARA E. MCCAUSLAND *vs.* NETTIE B. YORK.

Cumberland. Opinion, August 11, 1934.

PLEADING AND PRACTICE. TRESPASS. DEEDS. BOUNDARIES. EVIDENCE.

The issue in trespass quare clausum fregit, is rightful possession.

If the plaintiff establishes a legal title to the land in controversy, in the absence of actual adverse possession by someone else, the law implies that he had constructive possession sufficient to maintain an action.

In the absence of controlling evidence to the contrary, when a deed is acknowledged on a date later than the instrument itself bears, the presumption is that delivery was upon the date of acknowledgment.

When one accepts a deed bounding his conveyance by the land of another, the land referred to becomes a controlling monument. This is true whether the deed is or is not recorded. The land referred to as a bound is established as a monument by the deed of the parties and is in no way dependent upon the Recording Act.

It is an established rule of construction that, if it can be ascertained from such parts of the description in a deed as are found correct what was intended to be conveyed, the property will pass and the incorrect parts of the description will be merely rejected and disregarded.

What are the boundaries of land conveyed by a deed is a question of law. Where the boundaries are is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object. And the identity of a monument found upon the ground with one referred to in the deed is always a question for the triers of fact.

In references of cases by rule of court under Rule XLII *of the Supreme and Superior Courts, a finding of fact by a referee supported by any evidence of probative value, and his decision thereon, if sound in law, is not exceptionable.*

In the case at bar, the deed from Arthur E. Marks to Herbert W. McCausland dated March 26, 1896 and acknowledged March 28, 1896, must be deemed to have been delivered on the day of its acknowledgment.

Although this deed was not then recorded, as between the grantee and the grantor, his heirs and devisees and persons having actual notice thereof, it effected a valid transfer of the title to the land there described.

As long as the deed remained unrecorded, it was not effective against a prior

recorded conveyance of the same property under the statutes then in force, which were R. S. 1883, Chap. 73, Sec. 8; R. S. 1903, Chap. 75, Sec. 11.

These Recording Acts, however, had reference only to conveyances of the same property.

The deed of Arthur E. Marks to Herbert W. McCausland dated March 26, 1896, clearly embraced the disputed triangle.

The finding of the Referees that the deed of Arthur E. Marks to Fannie E. Hopkinson dated March 27, 1896 and acknowledged March 28, 1896, did not include the triangle was warranted in fact and law.

It appearing that that deed, as well as the deed of the triangle to Herbert W. McCausland dated March 26, 1896, were both acknowledged on March 28, 1896, it will be presumed that they were both delivered on the day they were acknowledged and in such order of time as to make them effectual to carry out the intentions of the parties to them.

The defendant has gained no title to the land in dispute by reason of the failure of the owner to record his deed.

The findings of fact and the rulings of law of the Referees in the case at bar were fully warranted.

On exceptions by defendant. An action of trespass quare clausum, to which defendant pleaded the general issue, and in a brief statement set up title in the defendant. Hearing was had before Referees with right of exceptions as to matter of law reserved. The Referees found for the plaintiff. To the overruling of defendant's written objections to the acceptance of the Referees' report, defendant seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Frederic J. Laughlin, for defendant.

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

STURGIS, J. This is an action of trespass quare clausum fregit to which the defendant pleads the general issue and, in a brief statement, alleges that she is lawfully seized and possessed of the land described in the plaintiff's writ on which the acts of trespass are alleged to have been committed. The suit was duly entered in the

Superior Court and referred under rule of court with the right of exceptions to decisions of law reserved. The Referees found for the plaintiff and assessed damages. The defendant filed written objections and perfected her exceptions to the acceptance of the report. The writ, pleadings, evidence, and report of the Referees, together with the objections filed in the trial court, are made a part of the bill of exceptions.

The land in controversy is a small parcel lying between the homestead lots owned and occupied by the parties, and all situated on the northerly side of Clifton Street near its intersection with Forest Avenue in the City of Portland. This tier of three lots is a part of a tract of land which was formerly owned by Arthur E. Marks, now deceased. He is the common grantor from whom the predecessors in title of these parties derived their titles.

By his deed dated September 19, 1894, Arthur E. Marks conveyed the northeasterly end of this tract with the buildings thereon to Herbert W. McCausland, the plaintiff's husband. This deed was duly recorded on October 8, 1894, in the Cumberland Registry of Deeds and the grantor and his successors in title, including the plaintiff, have since continuously occupied the premises.

About two years later, Arthur E. Marks sold the southwesterly lot in his tract on Clifton Street to Fannie E. Hopkinson. The deed then given was dated March 27, 1896, acknowledged March 28, 1896, and recorded April 4, 1896. It contained the following description:

> "A certain lot or parcel of land with the buildings thereon, situated in said Deering, and bounded and described as follows, to wit: Beginning at the South-Westerly corner of Clifton Street at the point of intersection of said Clifton Street with Forest Avenue; thence Northerly on the Westerly side line of said Clifton Street eighty-nine (89) feet to a stake; thence North Westerly at nearly right angles with said Clifton Street and along the Southerly side-line of land deeded to H. W. McCausland forty-seven (47) feet to an iron rod located on the South Easterly side-line of land of L. W. Whitney; thence Southerly on the South Easterly side-line of said Whitney's land eighty-nine (89) feet more or less to the

Northerly side-line of Forest Avenue; thence South-Easterly on the Northerly side-line of said Forest Avenue forty-seven (47) feet to the point of beginning."

Fannie E. Hopkinson, the grantee in this deed, died September 24, 1913, and this property descended to her sister, Elizabeth H. Marks, who conveyed it by substantially identical metes and bounds to the defendant, Nettie B. York, by deed dated July 8, 1914, and recorded on the following day. On the strength of this chain of title, the defendant claims that her land extends northeasterly from Forest Avenue to the land which Arthur E. Marks conveyed to Herbert W. McCausland by deed dated September 19, 1894, to which reference has already been made. If this claim can be sustained, the defendant has title to the land upon which the trespass is alleged to have been committed.

It appears and is undisputed, however, that by deed dated March 26, 1896 and acknowledged March 28, 1896, but not recorded until June 27, 1927, Arthur E. Marks purported to convey to Herbert W. McCausland a small practically triangular lot of land abutting on Clifton Street and lying on the southwesterly side and adjoining the land and buildings which he had previously conveyed to McCausland by deed of September 19, 1894. The evidence tends to prove that, although McCausland, the grantee, did not then record this deed, he immediately went into possession of the lot therein described, graded it and made it a part of his lawn, and until his death used and occupied it as a part of his homestead lot. His wife, the plaintiff in this action, his successor in title as life tenant under his will, has been in possession since his death. A part or all of this lot is included in the land claimed by the defendant, and her entry, excavation, and spoliation of the growing grass on it is the basis of this action.

For nearly thirty years after Arthur E. Marks conveyed these lots on Clifton Street, there appears to have been no controversy as to the ownership of the triangular intermediate lot. The Hopkinson land, now the York land, being higher was graded down in an embankment which ran, if not exactly nevertheless practically, to the southwesterly line of the triangle, as for convenience the lot in dispute may be called. This embankment was already built when

the Yorks purchased this property and was used as a part of their back lawn just as it had been used, it may be fairly inferred, by Fannie E. Hopkinson in her lifetime. The McCauslands, on the other hand, occupied the triangle as part of their lot. They mowed to the foot of the embankment where Hopkinson and the Yorks stopped mowing, and the adjoining owners treated the foot of the embankment as the approximate location of this dividing line. Neither here presents a claim of adverse possession. Although that question is not raised here, it well may be that both parties intended to occupy and claim title to their true line wherever that might be ascertained to be, and find themselves within the doctrine of *Preble* v. *Railroad Company*, 85 Me., 260, 27 A., 149, and the later decisions of this Court.

In 1927 or the year following, a surveyor, employed by the defendant York to run her lines, apparently advised her that she owned the triangle, made a plan of it and the adjoining lots, and set stakes in accordance with his interpretation of the deeds and their legal effect. Acting on this advice, the defendant York started to build a garage on the triangle but stopped the work. She dug a trench practically across the lot and set posts for a fence, and from time to time mowed the grass and otherwise attempted to use and occupy it as owner. Finally, alleging that the deed of Arthur E. Marks to Herbert W. McCausland bearing date of March 26, 1896, which purported to transfer the title to the triangle, constituted a cloud on her title to the triangle, she brought a bill in equity to remove the cloud. The bill was dismissed without prejudice, this Court on appeal holding that equity had no jurisdiction, the proceeding on pleading and proof being nothing more than an attempt to settle a line dispute and try title, a matter which was cognizable in the courts of law. *York* v. *McCausland*, 130 Me., 245, 154 A., 780. In this action at law, the parties are reversed but the controversy is the same. Both parties claim the legal title to the triangle, so-called, under their respective deeds and base their right of possession thereon. The issue in trespass quare clausum fregit is rightful possession. *Kimball* v. *Hilton*, 92 Me., 214, 42 A., 394. If the plaintiff establishes a legal title to the triangle, in the absence of proof of actual adverse possession by someone else, which is lacking here, the law implies that she had constructive possession

sufficient to maintain this action. *Thurston* v. *McMillan*, 108 Me., 67, 78 A., 1122; *Butler* v. *Taylor*, 86 Me., 17, 29 A., 923; *Griffin* v. *Creppin*, 60 Me., 270. If the defendant has the title, the plaintiff can not maintain her action.

The deed by which Arthur E. Marks attempted to convey the triangle in dispute to Herbert W. McCausland, from whom the plaintiff derives her title as life tenant, was a warranty deed and, as already pointed out, although dated March 26, 1896, was not acknowledged until March 28, 1896. There being no convincing evidence outside the deed itself as to when it was delivered, the date of the acknowledgment must be taken as the date of delivery. In the absence of controlling evidence to the contrary, when a deed is acknowledged at a date later than the instrument itself bears, the presumption is that delivery was upon the date of acknowledgment. *Loomis* v. *Pingree*, 43 Me., 299; *Mighill* v. *Rowley*, 224 Mass., 586, 113 N. E., 569.

On the record, therefore, on March 28, 1896, Herbert W. McCausland received delivery of and accepted a deed apparently conveying the title to the disputed premises. Although the deed was not then recorded, as between the grantee and the grantor, his heirs and devisees and persons having actual notice thereof, this transfer of title was complete and effectual. It was not effectual as against a prior recorded conveyance of the same property. The Recording Act of this State in force when the rights of these parties accrued provided: "No conveyance of an estate in fee simple, fee tail or for life or less, for more than seven years is effectual against any person except the grantor, his heirs and devisees and persons having actual notice thereof, unless the deed is recorded as herein provided." R. S. 1883, Chap. 73, Sec. 8; R. S. 1903, Chap. 75, Sec. 11. The statute has reference, however, only to conveyances of the same property. *Hooper* v. *Leavitt*, 109 Me., 70, 82 A., 547. Unless it here appears that the parties and their predecessors in title both received deeds purporting to convey the same disputed triangle, the defendant obtains no priority merely because the McCausland deed was withheld from the record. There is no doubt that the deed of Arthur E. Marks to Herbert W. McCausland, which bore date as of March 26, 1896, embraced and purported to convey the triangle. The real question in the case is

whether the deed of Arthur E. Marks to Fannie E. Hopkinson dated March 27, 1896, which has already been discussed, included this disputed lot. The defendant's title, in so far as this controversy is concerned, is measured by that originally acquired by Fannie E. Hopkinson. It has been in no way enlarged by subsequent inheritance or conveyance. The widening of Forest Avenue has reduced the length of the lot as will hereinafter appear in another connection, but it has not changed its northeasterly bound.

The defendant, relying on the description given in the Hopkinson deed, contends that the northeasterly bound of her land is the southeasterly bound of the first lot with the buildings thereon which Arthur E. Marks conveyed to Herbert W. McCausland on September 19, 1894. The second call in that deed reads: "Thence North Westerly at nearly right angles with said Clifton Street *and along the Southerly side-line of land deeded to H. W. McCausland* forty-seven (47) feet to an iron rod located in the South-Easterly side-line of land of L. W. Whitney." The Referees ruled against the defendant on this issue. They note that the McCausland deed of the triangle bears date of March 26, 1896, the day before the Hopkinson deed is dated, and that both deeds were acknowledged on March 28, 1896. From this, they draw the inference and find that these deeds were delivered on the day of their acknowledgment and, both being acknowledged on the same day, the McCausland deed was delivered before Fannie E. Hopkinson received her deed. We are of opinion that the Referees were fully warranted in this conclusion. It is the accepted rule that when two deeds purport to have been acknowledged on the same day "we may well presume, notwithstanding the form of words as to the attestation, that the deeds were in fact delivered on the day they were acknowledged, and in such order of time as to make them effectual to carry out the intentions of the parties to them." *Loomis* v. *Pingree*, supra. Here was a common owner delivering deeds of adjoining lots of land to different grantees on the same day. It must be presumed that he was acquainted with the contents of his deeds, mindful of his former conveyances from the same tract, and honest in his intentions. There can be no doubt that he intended to convey the triangle to Herbert W. McCausland and it can not be assumed that he intended to perpetrate a fraud by including the same property in his con-

veyance to Fannie E. Hopkinson. We also feel justified, as did the Referees, in attributing honorable intentions to the grantees who accepted the deeds. Their subsequent use and occupation of the two lots indicate a mutual intent to hold their lands as the grantor intended to convey them. The presumption of the delivery of the McCausland deed to the triangle before the Hopkinson deed was given is in accord with the apparent intentions of the parties.

The triangle, therefore, seems to have been "land deeded H. W. McCausland" when the Hopkinson deed was given. The acceptance of its "Southerly side-line" as the northeasterly bound of the defendant's land is consistent with the other metes and bounds given in the deed. The "Southerly side-line" of McCausland's first lot is entirely inconsistent with those calls. Running "Northerly on the Westerly side-line of said Clifton Street eighty-nine (89) feet to a stake", the line of the Hopkinson lot turns and runs "*thence North Westerly at nearly right angles with said Clifton Street* and along the Southerly side-line of land deeded to H. W. McCausland *forty-seven* (47) *feet to an iron rod located on the South-Easterly side-line of land of L. W. Whitney.*" The iron rod referred to in this description, according to the record, still exists and its location is not in dispute. The "Southerly side-line" of the triangle turns "nearly at right angles with Clifton Street," and runs in a straight line to the iron rod, the distance being approximately forty-seven feet. The "Southerly side-line" of the first lot conveyed to McCausland does not turn even approximately at right angles with Clifton Street, nor would a line run from the southwest corner of that lot at such an angle reach the iron rod or strike the south-westerly side-line of the Whitney land. These significant facts carried weight to the minds of the Referees and confirmed their conclusion that, according to the description in the Hopkinson deed, the defendant's land ran to the "Southerly side-line" of the triangle.

The defendant lays much stress on the fact that, when and since she acquired her title to the Hopkinson lot, so-called, it has never had a depth of eighty-nine feet from Forest Avenue running northeasterly on Clifton Street as stated in the first call of her deed and in the original conveyance to Fannie E. Hopkinson. This is undoubtedly true, but it does not give her title to any part of the

triangle which the plaintiff owns. It is not denied that in 1880 the tract of land on Clifton Street acquired by Arthur E. Marks extended one hundred sixty-five feet northeasterly from Forest Avenue, but it appears that, by proceedings begun in 1893 and concluded in 1897, Forest Avenue was widened approximately twenty-four feet, and Fannie E. Hopkinson, who then owned the defendant's lot, was compensated for the land taken therefrom. The defendant acquired title to the Hopkinson lot after and as it had been cut down by the widening of Forest Avenue. This accounts for the deficiency in the frontage on Clifton Street called for in her deed. The length of the defendant's lot does not militate against the finding that the "Southerly side-line" of the triangle marks her northeasterly bound.

The defendant urges in an extended argument that the triangle in dispute can not be deemed the boundary mentioned in the second call of the Hopkinson deed because the deed conveying it to Herbert W. McCausland was not recorded when she and her predecessors in title received their conveyances. She insists that the owners of the Hopkinson lot were entitled to notice that the "land deeded H. W. McCausland" was in fact the triangle. We are not of opinion that the question of actual notice or of constructive notice which might have been obtained through the recording of the McCausland deed affects the defendant's title one way or the other. When one accepts a deed bounding his conveyance by the land of another, the land referred to becomes a controlling monument. *Perkins* v. *Jacobs*, 124 Me., 347, 129 A., 4. This is true whether the deed is or is not recorded. The land referred to as a bound is established as a monument by the deed of the parties and is in no way dependent upon the Recording Act. This rule is definitely settled in the earlier decisions of this Court. We are not unmindful that the facts in those cases are in some ways distinguishable from those in the case at bar, but the principles involved are the same and must be affirmed. *Bryant* v. *Maine Central Railroad Company*, 79 Me., 312, 9 A., 736; *Bonney* v. *Morrill*, 52 Me., 252.

Nor does the defendant take anything by the fact that one of the calls in the deed of the triangle to Herbert W. McCausland was erroneous. It is true that the first call is wrong. Its recital is, "Beginning at a point on the South-Easterly corner of land of said

McCausland on the North-Westerly side-line of Clifton Street," etc. The reference should have been to the "*Southwesterly* corner." With this correction of an obvious error, the calls in the deed are made consistent with each other and the description perfect. It is an established rule of construction that, if it can be ascertained from such parts of the description in a deed as are found correct what was intended to be conveyed, the property will pass and the incorrect parts of the description will be merely rejected and disregarded. *Richardson* v. *Watts*, 94 Me., 476, 484, 48 A., 180; *Abbott* v. *Abbott*, 53 Me., 356, 361.

What are the boundaries of land conveyed by a deed is a question of law. Where the boundaries are is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object. And the identity of a monument found upon the ground with one referred to in the deed is always a question for the triers of fact. *Abbott* v. *Abbott*, 51 Me., 575; *Murray* v. *Munsey*, 120 Me., 148, 150, 113 A, 36; *Perkins* v. *Jacobs*, supra. In references of cases by rule of court under Rule XLII of the Supreme and Superior Courts, a finding of fact by a Referee supported by any evidence of probative value, and his decision thereon, if sound in law, is not exceptionable. *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853. The finding of fact by the Referees in the case at bar that the "Southerly side-line" of the triangle conveyed to Herbert McCausland by deed dated March 26, 1896, was the northeasterly boundary of the defendant's lot at the corner of Clifton Street and Forest Avenue in Portland, and the ruling that the plaintiff holds the legal title to the triangle as life tenant under her husband's will, were fully warranted. The numerous requests for rulings submitted to the Referees were granted or sufficiently otherwise covered in the Report. The exceptions based on the objections filed in the Trial Court can not be sustained and must be overruled.

Exceptions overruled.

LILLIAN BUMPUS *vs.* WILLIAM P. LYON.

Oxford. Opinion, August 14, 1934.

MOTOR VEHICLES. NEGLIGENCE. NEW TRIAL.

A new trial will not be ordered on the ground of newly discovered evidence when the complaining party, by the exercise of due diligence, might have discovered the evidence prior to the trial. The newly discovered evidence must be of such character and weight, considered in connection with the evidence already in the case, that it seems probable that on a new trial, with the additional evidence, the result will be changed.

The rules which the court has promulgated with respect to new trials for newly discovered evidence are not simply legal formulae to be rigidly applied. They are designed to further justice, not to thwart it, and to serve as a guide to the court in the exercise of what is in effect a sound discretion.

In the case at bar, the defendant cannot be charged with neglect in accepting the plaintiff's statement of her condition. The evidence in question seems to refute the plaintiff's testimony on a very vital point, the state of her health prior to the accident, which was apparently regarded by her as of sufficient importance so that she concealed the fact from the jury. In such instance the court holds its duty to order a new trial is imperative.

On general and special motion for new trial by defendant. An action on the case to recover damages for personal injuries alleged to have been suffered by plaintiff when a Ford truck which she was driving was struck by an automobile driven by the defendant. Trial was had at the November 1933 Term of the Superior Court for the County of Oxford. The jury rendered a verdict for the plaintiff in the sum of $3500.00. A general motion for new trial was thereupon filed by defendant, and later a special motion for new trial on the ground of newly discovered evidence. Special motion sustained. New trial granted. The case fully appears in the opinion.

Arthur J. Henry,
George A. Hutchins, for plaintiff.
Albert Beliveau, for defendant.

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

THAXTER, J. The plaintiff in an action against the defendant for personal injuries received in an automobile accident won a verdict for $3500. The case is now before this court on the defendant's general motion for a new trial and on a special motion based on newly discovered evidence. As the special motion must be sustained, we shall not discuss the other.

The plaintiff was injured November 2, 1932. After the accident she was able to walk, and in fact did not consult a doctor until the next morning, who found that she had some pain in her back and that her nose was injured slightly. He treated the nose and advised x-rays of the back, which, however, were not taken. About a week later the plaintiff returned and complained of excessive menstrual flowing. On November 20th she consulted Dr. Call who found her weak and nervous; but she said nothing to him about her menstrual condition. On February 14th he examined her again, when she complained of her uterine trouble. She claimed at the trial that this condition was a result of the accident, and that prior thereto she had had no such difficulty. She testified as follows:

"Q. And did you tell Dr. McCarthy that for some time past, probably a year or so, you had been troubled more or less with excessive flowings?
A. No, sir.
Q. You hadn't been?
A. I hadn't been.
Q. And your periods were regular?
A. Yes, sir.
Q. All the time?
A. They had.
Q. And you never had any trouble in that direction?
A. They always were regular.
THE COURT: Do you mean—there may be a chance of misunderstanding there—Do you mean up to the time Dr. McCarthy examined you, or up to the time of this accident?
A. I was always regular up until this accident. I never varied over two or three days at any time."

The jury were given to understand and apparently believed that the plaintiff had been in good health prior to the accident, which resulted in a uterine disturbance of a serious nature. That this belief weighed heavily with them in the assessment of damages seems clear.

The newly discovered evidence is from three witnesses. A Mrs. Coolidge testifies that she had known the plaintiff for a number of years prior to the accident, that the plaintiff had complained to her of excessive menstrual flowing and that by reason of it her health had apparently been very poor. Dr. Stewart of South Paris testifies that in 1926 the plaintiff had consulted him about excessive menstruation, and that he had operated on her in an effort to cure this condition without beneficial result. Dr. Doughty of Oxford states that the plaintiff consulted him for the same trouble in 1928 and that he treated her in a hospital at Lewiston. The testimony of these three witnesses raises a strong presumption that the story which the plaintiff told the jury was false.

This court has in a number of instances indicated the conditions which will justify the granting of a new trial on the ground of newly discovered evidence. A new trial will not ordinarily be ordered when the complaining party by the exercise of due diligence might have discovered the evidence prior to the trial. *Gilpatrick* v. *Chamberlain*, 121 Me., 561, 118 A., 481. Without such limitation there would always be the danger of a retrial of every case because of the laxity of the party or his counsel seeking such relief. In the second place the newly discovered evidence must be of such character and weight, considered in connection with the evidence already in the case, that it seems probable that on a new trial, with the additional evidence, the result will be changed. *Parsons* v. *Lewiston, Brunswick and Bath Street Railway*, 96 Me., 503, 52 A., 1006.

Counsel for the plaintiff contends that there was not here due diligence on the part of this defendant in presenting this testimony. We feel differently. The fact of the plaintiff's condition was peculiarly within her own knowledge, and confided by her solely to her medical advisers and intimate friends. She deliberately concealed the fact; they disclosed the truth only when they became aware of the falsehood. The defendant cannot be charged with neglect for accepting the plaintiff's statement. But beyond this the

rule in question is not simply a legal formula to be rigidly applied in disregard of the purpose for which it was conceived. It was designed to further justice, not to thwart it, and to serve as a guide to the court in the exercise of what is in effect a sound discretion. *Nathan M. Rodman Company* v. *Kostis*, 121 Me., 90, 115 A., 557.

Counsel for the plaintiff argues that the new evidence is trivial, and is not of such a character as to create a probability of a changed result should the case be submitted to another jury. It seems to us to refute the plaintiff's testimony on a very vital point, the state of her health prior to the accident. If the evidence of the doctors who treated her is to be believed, she herself apparently regarded this fact of sufficient importance to conceal it from the jury.

Not only is it proper that there should be a new trial in this case, but the duty on the court to order it is imperative.

Special motion sustained.
New trial granted.

CHARLES L. TIBBETTS *vs.* ORRIN W. DUNTON.

Penobscot. Opinion, August 21, 1934.

NEGLIGENCE. MOTOR VEHICLES. EVIDENCE. R. S., CHAPTER 29, SECTION 75.

Where it is reasonably necessary for one to change his tire with the automobile remaining on the highway, then for such length of time consistent with the reasonable use of the highway for that purpose the automobile is not parked within the meaning of Chapter 29, Section 75, R. S., 1930, which provides that: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any way, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such way; . . ."

The applicability of this statute depends upon the finding of fact as to the exigency of the occasion for stopping on the highway.

It can not be ruled as a matter of law that failure to drive one's car into a driveway or farther on into a gravel pit, there to change the tire, constitutes contributory negligence. It is a jury question.

The right to stop on the highway for a reasonable length of time to do reasonably necessary repair work on an automobile does not relieve one from the duty of exercising due care for his own safety while so engaged.

When one puts himself in a dangerous place, trusts his safety entirely to the driver of the approaching car, and for his own protection does not even once look to see if any car is approaching, he fails as a matter of law to exercise due care.

In the case at bar, there was ample evidence from which to find negligence on the part of the defendant, but likewise there was undisputed evidence to show that the plaintiff was contributorily negligent.

On general motion for new trial by defendant. An action on the case to recover for personal injuries sustained by plaintiff through the alleged negligence of the defendant who drove his automobile into the automobile of the plaintiff while plaintiff was on the road repairing a tire. Trial was had at the January Term, 1934, of the Superior Court for the County of Penobscot. The jury rendered a verdict for the plaintiff in the sum of $3500.00. A general motion for new trial was thereupon filed by defendant. Motion sustained. The case fully appears in the opinion.

B. W. Blanchard, for plaintiff.

Arthur L. Thayer, for defendant.

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

HUDSON, J. Action on the case for negligence to recover for personal injuries and property damages resulting from an automobile accident occurring in the town of Hampden late in the afternoon of October 29, 1933, on state road number 138. The defendant seeks by motion to overturn the jury's verdict for the plaintiff.

The road at the place of collision nearly in front of the driveway into the residence of Lyndon Dunton was twenty-two feet in width, with eighteen feet of tarvia and two feet of gravel on each side of the tarvia. It was generally level and straight with possibility of vision in either direction of approximately one quarter of a mile. Next to the two feet of gravel on the right, as one went from Hampden westerly toward Augusta on this road, there was a ditch and

the descent from the gravel shoulder to the ditch was quite abrupt.

On this day the plaintiff, accompanied by the young lady whom he has since married, was driving easterly on this road on his way to Newburgh. He had been working for Lyndon Dunton and, desiring to see him on a matter of business, stopped his car nearly opposite to Lyndon's driveway, which was on his left. As he stopped, he pulled his car well to the right of the road. Lyndon Dunton came to the automobile, noticed that the left rear tire was flat, and so informed the plaintiff. The plaintiff put on his lights, rear and front, and with the assistance of Lyndon Dunton, upon his return from his house where he went to get a wrench, changed the tire for a spare, the now Mrs. Tibbetts remaining in the car.

There was a conflict of testimony as to the exact location of the Tibbetts car while the tire was being changed. The plaintiff claimed that the right wheels were out on the gravel practically to the ditch. The defendant contended that the left wheels were quite close to the center of the tarvia. It is reasonable to believe from the verdict that the jury sustained the plaintiff's contention, the effect of which would be that on the left of the plaintiff's car there was a clearance for passing traffic of some fourteen or fifteen feet.

From the time the plaintiff arrived until the accident there elapsed from twenty to thirty minutes, during which time some cars passed safely by. Finally along came the defendant with one passenger. If not then dark, it was very dusky. The defendant's lights were on. Although the defendant testified that he saw the tail light of the plaintiff's car, he said he did not see the car itself until he was from within twenty to twenty-four feet of it, too late to do anything except to try to pass out around it. He did not see the plaintiff then kneeling at his left rear wheel as he was then tightening the last bolt in it. Not only did he not clear the plaintiff there kneeling in the highway, but he ran into his automobile, striking with his right mud guard the plaintiff's tail light and left mud guard.

Justification for the verdict of the jury can be had only if the evidence proves sufficiently negligence upon the part of the defendant as the proximate cause of the injuries and lack of contributory negligence upon the part of the plaintiff himself. Unless manifestly wrong, the verdict must stand.

In our judgment, there was ample evidence on which to find negligence upon the part of the defendant, and his counsel rather than relying much on that branch of the case insisted much more upon the defense of contributory negligence.

In the first place, the defendant claimed that the plaintiff was guilty of violation of Section 75 of Chapter 29, R. S. 1930, which provides that: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any way, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such way; . . ." The defense says that it was practicable to change this tire in the driveway above referred to, as well as practicable to have driven his car on a distance of some three hundred feet to an opening on the right of the road where gravel had been taken out of a bank and there change the tire. It insists that failure to do this was contributory negligence. The plaintiff, on the other hand, says that this statute is inapplicable.

This statute is not necessarily applicable. Its applicability depends upon the finding of fact as to the exigency of the occasion. It is not claimed that the plaintiff left his vehicle but parked it in violation of this statute. Did he park it within the meaning of this statute? If so, the violation is prima facie evidence of negligence; otherwise, not. *Dansky* v. *Kotimaki*, 125 Me., 72, 74, 130 A., 871; *Kimball* v. *Davis*, 117 Me., 187, 103 A., 154; *Rouse* v. *Scott*, 132 Me., 22, 23, 164 A., 872.

In *Elliott* v. *Seattle Chain & Manufacturing Co.* (Wash.), 251 Pac. 117, there was an ordinance forbidding the parking of automobiles which, it was claimed, the driver violated. The Court said:

> "The ordinance prohibiting parking on Madison Street did not contemplate a situation where, by the exigencies of the occasion, a person must temporarily stop his car on that street."

In that case the driver stopped on a steep grade because he was out of gas, and while away to get it the accident occurred.

In *Dare* v. *Boss, et al.* (Ore.), 224 Pac. 646, the question arose whether there was a violation of a parking statute forbidding the

parking upon main traveled portions of highways. The Court said:

> "We find no definition in the statute of the word 'park', but we take it that it means something more than a mere temporary or momentary stoppage on the road for a necessary purpose."

In *Bruening* v. *Miller, et al.* (S. D.), 230 N. W., 754, a tractor ran out of gas on the road and stopped. The operator left it to obtain gas. With relation to a statute against parking, the Court said:

> "Leaving the rig upon the highway under these circumstances was not 'parking' it in the sense in which the word is properly used."

It quoted Blashfield's *Encyclopedia of Automobile Law*, vol. 1, page 656, section 4, as follows:

> "'The exigencies of automobile traffic make constant demands upon operators of motor vehicles to stop their cars either on the highway or at the side of the road to make repairs, and the driver or owner of such vehicle has the right to stop his machine in the highway for the purpose of making repairs, adjusting the machinery of his car, or to do whatever is necessary to be done about the car to increase its service for the purpose of travel.'"

The Court also stated:

> "If respondent had the right to stop his tractor to do whatever was necessary for the purpose of travel, he had the right to leave the rig on the highway a reasonable time for that purpose."

> "The term 'parking' as applied to automobiles has well defined meaning, understood by automobile drivers to mean not only voluntary act of leaving car on street unattended, but also stopping of car on highway, though occupied and attended, for length of time inconsistent with reasonable use of street, considering primary purpose for which streets exist. . . .

Village of *Wonewoc* v. *Taubert* (Wis.), 233 N. W., 755, 756." Words and Phrases, 4th Series, vol. 3, page 20.

If it was reasonably necessary for the plaintiff to change this tire where the car was on the highway, then for such length of time, consistent with the reasonable use of the highway for that purpose, his automobile was not parked within the meaning of this statute. No exceptions were taken to the charge of the presiding Justice and we must assume that the proper interpretation of this statute was given to the jury. The determination of the facts was for it. We can not hold as a matter of law that the facts, interpreted most favorably for the plaintiff's contention (and that is the light in which we must now regard them) proved the plaintiff to be a violator of this statute.

Even if, however, this statute were applicable, it should not be ruled as a matter of law that the plaintiff's failure to drive his car into the driveway or the gravel pit, there to change his tire, constituted contributory negligence. That was a question of fact for the jury and was rightly submitted to it.

"It could not have been ruled as matter of law that they were lacking in due care because they did not take their machine to one of the adjacent streets, where there was less traffic, for the purpose of making the necessary repairs, or that they did not convey it under a powerful electric arc light on Reynolds Avenue not far distant from where they stopped, or that they did not proceed to a garage. Whether they were negligent under all the circumstances was a question of fact for the determination of the jury." *Reynolds* v. *Murphy*, 241 Mass., 225, 228, 229, 135 N. E., 116, 117.

But apart from this statute, the verdict must be overturned because of contributory negligence of the plaintiff in another respect. Even though he had the right to change this tire there on the highway, would he recover for injuries received while so doing, he must at the time himself have been in the exercise of due care in the performance of his work. The right to stop for a reasonable length of time to do reasonably necessary work on the automobile does not relieve one from the duty of exercising due care for his own safety, while so engaged.

A careful reading of the record, particularly the evidence of the plaintiff himself, convinces us that instead of proving due care while changing this tire, he clearly demonstrated his lack of it. In the observance of due care he was bound, would he not have been contributorily negligent, to do for his own safety that which the ordinarily careful and prudent person would have done under the same circumstances. The vigilance of such a person he must have exercised in his own behalf and it should have been "commensurate with the danger arising from lack of it." *Aiken* v. *Metcalf*, 90 Vt., 96, 97 A., 669; *Day* v *Cunningham*, 125 Me., 328, 330, 133 A., 855. The greater the danger, correspondingly greater is the vigilance required. That this was a dangerous place in which to change a tire can not be denied, and it did not make much difference in this regard whether, as claimed by the plaintiff, his car was so placed in the road that as he knelt by the wheel his foot did not extend to the center of the road or, as claimed by the defendant, it did. His body in either place was exposed to the traffic. He put himself voluntarily in a most perilous situation. Then, under these circumstances, what was his actual conduct? Let him answer.

"Q. Now Mr. Tibbetts, what would have prevented you, as you knelt there by that car, from seeing an automobile that was approaching you?
"A. Because I was busy at my work.

* * *

"Q. And with just a little bit of caution you could have watched the cars approaching you from either side, couldn't you?
"A. I don't know why it was necessary.
"Q. But you could have done so, couldn't you?
"A. Yes, if I had wanted to quit changing my tire.

* * *

"Q. Was there anything to prevent you from seeing Mr. Dunton as he came along and drove right up to your car?
"A. I didn't even see Mr. Dunton.
"Q. There was nothing to prevent your seeing him, was there?
"A. There wasn't if I was looking that way."

Thus in the absence of other proof, and there is none such in the case, it is apparent that in that dangerous situation the plaintiff was perfectly oblivious to the traffic; that he did not keep any watch for it because he was busy at his work and, furthermore, didn't think it was necessary so to do. True it is that Mr. Lyndon Dunton was by his side helping him in his work, but there is no evidence in the case to show that he relied on him to keep a lookout and he did not keep watch. There is nothing in the case to show that Lyndon knew anything about the presence of the defendant's car until it was within twenty to twenty-four feet of the Tibbetts car, when he hollered to the plaintiff, "Look out for that car!" but too late.

So the record is void absolutely of any evidence that the plaintiff even once while changing the tire looked to see if any car was coming from either direction. In a recent case, *Loyle* v. *Boston Elevated Railway*, 260 Mass., 404, 406, 157 N. E., 356, the Court said:

> "It is obvious that in acting as he did the plaintiff was not exercising the care of a reasonably prudent man. Stopped in a narrow space in the public way, he put himself in a place of danger without taking any precaution, and without a glance in the direction from which danger was most likely to come,"

and the Court ordered judgment for the defendant.

Of like import may be cited *Carney* v. *Boston Elevated Railway*, 219 Mass., 552, 107 N. E., 411; *O'Leary* v. *Haverhill & Plaistow Street Railway*, 193 Mass., 339, 79 N. E., 733; *Quinn* v. *Boston Elevated Railway Co.*, 188 Mass., 473, 74 N. E., 687; *Kelly* v. *Boston Elevated Railway*, 197 Mass., 420, 83 N. E., 865.

Having put himself in a place of so great danger, the plaintiff made the fatal mistake of trusting his safety entirely to the driver of the approaching car and that constituted undue rather than due care under the circumstances. The plaintiff's verdict can not stand because of his own contributory negligence, founded on undisputed evidence admitted by him to be true.

Motion sustained.

E. H. STEWART AND LOUISA P. STEWART *vs.* FRANK W. WINTER.

Androscoggin. Opinion, August 21, 1934.

DECEIT. FRAUD. DAMAGES. ACTIONS.

Promises of performance of future acts do not constitute actionable representation.

The fact that a promise for future performance relied on is accompanied by a misrepresentation as to existing or preexisting fact does not constitute a representation on which to base an action of deceit where the only damage proven is a consequence of the broken promise rather than of the misrepresentation, even though such a false representation without damage might justify the avoidance of the contract by the party defrauded.

One in relying upon a false representation may be led to make a contract and yet be damaged not as a result of the reliance on the representation but by reason of the breach of some promise in the contract separate and independent from the representation. Where the damage sustained results from the broken promise, and no damage results proximately from the misrepresentation, the remedy is assumpsit for breach of the contract and not an action in deceit.

The striking out of testimony of a witness, all of which relates to damages, is not harmful or prejudicial to a plaintiff who fails to establish liability of the defendant.

In the case at bar, defendant made a representation "that he had eighteen Guernsey cows coming down immediately with Mr. Sargent, said cows to be placed in said barn". The plaintiffs, however, did not rely on this representation as one of existing fact, but placed sole reliance on promises made of future acts. Such promises could not constitute an actionable claim on which to base an action of deceit.

On exceptions by plaintiff. An action of deceit. To the direction of a verdict for the defendant, and to a ruling striking from the record, testimony of one of plaintiffs' witnesses, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Pulsifer & Ludden, for plaintiffs.

Frank W. Winter pro se

Elwyn H. Gamage, for defendant.

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

HUDSON, J. Action of deceit. On motion therefor, the Justice presiding directed a verdict for the defendant. The case is before us on two exceptions, first to the direction of the verdict, and second, to the ruling of the Court in ordering all of the testimony of the plaintiffs' witness, Harold S. White, to be stricken from the record as inadmissible.

FIRST EXCEPTION

The action is founded on nine alleged false and fraudulent representations, all of which, excepting one, clearly did not pertain to any existing or preexisting fact but were simply promises for performance of acts in the future. Promises of performance of future acts do not constitute actionable representation.—*Long* v. *Woodman*, 58 Me., 53; *Carter* v. *Orne*, 112 Me., 367, 92 A., 289, 290; *Albee* v. *La Roux*, 122 Me., 273, 119 A., 626, 627.

The excepted representation as alleged in the declaration in the writ was "that he" (meaning the defendant) "had eighteen Guernsey cows coming down immediately with a Mr. Sargent, said cows to be placed in said barn." This representation may be said to consist of two statements, first, not clearly so expressed but probably intended as an existing fact that he *then had* the eighteen cows, and second, that Sargent would "bring them down to the barn" on the farm of which the defendant gave the plaintiffs the lease, the latter statement constituting simply a promise for the performance of a future act. Then does the fact that the promise relied on, that the cows would be brought to the barn, accompanied by a statement that he had them (giving the plaintiffs the benefit of such an interpretation) constitute a representation which would be a basis for an action of deceit? In the somewhat analogous case of *Carter* v. *Orne*, supra, our Court indicated it would not, saying:

> "The prior allegation as to the actual sale of one hundred copies, if separated from the promise to sell the second lot also in Lewiston, is entirely unimportant and immaterial because if the defendant had actually sold the second lot in Lewiston as he agreed to do, no action could have been main-

tained by reason of any false representation in regard to the first lot, *and no injury could have resulted to the plaintiff thereby.* The only injury claimed by the plaintiff is because of the defendant's failure to perform his agreement, and for that injury the remedy sounds in contract and not in tort. *Ross* v. *Reynolds*, 112 Me., 223."

The evidence of both plaintiffs accords with and supports our interpretation of this representation, for they testified that before the lease was executed the defendant told them that he had the eighteen cows and that they would be taken to the farm. If at the time the words were spoken the defendant did not have the eighteen cows but later had gotten them and Sargent had brought and placed them in the barn at the stated time, no action of deceit could have been maintained against the defendant because the plaintiffs would not have been "misled to their damage" by the misrepresentation. Damage as a result is essential in actionable deceit. *Patten* v. *Field*, 108 Me., 299, 81 A., 77; *Gilbert et al* v. *Dodge*, 130 Me., 417, and cases cited therein on page 419, 156 A., 891.

Lest we be misunderstood, however, it should be stated that we do not hold that such a false representation, even without damage, could not amount to fraud so as to justify the avoidance of a contract by the party defrauded.

" . . . It is universally held that the most sacred instrument may be avoided for fraud. . . . 'Fraud has been defined to be any cunning, deception or artifice used to circumvent, cheat or deceive another. Words and Phrases, vol. 3, 2943.' " *Great Northern Manufacturing Co.* v. *Brown*, 113 Me., 51, 53, 92 A., 993.

To constitute fraud the false representation must actually be relied on. *Duffy* v. *Metropolitan Life Ins. Co.*, 94 Me., 420, 47 A., 905; *Hotchkiss* v. *Bon Air Coal & Iron Co.*, 108 Me., 34, 78 A., 1108; *Erie City Iron Works* v. *Cushnoc Paper Co.*, 113 Me., 222, 93 A., 356; *Patten* v. *Field*, 108 Me., 299, 81 A., 77.

One in relying upon a false representation may be led to make a contract and yet be damaged not as a result of reliance on the representation but by reason of the breach of some promise in the contract separate and independent from the representation. The

relation of cause and effect may not exist, or if so, the effect may not be the proximate result of the fraud.

Fraud vitiates contracts. *Warren* v. *Kimball*, 59 Me., 264; *Whittier* v. *Vose*, 16 Me., 398, 406. A defrauded party has an election to affirm or rescind. *Getchell* v. *Kirkby*, 113 Me., 91, 94, 92 A., 1007. Still, unless damage results from the representation, while there may be such fraud as to justify a rescission or an avoidance of the contract, yet there must proximately result actual damage in order to maintain an action of deceit. Without damage it is not actionable fraud. In the case at bar no such damage appears as a result of the representation that he had the eighteen cows. The damage, if any, that did result was occasioned by breach of his promise to bring the cows to the barn; but the remedy for this was assumpsit for breach of the contract and not an action of deceit.

It is observed, however, that the learned counsel for the plaintiffs apparently did not rely on this representation as one of an existing fact. In his brief he said: "The trap was baited with a promise the defendant did not keep and never intended to keep," thus indicating that his sole reliance was placed on the promises made for performance of future acts with no intention at the time of the making of the promises to keep them. He stated further: "On this undisputed evidence I claimed the right to go to the jury on the issue of fact that at the time of the execution of the contract itself Mr. Winter had the fraudulent intent of not fulfilling his obligation under it."

To sustain his contention, counsel invoked *Burrill* v. *Stevens*, 73 Me., 395, an action brought upon a promissory note given by the defendant in consideration of a promise by the payees to deliver to him certain personal property at a future time. The defense set up was fraud and the Court stated the issue to be whether getting property by a purchase upon credit with an intention on the part of the purchaser never to pay for the same constitutes such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretenses. The Court held that such fraud was a defense.

Later, in *Albee* v. *LaRoux*, supra, Chief Justice Cornish distinguished that case from one of deceit and said:

"There is a clear distinction between the general term fraud and the specific term deceit or fraudulent representations, and the facts to substantiate the one may be inadequate to substantiate the other. . . . When at the time of the purchase of the goods there is an intent never to pay for them, the sale may be avoided for fraud 'although no false and fraudulent representations are made by the purchaser.' The facts in those cases" (one of which was *Burrill* v. *Stevens*, supra, relied on by the plaintiffs in this case) "were deemed by the court to constitute such fraud as to avoid the sale, but also were deemed insufficient to support the charge of false and fraudulent representations, because a broken promise cannot supply the necessary elements."

This is later confirmed in *Shine* v. *Dodge*, 130 Me., 440, in which on page 443, 157 A., 318, 319 our Court said:

"The allegation in the declaration that the defendant represented that she would guarantee the dividends on the stock is quite immaterial, for it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform. *Albee* v. *LaRoux*, 122 Me., 273, 119 A., 626."

In view of the law enunciated in the cases just cited, the Court directed rightly a verdict for the defendant for acceptance of the facts, both as alleged and proved by the plaintiffs, could not constitute an actionable claim on which to base this form of action.

SECOND EXCEPTION

The plaintiffs excepted to the striking out of the testimony of the plaintiffs' witness, White, all of which related to damages. The striking out of this testimony could not and did not prejudice the plaintiffs, even if it were an erroneous ruling, for damages because material only upon establishment of liability and this the plaintiffs failed to do.

Exceptions overruled.

FRED W. BAYLEY ET ALS

vs.

INHABITANTS OF THE TOWN OF WELLS ET ALS.

York. Opinion, August 23, 1934.

MUNICIPAL CORPORATIONS. EQUITY.

Individual taxpayers of a municipal corporation have not ordinarily the right to sue for remedial relief, where the wrong, for which they seek redress, is one which affects the entire community and not specifically those bringing the action. An individual taxpayer has only the right to apply for preventive relief.

There is no constitutional prohibition against municipal corporations adjusting differences which may arise between them.

In the case at bar, the plaintiffs were seeking remedial relief, for primarily they asked for an accounting of money claimed to be due. Under the well established rule in this State they had no standing in court.

In attempting to adjust these difficulties the town and the village were not usurping any judicial function. They were not attempting to interpret a legislative enactment but to settle a dispute peacefully. No constitutional mandate requires that this town and this village should be committed to costly and continuing litigation at the instance of any taxpayer without themselves having the right to control such litigation or to end it.

On report. A bill in equity brought by fifteen tax payers of the Town of Wells, against the town, its selectmen and treasurer and the Ogunquit Village Corporation for an interpretation of Chapter 203 of the Private and Special Laws of 1913, establishing the Ogunquit Village Corporation. Cause remanded to the sitting Justice for a decree dismissing the bill. The case fully appears in the opinion.

John P. Deering, for plaintiffs.

Hiram Willard,

Ray P. Hanscom, for defendants.

Walter E. Hatch, for Town of Wells.

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

THAXTER, J. This is a bill in equity brought by fifteen taxpayers of the Town of Wells against the town, its selectmen and its treasurer, and against the Ogunquit Village Corporation seeking an interpretation of Section 3 of Chapter 203 Priv. & Spec. Laws of Maine, 1913, establishing the Ogunquit Village Corporation. The bill also asks that the officers of the town of Wells be restrained from paying certain money claimed to be due to the village corporation from the town. An amendment to the bill prays for the appointment of a master and for an accounting. After a hearing the cause is before this court on report, on bill, answer, replication and all admissible evidence.

The litigation grows out of a long standing dispute between two municipal corporations formerly comprising the Town of Wells. By the act of the legislature above referred to the Ogunquit Village Corporation was created within the limits of the Town of Wells. This act became effective July 1, 1913 subject to acceptance by the town, which was given October 9th of the same year. To the village were transferred certain of the functions formerly exercised by the town in the area comprising the village, particularly those relating to police, fire protection, construction and maintenance of roads, sewers, parks, public wharves and landings, and to all matters concerning water supply and public lighting.

The village corporation was given no authority to assess taxes, but the act provided that sixty percent of all town taxes, exclusive of state and county taxes, collected from inhabitants and estates within the territory of the new corporation should be paid by the town to the Ogunquit Village Corporation.

The present controversy relates to money claimed by the plaintiffs to be due the Town of Wells from the village for the cost of maintaining schools and schoolhouses within the limits of Ogunquit.

That portion of the act relating to this matter reads as follows:

"Sec. 3. (in part). With reference to the common schools which are within the territory of said corporation there shall be paid to the town of Wells by this corporation whatever amount is the actual net cost to said town of Wells for maintaining said common

schools and schoolhouses, located within the limits of said corporation, reference being had to the amount raised therefor by taxation and the amount which said town of Wells received from the State of Maine for the maintenance of common schools. Said village corporation shall annually pay to the town of Wells the sum of seven hundred dollars to be used by said town in maintenance of its high school."

Almost immediately after the passage of the act creating the village disputes arose over its interpretation. In 1923 these culminated in the filing of a bill in equity, and the case was reported to the Law Court. The opinion, *Ogunquit Village Corporation* v. *Inhabitants of Wells*, 123 Me., 207, 122 A., 522, determined among other things that the phrase "actual net cost" in the above section of the act meant the gross cost of maintaining schools and schoolhouses less the amount received from the state in respect to the scholars and estates in the village, and also less the sum received as income on the town school fund, if any, appointed in the same way.

Unfortunately this decision did not end the trouble. The Town of Wells claimed that Ogunquit should pay the actual net cost of maintaining the common schools and schoolhouses out of the sixty percent of the taxes, which were paid back to it after Ogunquit had received credit on account of the state school fund. Ogunquit claimed that the town should pay for the maintenance of common schools and schoolhouses in Ogunquit out of the forty percent of the taxes retained by the town, which were collected from the territory of Ogunquit Village. Until 1932 the accounts between the town and the village appear to have been settled by the town officials on the basis of their construction of the legislative enactment and in accordance with their own methods of accounting. The controversy then seems to have flared up anew; and on petition of Fred W. Bayley, one of the plaintiffs in this action, an article was inserted in the warrant for the annual town meeting of Wells in order that the matter might be acted on by the duly qualified voters of the town. At the meeting Mr. Bayley moved that the Town of Wells bring a suit in equity against the Ogunquit Village Corporation for the cost of the Ogunquit elementary schools, which was claimed to be unpaid. This motion was finally laid on the table, and it was voted that a committee of three be appointed

to act and cooperate with a committee appointed by the Ogunquit Village Corporation. Committees were appointed from both the town and the village. The report of this joint committee was filed and accepted by the town and by the village corporation in meetings, duly called, by Ogunquit on April 4, 1932, and by Wells on December 6, 1932; and another joint committee was constituted to present to the legislature amendments to the charter of the Ogunquit Village Corporation for the purpose of carrying into effect the recommendations of the original committee. On December 8, 1932 the bill in equity now before us was filed.

The report of the original committee is significant. The members of it seem to have approached the subject in a conciliatory spirit, without bias, and with a sincere purpose to end a controversy which was causing expense to both the town and the village and engendering ill-will between them. The report says: "Your committee have not attempted to decide the issue involved, but have worked more along the lines of a compromise and for the best interest of both parties." They then urge the two sides to "bury the hatchet" so that the issue shall not again cause trouble between them. The acceptance of the compromise by the voters in their respective meetings is evidence of a similar desire.

The committee recommended in brief that the Town of Wells should set off its claim for money past due against $20,000, which Ogunquit had contracted to pay on an elementary school in Ogunquit; that the Town of Wells should wholly maintain the schools and schoolhouses within the territory of Ogunquit; that Ogunquit should not receive the sixty percent or in fact any percentage on the portion of any money raised and appropriated by the town for common schools, collected within the territorial limits of Ogunquit, unless said portion of said town appropriation so collected within the territory of the village should exceed five thousand dollars; that the amount which Ogunquit but for this provision would receive should be paid by the Town of Wells to the Wells School Board to raise and improve the standard of the Wells High School; that Ogunquit should be relieved from the obligation to contribute $700 annually for the support of the High School.

These major provisions of the report are cited, not because the present case is concerned with their interpretation, but to show

that the two parties to the dispute were making an earnest attempt to arrive at a reasonable adjustment of their differences.

The plaintiffs argue that the act of the legislature purporting to ratify the agreement between the town and the village is void, because it is an interference by the legislature with a judicial controversy, which was pending in court, and hence violates the provisions of Article III of the state constitution which prohibits the exercise by the legislative, executive or judicial departments of any powers properly belonging to either of the others. The defendants question the right of the plaintiffs to bring this bill.

Individual taxpayers of a municipal corporation have not ordinarily the right to sue for remedial relief, where the wrong, for which they seek redress, is one which affects the entire community and not specifically those bringing the action. *Eaton* v. *Thayer*, 124 Me., 311, 128 A., 475; *Tuscan* v. *Smith*, 130 Me., 36, 153 A., 289. This rule has its origin in a sound public policy, which holds that municipal officers should not be subjected to litigation at the suit of every dissatisfied taxpayer. This restriction, however, does not apply where the taxpayer seeks to prevent the commission by town officers of an illegal act. Both under the special provisions now embodied in Rev. Stat. 1930, Ch. 91, Sec. 36, Par. XIII, and under the general equity powers given to the Supreme Judicial Court in 1874, the individual taxpayer has the right to apply for preventive relief. *Tuscan* v. *Smith*, supra.

In the case before us, however, these plaintiffs are seeking remedial relief. Primarily they ask for an accounting of money claimed to be due. The injunction prayed for against the payment of the money by Wells to Ogunquit is merely incidental to such accounting. Under the well established rule in this state, they have no standing in court.

These observations might well end this case. That there may, however, be no misapprehension of our views on the suggested constitutional question, a short comment on it is perhaps not out of place. Neither these municipal corporations, nor the legislature in ratifying their acts, were usurping any judicial function. The parties were seeking not to interpret the legislative act creating the Ogunquit Village Corporation, not to decide a legal controversy, but to settle peaceably a dispute between themselves. It

would be a sad commentary on the purpose of a constitutional limitation, if it should be so interpreted as to prevent the consummation of so beneficent a result. Whether the towns might themselves without the sanction of the legislature have accomplished this end, it is unnecessary to decide. The concurrent action of the municipalities and the legislature certainly did no harm. That this town and this village should be committed to costly and continuing litigation on this subject at the instance of any taxpayer, without themselves having the right to control it or to end it, would be an anomaly not required by any constitutional mandate.

Cause remanded to the sitting Justice for a decree dismissing the bill.

LEVI COLLETTE *vs.* HERMON W. HANSON.

Oxford. Opinion, September 15, 1934.

OATH. EVIDENCE. JUDGMENTS.

The law is well settled that at Common Law a Notary Public cannot administer an oath.

Verifications of judgments, as what they purport to be, is known as authentication.

To be received by our courts they are authenticated,

1. *By an exemplification under the great seal of the foreign state,*

2. *By a copy proved to be a true copy, or*

3. *By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.*

In the case at bar, the certificate of the judge of the foreign court was not sufficient proof of the authority of the deputy registrar to exemplify the judgment necessary for authentication, since there was no evidence of statutory authority of the Notary who executed the jurat, to administer the oath.

The document, however, was admissible under the third provision set forth above, inasmuch as Mr. Teed, the notary public, who administered the oath, qualified as an attorney and barrister at law, and our court could well believe his testimony.

On exceptions by defendant. An action of debt on a judgment of a foreign court. The issue involved the proving of such judgment. Exceptions overruled. The case fully appears in the opinion.

J. F. Burns, for plaintiff.

Peter M. McDonald,

Arthur J. Henry, for defendant.

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

BARNES, J. This case comes up on exceptions to the admission of evidence by a Justice of the Superior Court at trial by agreement of parties without the intervention of a jury, with right of exception as to rulings of law reserved to either party.

The action was of debt on a judgment of a foreign court.

Two exceptions were taken, but the only one relied on is to a ruling that the certificate of the judgment, issued by an officer authorized by the law of the land of the foreign court was authenticated, within the meaning of the rule which allows the introduction of authenticated copies of foreign judgments, as evidence in courts of this state.

The court of issue of the judgment was the Supreme Court of Judicature for the Province of New Brunswick, Dominion of Canada, King's Bench Division.

The plaintiff presented a Copy of Judgment, attested and sealed with the seal of said Court by the Deputy Registrar, at Fredericton, in said Province and, annexed thereto, the certificate of W. C. Hazen Grimmer, one of the Judges of said Court, of the same date.

The certificate sets out that the maker was, on the date of certification one of the Judges of the Court, that the attestant of what is termed in New Brunswick an exemplification of the Judgment was an officer of the Court, authorized by the law of the Province to sign the exemplification, and that the signature was genuine.

The oath was administered to Judge Grimmer by John F. H. Teed, a notary public, and the seal of the latter affixed.

Authorization of the Deputy Registrar to exemplify must ap-

pear in the case, else there would be no proof of recovery of the foreign judgment. It is true that Judge Grimmer in his certificate asserted that the Deputy Registrar of New Brunswick is qualified by the law of that Province to exemplify its judgments, but unless it appears that the Notary Public who executed the jurat to his certificate had authority to administer an oath, then the Judge's assertion was an unsworn statement. The law seems to be well settled that at Common Law a Notary Public could not administer an oath and since there is nothing in the record to show that there is any statute in New Brunswick authorizing this to be done by a Notary Public, Judge Grimmer's certificate is not a sworn statement, and not admissible alone as sufficient proof of the fact of the authority of the Registrar to exemplify. It should have the sanction of an oath.

In spite of the fact, however, that Judge Grimmer's certificate, for reasons above stated, can not supply evidence of the authority of the Deputy Registrar, the record contains what satisfied the Justice below.

When Mr. Teed, the notary public, was on the stand as a witness called by the plaintiff, the Certified Copy of Judgment was presented as an Exhibit, and the witness identified the signatures of both the Judge and the Deputy Registrar. Referring to Deputy Registrar McKay, Mr. Teed testified: "He is the man, or one of the men, who is by law authorized to certify it."

He also testified that the signature of the Deputy Registrar was genuine.

Mr. Teed had qualified as an attorney at law and barrister at law, in active practice in his profession before the Court of issue of the judgment since 1911, and our Court could well believe his testimony.

Verifications of judgments, as what they purport to be, is known as authentication. To be received by our courts they are authenticated,

1. By an exemplification under the great seal of the foreign state,
2. By a copy proved to be a true copy, or
3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. *Church* v. *Hubbart*, 2 Cranch 187.

In the case at bar the admissibility of the document was claimed under the third heading above.

Its introductions was regular and proper, with the testimony of witness Teed, if that were credible. Wigmore on Evidence, Vol. III, Sec. 1679, *Jordan* v. *Robinson*, 15 Me., 167.

Nothing was adduced to attack the validity of the judgment or the testimony of Mr. Teed, and the Court of issue was the Court chosen by defendant here, as plaintiff there, the judgment being for costs.

Exceptions overruled.

NAPOLEON OUELLETTE AND EMERIQUE CLOUTIER

vs.

CITY OF NEW YORK INSURANCE CO.

Cumberland. Opinion, September 20, 1934.

WRITS. TRUSTEE PROCESS. CORPORATIONS. INSURANCE. R. S., CHAPTER 100, SECTION 8.

Under the provisions of Rev. Stat. 1930, *Ch.* 100, *Sec.* 8, *a trustee writ may be served on a foreign corporation in the same manner as other writs are served except that the service shall be by summons.*

The qualification of a foreign corporation to do business within the state is an assent by it to all reasonable conditions with respect to service of process.

There is no statute which requires a foreign insurance company to designate an agent in the state other than the insurance commissioner for the sole purpose of accepting service of process.

Rev. Stat. 1930, Ch. 95, Sec. 19, and Ch. 60, Sec. 119, in connection with Ch. 100, Sec. 8, authorize service on an agent of a foreign insurance company, but, in the case at bar, at the time of the service of the process Saindon was not the agent of the defendant.

In the absence of an estoppel on the part of the defendant to set up the revocation of its agent's authority, the plaintiffs had their option of serving their summons either on the insurance commissioner or on one who was an agent in fact of the company.

No estoppel arose for there was no evidence that after the revocation of the agent's authority the defendant did anything to hold him out as its agent. The failure of the defendant to request the insurance commissioner to revoke the license of the agent did not constitute an estoppel because the plaintiffs did not rely on such failure.

On report. An action of scire facias on a judgment against a foreign insurance company. The issue involved the validity of service of a trustee process on one who had been an agent of the defendant, but whose agency at the time of service had been revoked.

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

Benjamin L. Berman,
David V. Berman, for plaintiffs.
Perkins & Weeks, for defendant.

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

THAXTER, J. This case is reported to this court on an agreed statement of facts. The issue is the validity of a service of process on the defendant, a foreign insurance company, as trustee of one Marie C. Roy.

Marie C. Roy was the owner of certain real estate. This defendant insured the buildings against fire. The policy was issued by one A. P. Saindon, a resident of Maine, who, on the date of the issuance of the policy, was a duly appointed and licensed agent of the defendant for the purpose of soliciting business and endorsing, countersigning and issuing policies under the provisions of Section 122, Ch. 60, Rev. Stat., 1930, and with such authority as such agent had expressly or as implied by law. The license issued to Saindon under the provisions of said section of the statutes expired June 30, 1931. The buildings insured were destroyed by fire February 23, 1931. The fire loss was subsequently adjusted; but, prior to the payment to the insured of the amount due, these plaintiffs brought suit in the Superior Court for the County of Androscoggin against the insured on a claim amounting to $214.88, and alleged that the defendant herein was a trustee of the insured. On March 16, 1931 a trustee summons was served upon Saindon by a duly qualified deputy sheriff whose return is as follows:

"Androscoggin, ss:

By virtue of the within writ, on the 16th day of March, A. D. 1931, at 2:05 o'clock in the afternoon I summoned the City of New York Insurance Company, the within named alleged trustee, to appear at court as within commanded, by giving in hand to A. P. Saindon, its agent, a summons therefor.

RAYMOND L. POULIN,
Deputy Sheriff."

On February 26, 1931 the defendant had revoked the appointment of Saindon as its agent and severed all relations with him, but gave no notice of such action to the insurance commissioner of the State of Maine and made no request for the revocation of his license. Nor did the plaintiffs have any knowledge of such revocation. Saindon sent no word to the defendant of the service on him of the trustee process. The insurance company filed no disclosure, entered no appearance, was defaulted, and charged as trustee in the sum of $229.89, and judgment therefor was rendered against it on June 30, 1932.

The amount due on the insurance policy was paid to Marie C. Roy in the sum of $228.54, and the balance to three mortgagees having valid liens on the property. These payments were made April 27, 1931, subsequent to the service of the trustee process on Saindon, but without actual knowledge by the insurance company of the existence of the trustee suit.

The present suit is a scire facias on the judgment claimed to have been obtained against this defendant as aforesaid; and the sole question is whether the service on Saindon under the circumstances was sufficient to charge the defendant as trustee.

Service of trustee process on all foreign corporations is provided for by Rev. Stat. 1930, Ch. 100, Sec. 8, which reads in part as follows:

"All domestic corporations and all foreign or alien companies or corporations established by the laws of any other state or country, and having a place of business, or doing business, within this state may be summoned as trustees, and trustee writs may be served on them as other writs are served on

such companies or corporations, except that the service shall be by the summons described in section three of this chapter."

The question to be determined, accordingly, is how are other writs served on such companies.

The law is settled that a state is not required to admit a foreign corporation to do business within its borders. The state may, therefore, make reasonable requirements with respect to substituted service of process on a state officer or on a person to be designated by the corporation; and the qualifications of a foreign corporation to do business within a state in accordance with the statutes permitting its entry is an assent by it to all such reasonable conditions. *Bank of Augusta* v. *Earle*, 13 Pet., 519, 10 Law Ed., 274; *State of Washington Ex Rel. Bond & Goodwin & Tucker, Inc.* v. *Superior Court of the State of Washington for Spokane County*, 289 U. S., 361, 77 Law Ed., 1256.

Rev. Stat. 1930, Ch. 56, Sec. 106, provides for the appointment by a foreign corporation of an agent upon whom process may be served, whose appointment shall continue in force until revoked by an instrument in writing designating some other person to act in such capacity. This provision does not, however, apply to a foreign insurance company, and no statute has been cited which requires such company to designate an agent in this state other than the insurance commissioner for the sole purpose of accepting service of process. Service is, however, provided for in certain specified instances.

Rev. Stat. 1930, Ch. 60, Sec. 118, authorizes service in a suit by one having a claim against any foreign insurance company to be made upon any duly appointed agent of the company. The original action brought by these plaintiffs, however, was not on a claim against the insurance company, but against Marie C. Roy. Assuming that Saindon could then be regarded as the "duly appointed agent" of the company, service could not be justified under this clause.

Rev. Stat. 1930, Ch. 95, Sec. 22, provides that service is sufficient if made on the person who signed or countersigned the policy. This provision likewise does not apply, because it relates only to an action on the policy of insurance.

Rev. Stat. 1930, Ch. 95, Sec. 19, and Ch. 60, Sec. 119, in connection with Ch. 100, Sec. 8, authorize service of a trustee summons on an agent of a foreign insurance company. At the time, however, of the service on Mr. Saindon his authority to act as agent had been revoked.

In the absence of an estoppel on the part of the defendant to set up the revocation of the agent's authority, the plaintiffs had their option of serving their summons either on the insurance commissioner as provided in Ch. 60, Sec. 119, or on one who was an agent of the company in fact.

The plaintiffs claim, however, that in any event the defendant is estopped to deny the authority of Saindon as agent.

There is, however, nothing in the agreed statement to indicate that, after the revocation of the agent's authority, the defendant did anything to hold him out as its agent. The plaintiffs' only claim is that the defendant filed with the insurance commissioner no request for a revocation of the agent's license as provided for in Rev. Stat. 1930, Ch. 60, Sec. 123, and that his license to act as agent did not expire until July 1, 1931. The provisions of Ch. 60, Sec. 122, providing for the licensing of an agent by the insurance commissioner, presuppose his appointment by the principal. In the absence of any statutory provision requiring revocation of the appointment to be recorded, such action could be validly taken by the company at any time.

It is unnecessary to decide whether the failure of the defendant to request the insurance commissioner to revoke the license of its agent would under proper circumstances constitute an estoppel against the company, for in this case one of the requisites of an estoppel is lacking. It is admitted in the agreed statement that "the plaintiffs and their attorneys had no actual knowledge, prior to the entry of said trustee writ in court, as to whether or not said record and files of the insurance department of the State of Maine disclosed the granting or revocation of said appointment and license." To raise an estoppel there must be, either by words or conduct, a misrepresentation of fact by one party and a reliance thereon by another. In this case the second element is wanting.

Judgment for the defendant.

BLAINE S. VILES *vs.* FRANK A. KORTY.

Somerset. Opinion, October 3, 1934.

EQUITY. PLEADING AND PRACTICE. DEMURRER. MORTGAGES.

Where there is complete and adequate remedy at law, there is no occasion for invoking the equity powers of the court.

Equity courts may decline relief on this ground even though the question is not raised by the parties.

If a legal remedy exists but resorting to it incurs vexatious inconvenience, involves extraordinary expense, annoyance or undue delay, equity may properly assume jurisdiction.

Flint *v.* Land Co. et als, 89 *Me.*, 420, *is not authority for resorting to equity for the purpose of procuring a deficiency judgment, in a case devoid of complications such as existed there.*

Foreclosure of real estate mortgages by equity process is permissible only when foreclosure by legal methods is insufficient to give complete relief. In such cases the equity court may determine whether or not plaintiff is entitled to a deficiency judgment and fix the amount thereof.

In the case at bar, the law gave complete and adequate relief. There was no occasion to resort to equity.

The cause ordered transferred to the law side of the court with appropriate pleadings filed.

On report. To a bill in equity brought by plaintiff to ascertain and recover the deficiency in amount between the value of property recovered under foreclosure proceedings and the amount due on mortgage note, defendant demurred on the ground that the plaintiff had a complete and adequate remedy at law. Demurrer sustained. Case remanded to lower court for further proceedings. The case fully appears in the opinion.

Locke, Perkins & Williamson, for plaintiff.

Benjamin L. Berman,

David V. Berman, for defendant.

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

PATTANGALL, C. J. Bill in equity to ascertain and recover the amount of a deficiency judgment to which plaintiff is entitled, foreclosure of real estate having been made by publication and value of property being less than the mortgage debt. Case reported on bill and general demurrer. Ground of demurrer that plaintiff has complete and adequate remedy at law.

Demurrer must be sustained. Plaintiff has apparently a complete and adequate remedy at law. "If there be such a legal remedy, there is no occasion for invoking the equity powers of the court." *Titcomb* v. *McAllister*, 77 Me., 353. Equity courts may decline relief on this ground even though the question is not raised by the parties. They will not determine a purely legal question simply because the parties see fit to attempt to impose that duty on the court. *Roe* v. *Mayor and Aldermen*, 80 N. J., Eq. 35, 86 A., 815. True, it is not enough to bar equitable relief that a remedy at law exists. Such remedy must be adequate to afford full redress both in respect to the final relief sought and the mode of obtaining it. A legal remedy may be inadequate because vexatiously inconvenient or involving extraordinary expense and annoyance or undue delay.

None of these factors is present in the instant case. It appears that at the time foreclosure process was begun, it was apparent to the mortgagee that the value of the security was insufficient to satisfy the debt. Mortgagor was a non-resident but owned certain personal property within the jurisdiction of the Maine court. This property was held for the benefit of mortgagee by means of this bill inserted in a writ of attachment.

But no such process was necessary. The note which the mortgage was given to secure might have been sued at law and the same property attached. Such a suit and attachment would not have waived mortgagee's rights as to his security, provided that his attachment did not embrace it. The remedy at law was not only complete and adequate, it was just as efficacious as the remedy in equity and just as convenient. It involved no more delay.

Plaintiff was, apparently, led to the use of the equitable remedy by a study of the case of *Flint* v. *Land Co. et als*, 89 Me., 420,

36 A., 634. There are features in that case which seem to distinguish it from the case at bar. The complainant there was not a party to the deed in which one of the defendants, to whom the original mortgagor had conveyed the mortgaged property, had assumed and agreed to pay the mortgage. The case holds that although implied assumpsit would lie against either defendant, equity furnishes a concurrent remedy. A similar set of facts appeared in *National Bank* v. *St. Clair*, 93 Me., 35, 44 A., 123, and an action at law was upheld, but the court in that case intimated that equity might also be resorted to for the purpose of avoiding circuity of action and possible unnecessary delay. No complication of that sort is apparent here and no excuse furnished for asking equitable relief.

It is also suggested that because our statute permits foreclosure of real estate mortgages by equitable process, it reasonably follows that deficiency judgments may be awarded in equity. But our court has repeatedly held that foreclosure by equitable process is permissible only when the situation is such that foreclosure by legal methods is insufficient to give complete relief. *Rockland* v. *Water Co.*, 86 Me., 55, 29 A., 935. In such cases, the equity court, having properly assumed jurisdiction in the first instance, is authorized to retain it for the purpose of determining whether or not the mortgagee is entitled to a deficiency judgment and, if so, to fix the amount; but in a case such as the one before us, where legal foreclosure is admittedly sufficient, there is no reason for resorting to equity for that purpose.

In accordance with the provisions of Sec. 16, Chap. 96, R. S. 1930, plaintiff's rights may be protected in every particular by the transfer of the case to the law side in the court below and the substitution of appropriate pleadings for those now on file.

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

CHARLES GOFF *vs.* GEORGE E. FILES ET ALS.

Kennebec. Opinion, October 5, 1934.

TROVER. EMBLEMENTS. BONDS FOR DEED.

Even though in default, one in possession of real estate, having the rights of the obligee in a bond for a deed of it, is entitled to cut and remove the hay thereon where, after such default, the obligor's assignee has permitted him to continue in possession and at the time of severance the equity of redemption has not expired.

Refusal to allow one entitled thereto to take possession of hay and sale of the same to another constitutes conversion.

In the case at bar, the vendee was in actual possession, starting with the consent of the vendor, and there being no evidence to the contrary, the presumption would be that it continued to be a permitted possession, even after default.

The word "refusal" in the agreed statement of facts warrants an inference either that the refusal was in consequence of a demand or that there was such a refusal as waived the necessity of a demand.

On exceptions by plaintiff. An action of trover for conversion of hay. Hearing was had before the sitting Justice of the Superior Court as of the June Term, 1934, on an agreed statement of facts with right of exceptions on matters of law reserved. To the decision for the defendant, plaintiff seasonably excepted. Exceptions sustained. As stipulated, case remanded to Superior Court, where "damages are to be assessed" and then judgment be entered for plaintiff. The case fully appears in the opinion.

Joly & Marden, for plaintiff.

Manley O. Chase, for defendants.

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

HUDSON, J. Trover for the alleged conversion of forty tons of hay. To a decision for the defendants rendered by a Justice of the

Superior Court, who heard the case on an agreed statement of facts without intervention of a jury, the plaintiff excepts.

Succinctly stated, the facts necessary for the determination of the case are that on May 19, 1924, one George E. Files gave to Napoleon Pouliot a bond for a deed of the farms from which this hay was cut in the summer of 1933 by Vigue and Bolduc, assignees of the obligee's rights. They entered into lawful possession of the premises in April, 1932, and so remained until October, 1933. From them the plaintiff purchased this hay December 11, 1933, but on account of "the refusal of Files Brothers (the defendants) to allow Goff, plaintiff, to take the hay" the plaintiff never received it and as a consequence brought this action.

The defendants are the sons and assignees of the original obligor; their assignment dated May 12, 1933. It appears that the condition in the bond had been broken before the hay was cut and that no payment on the purchased premises was made "during the time Vigue and Bolduc were in possession." There was no foreclosure. Undisputedly the plaintiff's vendors, Vigue and Bolduc, succeeded to the rights of the original obligee in the bond and likewise the defendants to the rights of its original obligor.

Did Vigue and Bolduc own this hay at the time they sold it to the plaintiff? Thus is involved the right of one in lawful possession of real estate bonded to him to cut and have as his own property, hay, where at the time of the cutting the obligee is in default but the obligor has not exercised his right to take possession.

Exactly as presented this has not been determined in Maine, although it has been held that where there has been no default by the obligee, he is entitled to the hay cut "if severed by him while his possession is allowed to continue." *Look* v. *Norton*, 94 Me., 547, 550, 48 A., 117, 118. In that case no mention is made as to the effect of a default but later in *Harlow* v. *Pulsifer*, 122 Me., 472, 475, 120 A., 621, 623, it is suggested by counsel that our Court seemed to indicate that the right of the obligee is "a demise so long as the purchaser" is not in default and to confine the right of severance and subsequent ownership to one "while in possession of land under an unimpaired contract of purchase." The language just quoted from *Harlow* v. *Pulsifer* is only dicta, for in that case, as well as in *Look* v. *Norton*, there was no default.

In the latter case, our Court likened the relationship between the obligor and obligee in a bond for sale of real estate, so far as the ownership of crops is concerned, "to those of landlord and tenant or mortgagor in possession and mortgagee," and said:

> "While a person in possession of real estate under a contract of purchase, in some respects and for some purposes, is not a tenant, yet, so far as his ownership of crops severed by him while he remains in possession is concerned, his rights are similar to those of a tenant. In a certain sense he is a tenant at will."

Does the fact of the default change the relationship and its effect? We think not necessarily so. The vendor may permit one in default "to continue in possession" as much as one not in default. It may be to the advantage of the mortgagee that the mortgagor so remain. It would seem that where there is such permission the vendor by it, in the absence of evidence to the contrary, prima facie at least, manifests his willingness that the vendee during such possession shall have the right to the crops planted and harvested by him. Such conduct upon the part of the vendor, resulting in the vendee's performance of labor in planting and harvesting, as well as the incurrence of other expense, would the vendor be credited with a desire to deal fairly with the vendee, warrants an inference that such permit granted to the vendee the right of full ownership after severance.

Before severance the vendor, where it is not otherwise provided, may take possession of the land and the growing crops, but in case of the exercise of a right of redemption, must give credit for their fair value. If no redemption, the vendor holds them free from any claim by the vendee.

In *Killebrew et al.* v. *Hines et al.*, 10 S. E., 251 (N. C.), the Court, in speaking of an earlier decision in that State, said:

> "It plainly recognizes the right of the vendor in the absence of any contract, express or implied, to the contrary, to take possession of the growing—the unsevered—crops made by the vendee, and the equitable right of the latter to have the same devoted to the payment of the former, so far as it may be ade-

quate. It further decides that when the vendor allows the vendee to remain in possession of the land, and make a crop, and sever the same, the former cannot recover the severed crop from the latter, or third persons; and this rests upon the ground of the presumed assent of the vendor to allow the vendee to make and take the crop. The like rule applies to mortgagee and mortgagor."

In the case cited there had been a default previous to the severance.

"A purchaser let into possession has, it has been said, the same general rights with respect to crops raised by him as a mortgagor would have, and, so long as there has been no default on his part *or he is permitted to remain in the possession,* the crops raised and harvested belong to him. If the purchaser's right to possession has been forfeited by his default in payment and a demand by the vendor for possession, he is not entitled to the benefit of crops which he thereafter plants, *if his possession is terminated before they are harvested.*"—27 R. C. L., Sec. 275, page 541, and cases cited in Footnotes 14 and 15.

The defendants rely particularly upon *Perley* v. *Chase,* 79 Me., 519, 11 A., 418, 419, but that case is clearly distinguishable because in it the hay was not harvested until after the expiration of the equity of redemption, while in the case at bar foreclosure proceedings had not been instituted. Subsequently to the expiration of the equity of redemption, the vendee not only has no right in the property but then has no basis for belief that he still remains in possession with any consent whatsoever of the vendor. In such a case, as held in *Perley* v. *Chase,* supra, he is simply a tenant at sufferance; in possession no longer by consent but simply because he has not been ousted as might a trespasser. Although still in possession, no longer is he rightfully in possession, for it can not be *assumed* after the equity or redemption has expired that the vendor still permits the vendee to continue in possession.

As stated by Justice Virgin in *Perley* v. *Chase,* supra, . . . "when the right of redemption has become 'forever foreclosed,' the relation

formerly existing has become extinguished; and if without any agreement, express or implied, the former mortgagor continues in possession after the determination of the particular estate by which he originally gained it, he thereby brings himself within the definition of a tenant at sufferance. . . . And if a tenant at sufferance, he is not entitled to emblements. . . . And if he were, emblements do not include the grass which is not an annual crop." Thus, *Perley* v. *Chase* not only fails to support the defendants' contention, but, upon analysis and application to the facts in the instant case, comes to the aid of the plaintiff.

We hold, therefore, that where no express provision is made by contract, the deciding factor as to whether the crops belong to the vendor out of possession or the vendee in possession, even though there has been a default, depends on whether or not the vendor allowed the vendee to be in possession at the time of severance. If so, they become the absolute property of the vendee; otherwise, not.

What was the fact, then, in this case as to such permission? It does not appear definitely in the agreed statement. It is a fact, however, that the vendee was in actual possession, starting with the consent of the vendor, and there being no evidence to the contrary, the presumption would be that it continued to be a permitted possession, even after default. It seems that before severance a real action had been brought by the vendor against the vendee but was dismissed. The inference would be that the vendor in dismissing his action intended to abandon his claim, at least for the present, and to continue to allow the vendee to remain in possession; either that, or that the effect would be as though no such action had been brought at all. After severance an action of forcible entry and detainer was commenced but that could not affect title to this hay previously perfected on severance.

We conclude, therefore, that the decision of the Justice in favor of the defendants can not be upheld on the ground that the plaintiff failed to show title to this hay.

Counsel for the defendants claimed also that the plaintiff failed to show conversion by the defendants. This contention is not sound, for the agreed statement of facts shows that these defendants refused to allow the plaintiff to take the hay, and, more than that, sold it "to one Bickford and got down payment." Clearly the de-

fendants exercised such dominion over this hay "in defiance of and inconsistent with" the plaintiff's right as owner as to constitute conversion. *McPheters* v. *Page*, 83 Me., 234, 22 A., 101; *Leader* v. *Telesphore Plante*, 95 Me., 343, 50 A., 53.

Again, it is insisted that the exceptions can not be sustained because the record does not show demand by the plaintiff and refusal by the defendants. While it is true that the agreed statement does not in so many words state that a demand for the hay was made, yet it does say "the refusal of Files Brothers to allow Goff, plaintiff, to take the hay is the conversion claimed." The word "refusal" just quoted warrants an inference either that the refusal was in consequence of a demand or that there was such a refusal as waived the necessity of a demand.

Exceptions sustained. As stipulated, case remanded to Superior Court, where "damages are to be assessed" and then judgment be entered for plaintiff.

INHABITANTS OF TOWN OF FARMINGTON *vs.* WILLIAM F. MINER.
(Trial Docket Nos. 116 and 118.)

INHABITANTS OF TOWN OF FARMINGTON *vs.* WILLIAM F. MINER.
(Trial Docket No. 117.)

INHABITANTS OF TOWN OF FARMINGTON *vs.* J. A. BLAKE.

Franklin. Opinion, October 27, 1934.

MUNICIPAL CORPORATIONS. TOWN OFFICERS. R. S., CHAP. 19, SECS. 56-57

Superintendents of schools, required by R. S., Chap. 19, *Secs.* 56 *and* 57 *to annually return to the school committees of the towns under their supervision and to the State Commissioner of Education a certified list of the names of persons of school age in each of the towns, are authorized, whenever it is necessary, to*

employ other persons at the expense of the town to make the preliminary canvass for the census.

In the case at bar, it appearing that the superintendent's bill for expenses incurred in attending a superintendents' convention was approved by the school committee and paid from the treasury of the town of Farmington on the order of its municipal officers, in as much as the particular school appropriations from which the payment was made is not reported, it can not be held that the payment of these expenses was an illegal expenditure of public moneys.

The town of Farmington was not compelled by law to make an allowance to its superintendent of schools for travelling expenses incurred in connection with the supervision of its schools, but it had a right to do so if it saw fit.

In the absence of proof to the contrary, it must be presumed that the school committee and municipal officers of Farmington, in approving and ordering the payment of the superintendent's travelling expenses, used moneys lawfully appropriated for that purpose.

In Section 5, Chapter 206, Private and Special Laws of 1891, by which the school committee of Farmington was created, the town was charged with the duty of furnishing a suitable and convenient room for the superintendent's office and the meetings of the school committee.

It appearing that the school committee formally authorized the superintendent of schools to hire a room in a private house for an office and pay a rent therefor of fifteen dollars a month, and approved the rent bills as they were presented, and the municipal officers, chargeable with notice, drew town orders therefor for more than six years, the town is bound and can not recover the moneys so paid out.

The person who received the rent for the use of his room as an office for the superintendent and the school committee, for the same reasons, can not be compelled to make restitution.

On report on an agreed statement of facts. Actions of assumpsit brought by the Inhabitants of the Town of Farmington to recover town moneys alleged to have been illegally received or disbursed by William F. Miner, superintendent of schools. In each case judgment for the defendant. The cases fully appear in the opinion.

Frank W. & Benjamin Butler, for plaintiffs.

Benjamin L. Berman,

David V. Berman, for defendants.

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

STURGIS, J. In these actions, the Inhabitans of the Town of Farmington seek the restitution of public funds used and disbursed by the defendant, William F. Miner, while acting as superintendent of schools. The actions are brought in assumpsit on account annexed with the general money counts attached, and, with the consent of the parties, are reported on an agreed statement of facts. In accordance with the general rule, all technical questions of pleading must be deemed to be waived.

The case states that the public schools of Farmington are under the direct control of a school committee of five members who perform the duties and have the powers prescribed in Chapter 206 of the Private and Special Laws of 1891, except as the same have been further defined and modified by subsequent general legislation. Originally, this school committee elected the superintendent of schools of the town, fixed his compensation, and directed and supervised the performance of his duties. Pursuant, however, to the provisions of Chapter 188 of the Public Laws of 1917 and acts amendatory thereof, the town of Farmington was combined with the towns of New Vineyard and Temple into a school union, and a joint committee made up of the school committees of the several towns was organized as required by law. Since that time, the schools of Farmington have been under the supervision of the superintendent elected by the joint supervisory committee of the union. On June 29, 1927, the defendant, William F. Miner, who had been superintendent of the schools of Farmington since 1923, was elected superintendent of this union for a term of five years and on June 2, 1932, he was re-elected for a further term of two years. The instant suits concern his expenditures during these terms of office.

The first action reported, which is docketed in the trial court as two actions numbered 116 and 118 but argued here as one case, is assumpsit to recover moneys expended in the years 1928 to 1932 inclusive for taking a census of persons of school age in the town of Farmington. Under the general statutes then in force, superintendents of schools in the state were required to annually return to the school committees of the towns under their supervision and to the State Commissioner of Education a certified list of the names and ages of all persons in each of the towns between the

ages of five and twenty-one years, corrected to the first day of April. P. L. 1919, Chap. 83; R. S. Chap. 19, Sec. 56 and 57. Following the practice of former years, the defendant Miner, in making the school census of Farmington, employed one Frank Heminway to make a canvass of all persons of school age in the town and upon this census based his certified returns. The wages paid were the same as in previous years and the same person was employed. The claim now made is that it was the duty of the superintendent, under the statute, to personally make the annual school canvass and census, and the employment of another for that purpose at the expense of the town was unauthorized.

This contention can not be sustained. The school census is the basis of a large annual apportionment of state school funds to the several towns and cities. R. S. Chap 19, Sec. 213. All superintendents of schools in the state, union or otherwise, and regardless of the school population under their supervision, are required to certify these returns annually in order that the apportionment of state funds may be made as provided by law. To the end that this school census may be accurate and complete, it is provided that, if it appear that the census returns of any town have been inaccurately taken, the governor and council may require the census of such town to be retaken and returned and appoint persons to perform that service, "and such persons so appointed shall take the same oath, perform the same service and *receive the same compensation out of the same funds as the person or persons who took the school census in the first instance.*" R. S. Chap. 19, Sec. 57. In this provision, we find a legislative recognition of the well-known fact that in larger cities and towns, and in some of the school unions, it is entirely impractical, if not impossible, for the superintendents of schools to personally canvass the school population and attend to their other necessary supervisory duties, and, whenever it is necessary, they may employ other persons at the expense of the town to make the preliminary canvass for the annual school census. We are of opinion that recovery in the first actions reported is based on an erroneous construction of the law and must be denied.

In the next suit to be considered, the first item in the account annexed is for money which the defendant Miner drew as reim-

bursement for expenses incurred in attending a superintendents' convention. His bill for this disbursement was approved in advance by the school committee and paid from the treasury of the town on the order of the municipal officers. It does not appear in the case stated from what appropriations this money was drawn. It came to the superintendent in an order from the treasurer which included other items approved by the school committee and certified by the superintendent. It is true that it was not a proper charge against the state school funds nor money raised by the town for the support of the common schools by the per capita tax, nor money which the town is required to appropriate for the specific school purposes enumerated in R. S. (1916) Chap. 16, and R. S. (1930) Chap. 19. It always has been, however, and still is within the power of the municipalities to raise such amounts in addition to the required appropriations as they may deem necessary and proper. *Piper* v. *Moulton*, 72 Me., 155, 166; *Sawyer* v. *Gilmore*, 109 Me., 169, 174, 83 A., 673; Revised Statutes, Chap. 5, Sec. 78. The progress and advancement of our educational system demands trained superintendents, educated, experienced and in touch with modern school methods and practices, and it is now generally recognized that the conventions of superintendents, as well as teachers, have a real educational value and tend to promote the efficiency of those attending. Under the broad powers given towns to raise money for school purposes by our laws, we can not lay down the rule that the payment of the expenses of a superintendent to a convention is an illegal expenditure of public moneys. Nor can we assume that the school committee of Farmington approved the payment of the expenditure here questioned and the municipal officers drew orders for it on moneys which were not legally available for that purpose. If the contrary is true, it does not appear in the agreed statement and can not be here inferred.

The next item in the second action to be considered, is a charge against the defendant Miner for moneys which were paid him as an allowance for the use of his automobile in the performance of his official duties. When he was first elected superintendent of this school union, the joint committee of the towns apportioned his salary and added a travel allowance which they were not authorized to grant. R. S. Chap. 19, Sec. 64. However, each year during

the first term of the superintendent's appointment, the school committee of Farmington approved this charge and the municipal officers recognized its propriety by drawing orders on the treasury for its payment. Under the statutes then in force, the town was not compelled to make this payment. It had a right to do so, however, if it saw fit. It was not in itself an unlawful expenditure of public moneys. Again, the presumption favors the legality of the action of the school committee and the municipal officers of Farmington and is not rebutted.

The final charge in this second action is for money paid for the rent of an office for the superintendent. In Section 5 of Chapter 206 of the Private and Special Laws of 1891, the Act by which the school committee of Farmington was created as already noted in this opinion, is expressly provided that a suitable and convenient room shall be furnished by the town for the superintendent's office and the meetings of the school committee, wherein shall be kept their records. The agreed statement of facts shows that on April 8, 1926, when the defendant Miner was serving as superintendent of schools of Farmington and before the union now existing had been formed, the school committee, adopting his recommendation that the room in the high school building then used as an office was inadequate and needed for other purposes, authorized the superintendent to hire an apartment in the building of one E. W. Milliken and there equip and use one of the rooms for the office, paying the owner $15 a month as rent. Without further formal action, this arrangement was made and continued after Farmington was combined into the school union and until December, 1932, the rent being paid regularly to the owner on bills approved by the school committee and included in requisitions for which the municipal officers drew town orders. It was the duty of the town to furnish a suitable and convenient room for the superintendent's office and the meetings of the school committee. It is not made to appear, and we can not assume, that the municipal officers did not know that the room in the Milliken apartment was hired as an office when year after year they drew orders for the payment of the rent. It may be, as the case states, that they were not consulted about the matter and never formally approved it, but we think it must be inferred that they had full knowledge of what was

being done and acquiesced in it. Even if the superintendent of schools and the school committee did not have authority to hire and pay the rent of this office, the supplemental approving and ratifying action of the municipal officers binds the town. *Dennison* v. *Vinalhaven,* 100 Me., 136, 60 A., 798.

The final action reported is against the defendant, J. A. Blake, who is the owner of the building in which, since 1932, the superintendent of the union has maintained his office. Rent has been paid him just as it was to the owner of the Milliken apartment, and, seeking to recover it back, Farmington sues him instead of the superintendent. For the reasons already stated, recovery in this action must be denied.

In each of the cases brought forward on this Report, the mandate must be

Judgment for the defendant.

STATE OF MAINE *vs.* LINWOOD H. MOSLEY.

Hancock. Opinion, November 6, 1934.

CRIMINAL LAW. PLEADING AND PRACTICE. EVIDENCE. NEW TRIAL.

Neglect or refusal of a presiding Justice to instruct as to matters of law, in absence of evidence requiring such an instruction, is no cause for sustaining an appeal.

In a criminal case, a motion filed for a new trial should be submitted to the presiding Justice and, if denied, appeal taken. Practice differs in civil cases. Evidence that is merely impeaching and having no probative force as to substantive facts does not warrant a new trial even though such evidence satisfies other rules governing newly discovered evidence.

Evidence competent as tending to prove one cause of action is not to be excluded because it also tends to prove other and graver wrongs.

If a presiding Justice rightly admits or excludes evidence, though he give an erroneous reason for so doing, exceptions will not lie to the ruling. The question is not whether the presiding Justice placed the admission or the exclu-

sion of the testimony on right grounds but whether or not it was competent testimony.

Failure of the presiding Justice to limit the application of admissible evidence is no cause for exception unless request is made for an appropriate instruction. Failure to make such request is regarded as a waiver of right in that respect.

In the case at bar, there was sufficient credible evidence to warrant the jury in believing, beyond a reasonable doubt, and therefore, in finding, that the respondent was guilty as charged. No injustice was done him by a refusal on the part of the court to disturb the verdict.

On appeal, exceptions, and special motion for new trial. Respondent, tried for murder at the September Term, 1933, of the Superior Court for the County of Hancock, was found guilty. A general motion to set the verdict aside was overruled and appeal taken. Exceptions to the admission of certain evidence was also taken, and later a motion for new trial on the ground of newly discovered evidence was filed. Motion and exceptions overruled. Appeal dismissed. Judgment for the State.

Clyde R. Chapman, Attorney General,
Percy T. Clarke, County Attorney, for State.
Blaisdell & Blaisdell,
Fred L. Mason, for respondent.

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

PATTANGALL, C. J. Appeal and exceptions. Respondent, indicted for murder, was tried and convicted of that crime. A general motion, in the usual form, to set the verdict aside was filed below and overruled. Appeal was taken. Exceptions to the admission of certain evidence were seasonably taken and allowed. Later, motion was filed for new trial on newly discovered evidence. At the hearing before this Court, it was also urged that the failure of the presiding Justice to sufficiently state the law as to one feature of the case was cause for new trial and might properly be considered under the appeal, no instructions having been requested and no exception taken covering the point.

The record admits the homicide. There is no dispute but that respondent shot and killed one Elwood Gilley. It is not claimed that

he intended to do so. The theory of the State was that respondent intentionally shot and wounded one Delia Hooper and, in doing so, by mischance killed Gilley who was standing near her. The theory of the defense was that respondent did not intend to shoot anybody, but that a gun held by him was accidently discharged, the injury to Mrs. Hooper and the death of Gilley resulting.

It appeared that respondent and his wife, with Gilley and Mrs. Hooper, were spending the day together, a portion of the time at a lobster pound and the remainder at a farm belonging to respondent. During the day, respondent and the two women drank more or less liquor. The four ate lunch together and, after lunch while the men were temporarily absent, the women took a short nap. After the men returned, respondent and his wife walked to the pasture to look at some cows, Gilley and Mrs. Hooper remaining at the farmhouse. There was no evidence of drinking after lunch time, but there was evidence tending to show that during the earlier portion of the day, Mrs. Hooper and Mr. Mosley were intoxicated. There is also evidence tending to show that respondent made improper advances to Mrs. Hooper which she rejected. In the late afternoon, the party was about to break up and preparations were being made to leave the farm, when the shooting occurred.

In the corner of the kitchen of the farmhouse were two shotguns, one belonging to respondent, one to Gilley. It was with the latter weapon that the shooting was done. There were but four persons present when it occurred, respondent, his wife, Mrs. Hooper and Gilley. Respondent did not avail himself of his right to testify. The jury, therefore, was dependent upon his wife and Mrs. Hooper, so far as oral evidence was concerned, for the necessary information upon which to base its verdict. According to Mrs. Hooper, respondent pointed the shotgun directly at her head. Observing his action, Gilley who was standing between them threw up his arm either to protect her or to interfere with respondent's aim. The weapon was discharged and the shot took effect in Gilley's arm and chest and in Mrs. Hooper's face and neck.

According to Mrs. Mosley, respondent, at Gilley's request, started to take the gun from the house to hand it to its owner, who had asked for it, and while respondent was standing in the doorway, Gilley and Mrs. Hooper being outside, she (Mrs. Mosley), not

knowing the exact situation, abruptly closed the door in such a way that it struck her husband and caused the accidental discharge of the gun.

The jury apparently accepted Mrs. Hooper's version and rejected that of Mrs. Mosley. In support of the general motion, counsel for respondent argued, and not without support in the record, that Mrs. Hooper's story presented certain inconsistencies and contradictions which tended to discredit her. The claim is made that she was intoxicated and therefore unable to remember just what did happen and that she has, at different times, varied her relation of the events.

The evidence of intoxication is not carried to a point which would convince that she was not capable of appreciating everything of importance that occurred, nor does the fact that in minor details she was somewhat vague and uncertain indicate that she was not truthful as to the main facts which her testimony tends to establish. Respondent shot and killed Gilley. He shot and wounded Mrs. Hooper. There is no doubt about either of these facts. Mrs. Hooper may be wrong as to the place where respondent was standing when he did the shooting and as to where she and Gilley stood. But we are not impressed with the importance of the evidence on these points, nor would we regard it as remarkable that after such an occurrence she should be somewhat confused as to the exact details of the events immediately preceding the shooting. The evidence indicates that the shots were fired from a gun held at the shoulder of respondent and pointed directly at Mrs. Hooper's face. Her wounds and those of Gilley, shots lodged in a building near where they were standing, tend to sustain such a theory. The jury was entirely justified in assuming that the witness was endeavoring to answer truthfully and that her testimony, so far as it bore upon the real issue, was correct and could safely be relied upon.

On the other hand, the only other witness who testified regarding the main facts was the wife of the respondent, who was successfully impeached and whose story is inherently improbable. We cannot say that the jury erred in rejecting it.

It was also argued that the appeal should be sustained because the presiding Justice neglected to instruct the jury with regard to the law concerning intoxication as affecting ability to form an

intent. There was no occasion to do so. No claim was made that respondent was sufficiently under the influence of liquor to require such an instruction and there was no evidence warranting it. On the contrary, the opposite appeared.

The situation was entirely unlike that in *State* v. *Wright*, 128 Me., 404, 148 A., 141, on which respondent relies. In that case, the issue was whether or not respondent was guilty of involuntary manslaughter, the homicide having been caused by his negligent act. The presiding Justice instructed the jury that there was no distinction between criminal and civil negligence and, although no exception was noted, the instruction was so plainly wrong and the point involved so vital that a new trial was ordered on the ground that the verdict must have been based upon a misconception of the law, following the rule laid down in *Pierce* v. *Rodliff*, 95 Me., 346, 50 A., 32; and *Simonds* v. *Maine Tel. & Tel. Co.*, 104 Me., 440, 72 A., 175.

The appeal must be dismissed.

The motion for new trial on the ground of newly discovered evidence is without merit. It might properly be dismissed on the ground that it is not before the Court. The procedure followed was applicable to a civil, not a criminal, case. The distinction is carefully made and the governing rule clearly stated in *State* v. *Gustin*, 123 Me., 307, 122 A., 856. But even had correct practice been followed, respondent would not benefit by this motion. The newly discovered evidence consisted of statements that Mrs. Hooper had, after verdict, contradicted the testimony given by her. Such evidence would have no probative force as to the facts. Its only effect would be impeaching. A new trial may not be granted on newly discovered evidence of that character. *Shalit* v. *Shalit*, 126 Me., 291, 138 A., 70.

The sole exception relied on relates to the admission of certain rebuttal evidence offered for the purpose of impeaching Mrs. Mosley. She was asked, in cross examination, whether she had not, in interviews with the state officials, made statements contradictory to those given in her testimony. She was unable to recall certain specific questions and answers but stated she had not previously given a truthful account of what happened at the farm house, "keeping as far away from the truth as possible." In order to show

that her contradictory statements related to material matters, the State offered evidence as to what she really did say at the interviews in question. Counsel for respondent objected to the admission of the testimony and, his objection being overruled, excepted. There is no merit in this exception. The evidence was clearly admissible in rebuttal.

But during the argument concerning its admission, the presiding Justice said, "I think it is admissible as tending to rebut the inference to be drawn on the statement of Mrs. Mosley to the effect that she was inside when she heard the explosion." In this, he unquestionably erred. The testimony had no probative force as to the facts. It was only admissible as affecting her credibility. But the objection was general. No exception was taken to the remark made by the trial judge and no request was made to limit the application of the evidence. The objection was squarely to its admission.

"That evidence otherwise competent and admissible as tending to prove one cause of action also tends to prove other and graver wrongs, does not make it any the less admissible for the original purpose." *State* v. *Farmer*, 84 Me., 436, 24 A., 985; *Plourd* v. *Jarvis*, 99 Me., 163, 58 A., 774; *Beaudette* v. *Gagne*, 87 Me., 534, 33 A., 23; *O'Brien* v. *White & Company*, 105 Me., 308, 74 A., 721; *People* v. *Doyle*, 21 Mich. 221.

"It has been considered that if a Judge decides right though he may give erroneous reasons for so doing, yet no ground is thereby afforded for sustaining a writ of error; and we have repeatedly decided in such cases that the excepting party was not aggrieved and when in such cases exceptions have been taken, we have overruled them." *Warren* v. *Walker*, 23 Me., 453.

"If testimony is material and admissible on one ground, it is not reversible error to admit it on another and untenable ground." *Lausier* v. *Hooper*, 112 Me., 333, 92 A., 179.

"It is a matter of very little consequence whether a reason assigned by a Judge at nisi prius for his ruling is or not technically accurate and sound. Doubtless what may be denominated a sound legal instinct produces many correct results upon the admissibility of testimony when the Judge who made them might not be ready to state the true reason with precision or even with a perfect comprehension of the proper grounds upon which the admission or ex-

clusion should be placed. The question before us is not whether the presiding Justice placed the admission of the testimony upon exactly the true ground but whether or not it is competent testimony." *State* v. *Wagner*, 61 Me., 178.

"An objection to the failure of the Court to charge the jury upon a specific point cannot be raised for the first time by an assignment of error to the appellate court." *People* v. *Raher*, 92 Mich., 165, 52 N. W., 625, 31 A. S. A., 575.

"Error cannot be based upon the failure of the trial court to give instructions when no request was made for them." *Wragge* v. *Railroad Company*, 47 S. C., 105, 25 S. E., 76, 58 A. S. R., 70.

"It cannot be objected to on appeal that evidence properly admissible for a certain purpose was admitted without instruction limiting its application to such purpose where no request was made for such instruction." *Hasbrouck* v. *Western Union Telegraph Co.*, 107 Ia., 160, 77 N. W., 1034, 70 A. S. R., 181.

"Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the Court suffices for the purpose; and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection." *Wigmore on Evidence*, Vol. 1, Sec. 13, p. 42.

We think that respondent was not prejudiced by the failure of counsel to request an instruction limiting the application of the rebutting testimony. The only evidence on the vital point of the case, on which a theory of purely accidental shooting could have been predicted, was that of Mrs. Mosley. In any view of the matter, she was so discredited that no jury would have been justified in relying on her testimony.

A study of the entire record convinces us that the jury was warranted in believing, beyond a reasonable doubt, and, therefore, in finding, that the respondent was guilty as charged. No injustice is done him by a refusal on the part of this Court to disturb the verdict.

Motion and exception overruled.
Appeal dismissed.
Judgment for the State.

In Re Frank R. McLay.

Kennebec. Opinion, November 8, 1934.

Public Utilities. Interpretation of Statutes. P. L. 1933, Chap. 259.

In the interpretation of a statute, the controlling consideration is the legislative intent, and that must ordinarily be found in the words which the legislature has used to define its purpose. If the phrasing is unambiguous, the court has no power to correct supposed errors or to read into an enactment a meaning at variance with its express terms.

At the same time the court is not bound because of mere words to construe a statute contrary to its plain spirit.

In the case at bar, the court held it clear from the language used that the legislature delegated to the Public Utilities Commission the duty of determining what carriers should be entitled to permits as of right, and then, pending the issuance of a permit, gave permission to operate without a permit to those carriers who should file their application within the fifteen day period.

To hold that the fifteen day period was a limitation on the time within which all contract carriers claiming to operate as of right must file their applications would do violence to the language used.

On exception to a ruling of the Public Utilities Commission involving the interpretation of Public Laws 1933, Chap. 259, Sec. 5, Par. C. Exception sustained. The case fully appears in the opinion.

Currier C. Holman, for petitioner.

Frank M. Libby, for Public Utilities Commission.

Sitting: Pattangall, C. J., Dunn, Sturgis, Barnes, Thaxter, Hudson, JJ.

Pattangall, C. J., Hudson, J. Dissenting.

Thaxter, J. This case is before us on an exception to a ruling of the Public Utilities Commission, and involves the interpretation of Public Laws 1933, Chap. 259, Sec. 5, Par. C.

This statute became effective June 30, 1933, and provides for the regulation of the operation of motor trucks for hire on the highways of the state. Section 5 applies to so-called "contract carriers" which are designated as operators of motor vehicles, other than common carriers, transporting for hire freight or merchandise over regular routes within the state. Such business is declared to be affected with a public interest; and it is provided that no such carrier shall operate within the state without having obtained a permit therefor from the Public Utilities Commission. The conditions are prescribed under which such a permit shall be issued, and then follows a clause providing for the issuance of permits to certain of such carriers as a matter of right. It reads as follows:

> "A permit shall be granted as a matter of right when it appears to the satisfaction of the commission, after hearing, that the applicant has been regularly engaged in the business of a contract carrier as herein defined within this state, from the first day of March, 1932; and in such cases, operation may lawfully be continued pending the issuance of such permit, provided application therefor is made within 15 days from the effective date of this act."

The petitioner was a contract carrier entitled to a permit as a matter of right within the meaning of the above exception. On November 10, 1933, four months and ten days after the act became effective, he filed with the Public Utilities Commission an application for such a permit. The Commission dismissed his petition on the ground that his application should have been filed within fifteen days from the effective date of the act.

The petitioner contends that the legislature did not intend to impose a fifteen day limitation on the filing of applications for permits under this section, but was providing, pending a decision by the commission, for the operation of trucks without a permit by those contract carriers who should file their applications within the fifteen day period.

In the interpretation of a statute, the controlling consideration is the legislative intent, and that must ordinarily be found in the words which the legislature has used to define its purpose. If the phrasing is unambiguous, the court has no power to correct sup-

posed errors or to read into an enactment a meaning at variance with its express terms. *The Atlantic and St. Lawrence Railroad Company* v. *Cumberland County Commissioners*, 28 Me., 112, 120; *Hersom's Case*, 39 Me., 476, 481; *State* v. *Howard*, 72 Me., 459, 464; *Pease* v. *Foulkes*, 128 Me., 293, 297, 147 A., 212.

At the same time, it is true that there is something more to a statute than its phraseology, and that the court is not bound because of mere words to construe an act so as to defeat its obvious intent. The plain spirit of a law governs rather than the words which are used to define its purpose and indicate its scope. Some flexibility is essential in the proper interpretation of statutes. *Holmes* v. *Inhabitants of Paris*, 75 Me., 559; *Carrigan* v. *Stillwell*, 99 Me., 434, 59 A., 683; *Craughwell* v. *Mousam River Trust Co.*, 113 Me., 531, 95 A., 221; *Sullivan* v. *Prudential Insurance Company of America*, 131 Me., 288, 160 A., 777. The necessity for such a rule is well stated in a recent case. "It rescues," said the court, "legislation from absurdity. It is the dictate of common sense. It is not judicial legislation; it is seeking and enforcing the true sense of the law notwithstanding its imperfection or generality of expression." *State* v. *Day*, 132 Me., 38, 41, 165 A., 163, 164.

The interpretation placed by the Public Utilities Commission on this statute seems to us not only contrary to its terms, but as unnecessary to rescue the act from absurdity or to enforce the true sense of the law. The phraseology is distorted to carry out a supposed intent of the legislature. The sentence in question provides for the granting of a permit as a matter of right, if the applicant has been regularly engaged in the business of a contract carrier from March 1, 1932. Then follows a rather necessary provision permitting a continuation of operation pending the issuance of the permit "provided application therefor is made within 15 days from the effective date of this act." If we approach the solution of this question without any preconceived idea as to what the legislature may or may not have intended, it seems perfectly clear from the language used that the legislature delegated to the Public Utilities Commission the duty of determining what carriers should be entitled to permits as of right, and then, pending the issuance of a permit, gave permission to operate without a permit to those carriers who should file their applications within the fifteen day period.

Such an interpretation of the statute is entirely reasonable. What is more, it is in exact accord with the wording.

To hold that the fifteen day period is a limitation on the time within which all contract carriers claiming to operate as of right must file their applications is to do violence to the language used. To find such a meaning it is necessary to transpose the clause in question from the end to the beginning of the sentence so that the act will read as follows: "Provided application is made within fifteen days from the effective date of this act, a permit shall be granted as a matter of right . . . ." With this change it would be perfectly clear that the limitation applied to the time within which all applications should be made. The ease with which the legislature could have made such a meaning clear militates strongly against the interpretation of the commission in this instance.

The duty of the court is to apply the language which the legislature has used, not to modify it. If the phrasing is unambiguous and does not carry out the legislative intent, it is for the law making body to correct the error.

Exception sustained.

DISSENTING OPINION.

HUDSON, J. With exceeding regret do I find myself unable to concur in the majority opinion of the Court. On the contrary, I agree with the unanimous decision of the Public Utilities Commission.

Involved herein are the interpretation and construction of a portion of Par. C, Sec. 5, Chap. 259 of the Public Laws of 1933. Its language is stated in the majority opinion. About the facts there is no dispute. They appear in the opinion.

The Commission ruled adversely to the petitioner "in that he did not file his application within fifteen days from the effective date of said Act." Thus we have to determine whether or not a contract carrier, applying to the Commission for a permit as a matter of right and basing his claim on this statute, must file his application therefor within the said fifteen days. We deal particularly with the last clause in said Par. C, which reads: "provided application therefor is made within fifteen days from the effective date of this Act."

To what does this proviso apply? The Commission ruled that it applied to the application for a permit as a matter of right. The majority of this Court hold that it applies only to the continued operation pending the issuance of such permit.

That this clause, commencing with the words "provided application therefor," is relative and qualifying, there can be no doubt. Then to what does it relate and what does it qualify? The general rule is that "relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." Lewis' *Sutherland on Statutory Construction*, Sec. 420, p. 811. The last antecedent to the qualifying words, "provided application therefor," consists of the words "such permit" immediately preceding the word "provided." Those words, "such permit," however, have further reference and relationship, but to what? The only permit previously mentioned is the permit that may be granted as a matter of right. Consequently, the qualifying words of the clause relate back entirely over the intervening provision as to the operation pending the issuance to the permit to be granted as a matter of right. There can be no question that the words "such permit" and the words "a permit" refer to the same permit. That being so, the words "provided application therefor" must necessarily qualify and limit the right to obtain such a permit. The restriction, then, imposed by this qualifying clause is, in effect, that one entitled to receive the permit as a matter of right must make his application within the said fifteen days.

This interpretation not only does not violate the general rule above quoted, but entirely conforms with it, for, as already stated, we relate the qualifying words solely to the last antecedent.

Still another test to determine what this dependent clause qualifies is to consider the word "application" in it and to trace it back through the statute. We would discover if this word "application" as it there appears has reference to the application for the permit as a matter of right, or to any other application, particularly one on which to base a right of operation pending issuance. It is to be noted that no mention of the necessity of any application at all is made in the statute with reference to continuance of operation pending issuance. Antecedent to the qualifying words "provided application therefor," only one application is expressly provided for,

and we should not imply that there is any necessity for an application to be filed by one who would lawfully continue operation pending the issuance.

The word "application," then, in the three qualifying words above mentioned, must have reference to the only application thereinbefore mentioned, which has to do with the granting of the permit as a matter of right. Consequently, this word "application" appearing within the qualifying clause itself, and necessarily referring to the application for the permit as a matter of right, shows that that which is limited to the fifteen day period is that application. My construction of the statute, then, is that such an applicant must make his application within the fifteen days, and if he does, he has a legal right to continue to operate pending the issue of such permit without any action whatsoever by the Commission.

It need hardly be said that we are attempting to discover and declare the legislative intent underlying the enactment of this statute. "In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the Legislature. As has frequently been stated in effect, the intention of the Legislature constitutes the law." 25 R.C.L., Sec. 216, p.960.

> "Where the meaning of a statute or any statutory provision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute. To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment." Lewis' *Sutherland on Statutory Construction*, Vol. II, Sec. 456, p. 864, and cases cited in footnote 25.

What was the intention of the Legislature? Fortunately the purposes of this legislation appear in Section 1 of the Act under the heading "Declaration of Policy." Therein it is disclosed that the need of this law was to remedy conditions already harmful to the public and in the interests of the public not longer to be tolerated.

The rapid increase of trucks is mentioned, as well as their ineffective regulation. Their use in creating dangers and hazards on public highways is emphasized as well as the purpose of creating a safer condition for the general public. The benefits to the highways themselves in less and better regulated traffic are indicated. Likewise, the relief of congestion is alluded to, and in this section we find a declaration of policy purposing a minimum of such trucks "adjusted and correlated so that highways may serve the best interest of the general public." It would seem, thus, clearly to appear that there was in the minds of the legislators a most urgent need of immediate regulation involving the licensing of a smaller number of operators, some of whom would be preferred applicants, having been so engaged as truck operators, and others unpreferred who would undertake the business anew. To effect such a result in the most natural way, as well as most equitably, considering the rights of applicants, it would be necessary upon the enactment of this legislation to determine forthwith who and how many should be accorded the right by the Commission to engage in this semi-private business on the public highways.

When you pause to consider the benefits desired of accomplishment by this legislation and "the mischief intended to be removed or suppressed," the urgency of the situation and the consequent necessity for the law, it is self-evident that quick action under it is imperative. A construction that would permit the filing of applications indefinite as to time, later than the fifteen days, even after months, or perhaps years, if within a reasonable length of time, would most seriously affect, if not entirely destroy, the accomplishment of the purposes and the policy of the law as set forth in Section 1. My associates hold, in effect, that the contract carrier, simply to obtain a right *to continue operation pending the issue of a permit* as a matter of law, must file his application within fifteen days from the effective date of the Act, but that to obtain the permit to operate as a matter of right for an indefinite length of time the application may be filed any time if within a reasonable length of time. I can not believe that the Legislature ever so intended. I can see no reason whatever for indefiniteness of time when applying for the right which is of the greater importance, viz: to operate indefinitely, and definiteness of time, the fifteen days, in which to

apply for the right to operate simply during the issue of the license a matter of so much less importance. Such construction leaves the Legislature in the position of having made a specific limitation in time as to that which is only incidental and no definite provision for the principal.

Furthermore, such a construction also makes possible this result. We have two classes of applicants, the preferred, that is, the carrier who has been operating since March 1, 1932, and who because of that fact is entitled to a permit as a matter of right; and the unpreferred, the new applicant. Suppose: B, C, D, and others, unpreferred applicants, present their applications within the fifteen days. To such of the latter as are necessary to perform the service, the Commission grants permits. Months later along comes A, a preferred applicant, claiming a permit as a matter of right when the field of service has become exhausted. He can not be denied, for he is entitled to the permit as a matter of right. The permits of the unpreferred already granted can not well, if at all, be recalled. Thus, the efficacy of the statute is impaired and there is at least a partial return to conditions as they existed before its enactment. Now it would seem that in order to accord justice to all applicants, the legislators would have considered that it was essential to fix a definite time in which preferred applicants could come before the Commission to claim their rights. The Commission should know as early as possible those who, having preferred rights, would claim them, so that it might determine whether there was any occasion for the issuance of permits to the non-preferred.

In the settlement of an estate, were there a certain sum for distribution between preferred and unpreferred claimants, how unnatural and unlikely it would be for the Legislature to pass a law providing a short definite time in which unpreferred claimants could present their claims and no time at all in which preferred claimants could file their claims. Such legislation would be most unwise and would lead only to needless delay and long continued uncertainty in the determination of the rights of the estate's creditors.

Furthermore, such a construction, while fixing definitely the fifteen days for application for right to operate pending the issue, not only leaves indefinite the time for application by the preferred

claimant, but imposes upon the Commission the burden of determining whether the preferred claimant is filing his application within a reasonable length of time. The reasonable length of time depends upon the particular facts pertaining to the claimant's case. What might be reasonable for Mr. A might be found to be unreasonable for Mr. B, though A's claim were presented subsequently to B's. I can not believe the Legislature intended to burden the Commission with the determination of such reasonableness of time by applicants.

The Commission's interpretation of this statute "rescues legislation from absurdity. It is the dictate of common sense." *State* v. *Day*, 132 Me., 38, 41, 165 A., 163, 164.

It is my judgment, then, that would we give efficacy to the intent of the Legislature in the enactment of this law, this Court should overrule the exception and sustain the decision of the Commission.

PATTANGALL, C. J., joins in this dissent.

KILPINEN'S CASE.

Knox. Opinion, November 8, 1934.

WORKMEN'S COMPENSATION ACT.

Whether there is a disability due to injury is a question of fact. Whether there is causal relation between injury and disability is likewise a question of fact.

On appeal respecting administration of the Workmen's Compensation Act, cognizance is taken of questions of law only. Decisions of the Industrial Accident Commission, upon questions of fact, are not subject to review.

In the case at bar, the finding that the evidence did not show causal relation between traumatic injury and tuberculosis, cannot be set aside. Findings of essential facts are conclusive on the courts.

Workmen's compensation case. On appeal from a decree of a sitting Justice affirming a decree of the Industrial Accident Com-

mission dismissing the petition of plaintiff for further compensation. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Frank H. Ingraham, for plaintiff.

Robinson & Richardson, for defendant.

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

DUNN, J. This proceeding is under the workmen's act, for compensation for further disability. 1929 Laws, Chap. 300, now R. S. (1930), Chap. 55, Sec. 1 et seq. The Industrial Accident Commission, a single member sitting, refused to make a new award, and dismissed the petition. A justice of the Superior Court, as was his ministerial duty, rendered a decree to enforce the rights of the parties upon the facts as found by the commissioner. The case comes forward on appeal.

The employee, a quarryman, was accidentally injured on October 31, 1929, a piece of granite flying from a blast rupturing his left eyeball, the sight of the eye being eventually completely lost. The injury was an incident natural to his work, in addition to having been received within the scope of employment. Compensation was paid, in accordance with a duly approved agreement, for presumed total disability, for one hundred weeks. Final settlement receipt, dated October 26, 1931, was officially filed.

On January 5, 1932, the claimant, now appellant, brought his petition on the ground that his condition of actual partial loss of earning capacity was compensable. *Morin's Case*, 122 Me., 338, 120 A., 44; *Foster's Case*, 123 Me., 27, 121 A., 89.

He alleged that the quarry accident had resulted in loss of sight of his eye; also "caused a run down condition which developed into a high fever, and later pleurisy which developed into tuberculosis. . . ."

The statute of limitations was pleaded by the respondent, but abandoned.

In answer to the petition, there was denial that the condition existing subsequent to the one hundred week period was caused by the industrial hurt for which there had been the allowance and payment of compensation.

The issue was that of causal connection between injury to the eye and later pulmonary tubercular affliction. There was medical testimony, more or less conflicting in nature, from several witnesses; also other testimony and evidence. None need be narrated.

It was not claimed that there was any direct linking of injury and disease, but that, due to the injury, vitality of the injured person was lowered to a stage where his susceptibility to the disease was increased. Whether there is disability due to injury is a question of fact. *Pass's Case*, 232 Mass., 515, 122 N. E., 642; *Donovan's Case*, 243 Mass., 88, 137 N. E., 34. Whether there is causal relation between injury and disability is likewise a question of fact. *McCarthy's Case*, 231 Mass., 259, 120 N. E., 852.

The commissioner, on consideration of the evidence, found and decided against the claim for compensation. He determined, in effect, that the testimony which had been produced as tending to establish causative relationship, was insufficient for that purpose. The finding has support in legally admissible evidence.

"The employee," to quote from the findings, "failed to sustain the burden of proving either that any incapacity to work which has existed since the date of last payment of compensation is the result of the accident to the left eye . . . , or that any incapacity to work which has existed since the date of last payment of compensation is the result of a pre-existing physical condition which was aggravated or accelerated by the accident to the left eye. . . ."

Counsel for the appellant has argued that the decision of the commissioner is reviewable. His brief cites *Orff's Case*, 122 Me., 114, 119 A., 67, and *Ferris' Case*, 132 Me., 31, 165 A., 160. As for those cases, neither rules the one at bar. The authority of a case as a precedent is limited to the point adjudged. *Beal* v. *Warren*, 2 Gray, 447, 459.

On appeal respecting administration of the Workmen's Compensation Act, cognizance is taken of questions of law only. *Hight* v. *York Manufacturing Company*, 116 Me., 81, 100 A., 9; *Westman's Case*, 118 Me., 133, 106 A., 532; *Mailman's Case*, 118 Me., 172, 106 A., 606; *MacDonald* v. *Pocahontas Coal & Fuel Company*, 120 Me., 52, 112 A., 719; *Williams' Case*, 122 Me., 477, 120 A., 620. Decisions of the Industrial Accident Commission, upon questions of fact, are not subject to review. This has been

declared repeatedly. Some of the cases include: *Simmons' Case*, 117 Me., 175, 103 A., 68; *Westman's Case*, supra; *Mailman's Case*, supra; *Gauthier's Case*, 120 Me., 73, 113 A., 28; *Gray's Case*, 120 Me., 81, 113 A., 32; *Jacque's Case*, 121 Me., 353, 117 A., 306; *Williams' Case*, supra; *Henry's Case*, 124 Me., 104, 126 A., 286; *Weleska's Case*, 125 Me., 147, 131 A., 860; *Beverage's Case*, 126 Me., 601, 138 A., 628; *Miller* v. *Naughler Brothers*, 128 Me, 540, 146 A., 912.

The finding in the instant case, that the evidence did not show causal relation between traumatic injury and tuberculosis, cannot be set aside. *McCarthy's Case*, supra; *DePietro's Case* (Mass), 187 N. E., 773. Findings of essential facts are conclusive on the courts. *Lemelin's Case*, 123 Me., 478, 124 A., 204.

The appeal presents no question for review.

Appeal dismissed.
Decree below affirmed.

C. WALLACE HARMON, TRUSTEE

vs.

ANNIE M. PERRY AND ELWIN E. PERRY, ET ALS.

York. Opinion, November 9, 1934.

BANKRUPTCY. FRAUDULENT CONVEYANCES.

In actions brought under U. S. Statute 1898, *Chapter* 541, *Sec.* 70e, *in the State Courts to avoid fraudulent transfers of the bankrupt's property, the question whether a particular transfer is or is not fraudulent as to creditors depends upon the laws of the state where the transfers were made.*

The burden of proving that conveyances were made in fraud of creditors is upon the party bringing the action.

Fraud is never presumed. It must always be established by clear, full and convincing proof.

Surmise, suspicion or conjecture are not substitutes for proof.

A voluntary transfer or gift by a husband to a wife is prima facie *fraudulent if at the time he is indebted, and, if the transfer or gift embraces all of the property which the husband possesses, the probative force of the presumption is of the strongest. In such case, it is immaterial whether the grantee or donee is conversant of the fraud.*

If a transfer or gift is made by a debtor for a valuable and adequate consideration, it is valid unless there is a fraudulent intent on the part of the transferee.

A valid prior indebtedness owed to the grantee by the grantor may be a sufficient consideration for a conveyance by an insolvent debtor.

It is not fraudulent as a matter of law for a debtor to pay one creditor for the purpose of giving him a preference over others. This is true as between husband and wife.

Supposition, conjecture, guess or mere theory is not proof of fraud.

By making parties to the transactions attacked his witnesses, the complainant in the case at bar was bound by their statements, except as they were contradicted by credible evidence of probative value.

On the evidence in this case, the defendant, Elwin E. Perry, was a *bona fide* purchaser for value of the property which his father, the bankrupt, conveyed to him.

The validity of his sale of this property to Lillian P. Nichols not being contradicted, she was an innocent purchaser without notice and acquired a good title as against the creditors of the bankrupt.

The Ocean National Bank, on the record, was a *bona fide* holder for value of the notes and mortgage given by Lillian P. Nichols to Elwin E. Perry as part of the purchase price of the property which he acquired from the bankrupt.

Neither Lillian P. Nichols nor the Ocean National Bank being made parties to this proceeding, their equities could not be adjudicated.

It appearing that the defendant, Elwin E. Perry, when he purchased the homestead from his mother which she had acquired from the bankrupt, paid therefor adequate consideration for what he received, on the record he was a transferee without fraudulent intent.

The deeds by which the defendants took title from the bankrupt, on their face, establish their titles, and the Trustee in Bankruptcy acting in behalf of the creditors of the original grantor must impeach the deeds by proof, not theory.

The evidence in this case does not show fraud which will avoid the conveyances of the bankrupt here attacked.

On appeal. A bill in equity brought by the Trustee of the bankrupt estate of Albert G. Perry of Wells seeking to set aside conveyances made by the bankrupt to his son and wife, and alleged to be in fraud of his creditors. The sitting Justice sustained the bill, and ordered the properties in controversy, conveyed to a master to sell, pay the outstanding mortgages and turn over the balance of the proceeds for distribution among creditors. Appeal was taken by the defendants. Appeal sustained. Decree in accordance with the opinion. The case fully appears in the opinion.

John P. Deering, for plaintiff.

Spinney & Spinney, for defendants.

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

STURGIS, J. This is a bill in equity in which the Trustees of the bankrupt estate of Albert G. Perry of Wells in the County of York and State of Maine seeks to set aside certain conveyances alleged to have been made with the intent to hinder, delay or defraud his creditors and prevent the properties from being distributed under the Bankruptcy Laws of the United States.

It is alleged and admitted that on October 11, 1928, Albert G. Perry transferred and conveyed to his son, Elwin E. Perry, a defendant in this action, a parcel of land in Wells, containing about three acres and subject to a mortgage to the Sanford National Bank of Sanford, Maine. On November 1, 1928, he conveyed to his wife, the defendant Annie M. Perry, his homestead also situated in Wells and subject to a mortgage to one Fred H. Bridges. He owned no other property of any substantial value at that time.

It is further alleged that, when the bankrupt made these conveyances, he was insolvent, contemplated bankruptcy and intended to defraud his creditors, as his grantees then had reasonable cause to believe. It is denied that either Annie M. Perry or Elwin E. Perry were *bona fide* purchasers for value or that the holders of the titles to the equities of redemption in the properties are *bona fide* holders for value.

On November 7, 1930, Albert G. Perry was adjudicated a bankrupt in the United States District Court for the Southern District

of Maine, and this complainant, as Trustee of his estate, instituted this proceeding. The defendants, in their several answers, deny the charges made against them. The sitting Justice hearing the cause sustained the bill and ordered the defendants to convey their interests in the properties in controversy to a master appointed to make a sale, pay the outstanding mortgages and turn the proceeds over for distribution among the bankrupt's creditors. The case comes forward on appeal.

The Trustee brings this action under U. S. Statute 1898, Chap. 541, Sec. 70 e, U. S. C. A. Title 11. That clause of the Bankruptcy Act gives the Trustee authority to avoid any fraudulent transfers of his property by the bankrupt "which any creditor of such bankrupt might have avoided," but whether a particular transfer is or is not fraudulent as to creditors depends not upon the Bankruptcy Act, but upon the laws of the state where the transfers are made. *Woodman* v. *Butterfield*, 116 Me., 241, 101 A., 25; *Holbrook* v. *International Trust Co.*, 220 Mass., 151, 154, 107 N. E., 665; *Small* v. *Gilbert*, 56 Fed. (2d), 616.

The burden of proving that the conveyances in question were fraudulent is upon the complainant. Fraud is never presumed. It must be always established by clear, full and convincing proof. *Grant* v. *Ward*, 64 Me., 239; *Frost* v. *Walls*, 93 Me., 405, 45 A., 287; *Small* v. *Gilbert*, supra. The charge of fraud is a serious one, and it is well settled that to sustain an allegation of fraud there must be more than surmise, suspicion or conjecture, which are not substitutes for proof. *Bartlett* v. *Blake*, 37 Me., 124, 127; *Minott* v. *Johnson*, 120 Me., 287, 113 A., 464, 465; *Adams* v. *Ketchum*, 129 Me., 212, 151 A., 146; *Thibodeau* v. *Langlais*, 131 Me., 132, 159 A., 720.

In support of his essential allegations, the complainant called the bankrupt and his wife, the defendant Annie M. Perry, and made them his witnesses. They testified that the conveyances in question were made in good faith, for valid and adequate considerations, and at a time when bankruptcy was not contemplated. There is no convincing evidence to the contrary. The defendant, Elwin E. Perry, testifying for the defense, denied that either his transactions with his father, Albert G. Perry, or his subsequent dealings with his mother, Annie M. Perry were fraudulent, and the few disinterested

witnesses who testified had no direct knowledge of the facts and circumstances attending the conveyances. Under the general rule, the complainant, in making the parties to the transactions his witnesses, is bound by their statements, except as they are contradicted by credible evidence of probative value. *Kirby* v. *Canal Co.*, 46 N. Y. S., 777; *Voorhees* v. *Unger*, 135 N. Y. S., 113, 115; *Dunmore* v. *Padden*, 262 Pa., 436, 105 A., 559; *Entwisle* v. *Seidt*, 115 Fed., 864.

Albert G. Perry formerly operated a garage with his brother in Boston. Sometime prior to 1919, he came to Kingfield, Maine, and went into the lumbering business. In 1919-20, he was a foreman on a logging job in Amherst, Nova Scotia. In 1921, he ran a store in Newport, Maine, and in 1922 came back to Wells and bought a farm from one Fred Bridges, paying $6500 for it subject to a mortgage for $4500 which he assumed. This Bridges farm was his homestead and is the property which, after he had sold off two lots to one Souther, he conveyed to his wife on November 1, 1928, as here alleged. Mr. Perry later bought a piece of woodland from Arthur Littlefield, a house from Fred Pinkham and a parcel of land with the buildings thereon known as the Susan Jacobs place. He disposed of the Pinkham and Littlefield lots and sold off part of the Jacobs lot with the buildings on it. Sometime in 1927, Mr. Perry sold his brother his interest in the garage in Boston and received $10,000 for it. This he used, as he says, to reduce his mortgages and pay for or improve other properties he had previously acquired.

It does not appear to be necessary to go into the details of his other business ventures. He traded in real estate somewhat extensively and, as a side issue, carried on a grain business. He operated at a loss and finally in 1928, had used up his money and owned no property of any value except his homestead and a part of the Jacobs lot, so-called. He admits that at the time he could not pay his debts on demand or in the usual course of business, but shows that he was not heavily in debt and was not being pressed by his creditors. Except for a note for $800 due his uncle, Edward S. Larrabee, who is the largest unsecured creditor proving his claim in the pending bankruptcy proceedings, he has since paid practically all his then outstanding bills. According to Schedule A-3-4

of his petition in bankruptcy, his unsecured indebtedness, outside the Larrabee note and a few small items, amounts to about $700, which has been contracted since he conveyed these properties.

The first transfer to be considered is that made to the defendant, Elwin E. Perry. He testifies without contradiction that on August 3, 1926, his father agreed to sell him what remained of the Susan Jacobs property, which was then vacant land, for $1,000, and he paid the purchase price with money borrowed from one Fred Pinkham on his note indorsed by his father. He then built overnight camps with money he was earning and $1,000 which he borrowed from the Sanford National Bank on a mortgage which his father, who still held title to the property, gave in the first instance, and he later assumed. Albert G. Perry, the father, confirms this statement and denies that he had any title or ownership in the camps built upon the Jacobs lot. They both testify that, when on October 11, 1928, Mr. Perry conveyed this property, his son had already paid the full value of the land and built and paid for the buildings on it. The son denies that he knew that his father was in financial difficulties or that his purchase was in any way tainted with fraud. The statement of these witnesses concerning this transaction are in no way refuted. On the evidence, the defendant, Elwin E. Perry, was a *bona fide* purchaser for value of the Jacobs property. The suspicion of bad faith on his part, which the complainant finds in the record and argues on the brief, can not overcome the affirmative evidence offered in his behalf. Were this not so, the land he bought is not now open to reconveyance to the trustee in bankruptcy. On May 2, 1930, Elwin E. Perry sold it for $4500 with the camps he had built on it to Lillian P. Nichols, who paid him $1,000 in money, assumed the mortgage already on the property to the Sanford National Bank then amounting to $800, and gave him a second mortgage for $2,700. The validity of this transaction is not questioned. Lillian P. Nichols was an innocent purchaser without notice and acquired a good title as against the creditors of the original vendor. *Neal* v. *Williams*, 18 Me., 391; *Erskine* v. *Decker*, 39 Me., 467; *Butler* v. *Moore*, 73 Me., 151. The Nichols note and mortgage have since been assigned as collateral security for notes of Albert G. Perry and Annie M. Perry to the Ocean National Bank, which apparently is a *bona fide* holder for value. It is not

made a party to this proceeding nor is Lillian P. Nichols, the holder of the equity of redemption in the Jacobs land. Their equities can not be disregarded, much less destroyed, in this proceeding.

It is conceded that, when Albert G. Perry went to Amherst, Nova Scotia, his wife accompanied him and at that time took with her and deposited $2,167 in the Canadian Bank of Commerce. She says this was her money saved from her earnings and increased by the current rate of exchange between the United States and Canada. Nothing to the contrary is shown. While in Nova Scotia, she cooked in a logging camp, and $556.02 saved from her wages was added to her deposit. When they came to Newport, Maine, she brought her money, amounting to more than $2,700, with her. There she bought a house paying down $500 and giving or assuming a mortgage for $1,200 as a part of the purchase price. She later sold her equity in this property for $1,200, making a profit of $700 on the sale. All her money which she brought back from Nova Scotia, together with the proceeds of her Newport house, amounting to more than $3,400, she says she loaned to her husband, and, when on November 1, 1928, he conveyed the homestead at Wells to her, she gave him credit for these advances and paid him $400 in money which she had earned and saved taking overnight guests and serving meals to transients. Her testimony as a witness for the complainant is that, inasmuch as she assumed the mortgage on the homestead then amounting to $2,208, she paid more than $6,000 for the property which she received, which was its full value. It is not made to appear that the consideration she claims to have paid was inadequate.

A voluntary transfer or gift by a husband to a wife is *prima facie* fraudulent if at the time he is indebted, and if the transfer or gift embraces all the property which the husband possesses, the probative forces of the presumption is of the strongest. In such case, it is immaterial whether the grantee or donee is conversant of the fraud. *Seavey* v. *Seavey*, 114 Me., 14, 95 A., 265; *Robinson* v. *Clark*, 76 Me., 493; *Call* v. *Perkins*, 65 Me., 439. On the other hand, if the transfer or gift is made for a valuable and adequate consideration, it is valid unless there is a fraudulent intent on the part of the transferee. *Seavey* v. *Seavey*, supra; *Spear* v. *Spear*, 97 Me., 498, 54 A., 1106; *Blodgett* v. *Chaplin*, 48 Me., 322. And

a valid prior indebtedness owed to the grantee by the grantor may be a sufficient consideration for a conveyance by an insolvent debtor. It is not fraudulent as a matter of law for a debtor to pay one creditor for the purpose of giving him a preference over others. This is true as between husband and wife. *Seavey* v. *Seavey*, supra; *Hanscom* v. *Buffum*, 66 Me., 247; *Michaud* v. *Michaud*, 129 Me., 282, 151 A., 559.

It is true that the defendant, Annie M. Perry, in her testimony is somewhat vague and uncertain as to the times when she advanced her money to her husband and the specific amounts which she turned over. She kept no books and took no notes, but says she kept a record of her loans on pieces of paper which have been lost or destroyed since she received the conveyance from her husband and they squared accounts. The fact remains, according to her uncontroverted testimony, that she turned over to him more than $3,400 in money and expected it to be repaid. The doubts which grow out of her lack of verifying proof of her assertions give good ground for suspicion and conjecture. But "supposition, conjecture, guess or mere theory will not suffice. The effect of the evidence must be more exact." *Minott* v. *Johnson*, supra. This is not a case where the wife "never expected any payment" when she loaned money to her husband as in *Seavey* v. *Seavey*, supra.

Title to the bankrupt's homestead remained in his wife for nearly a year. They were indebted to Conant and Haskell on a note secured by a second mortgage on a house in Bath, and the few facts in evidence indicate that the mortgagees brought suit and attached the homestead. The son, Elwin E. Perry, came to his mother's assistance and purchased it from her together with her common interest in a property in Kingfield which was worth less than $1,000 and had descended to her from her mother. He borrowed $1,000 of Willis Underhill on a second mortgage on the homestead and turned it over to his mother, who paid Conant and Haskell and obtained a release of the attachment on the homestead. He assumed the first mortgage then amounting to $2,208 and held by Fred Bridges, and when he sold his Jacobs lot and camps to Lillian P. Nichols, to which reference has already been made, he paid his mother the $1,000 and the notes and mortgage for $2,700 he received in that transaction. The aggregate of his payments

was more than $6,900 and would appear to have been an entirely adequate consideration for the properties which he then purchased. Here again, on the face of the record, he was a transferee without fraudulent intent, paying a valuable and adequate consideration for what he received.

The complicated and involved dealings of the parties here charged with fraud, and their family relations, furnished ground for suspicion and called for a careful examination into the entire field of their activities. As was said, however, concerning very similar facts and circumstances, "Diligently and with courageous aggressiveness has the plaintiff endeavored to establish a cause; analytically has he dealt with the evidence; acutely has he argued. But we can not accept his estimate that the record leaves little to be desired." *Minott* v. *Johnson*, supra. The defendants severally received deeds to the properties with which this action is concerned. These deeds, on their face, establish the titles of the defendants, and creditors of the original grantor, in whose behalf the complainant acts, must impeach them by proof not theory. *Minott* v. *Johnson*, supra; *Call* v. *Perkins*, supra; *Winslow* v. *Gilbreth*, 50 Me., 90.

The conveyances here attacked were not made on the eve of bankruptcy, but more than two years before the petition was filed. There was no challenge by or for creditors during that period. The parties acted openly, recording their deeds promptly, and made no apparent attempt at concealment. A careful review of their acts in the light of the transcript of the evidence in this case does not show fraud which will avoid the defendants' titles. The bill must be dismissed with costs.

Appeal sustained.
Decree in accordance with this opinion.

ROGER V. SNOW AND PHILIP G. CLIFFORD

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE, ET ALS.

Cumberland. Opinion, November 10, 1934.

WILLS. TRUSTEES. EQUITY. CY PRES.

In cases involving the application of the doctrine of cy pres, *the equitable jurisdiction of the court is derived from its general power over the administration of trusts. Charitable trusts are objects of its peculiar regard. The power of the court is, however, limited to carrying out the intention of the donor of such a trust.*

That the intent of the donor can not be exactly carried out does not mean that there must be a failure of his general benevolent purpose. A fund for a charity will be administered cy pres, *to approximate the donor's intent, where there is a failure of the specific gift and a general charitable intent disclosed in the instrument creating the trust.*

Whether the gift fails because it is impossible to carry out the particular object which the testator had in mind, or because the particular institution to which he made his gift may cease to exist, if there is a general charitable intent evident, equity will endeavor to carry out the intent of the benefactor as nearly as possible by directing the use of the fund to objects of a similar nature, or by designating some other institution with similar purposes to administer the trust.

In the case at bar, as to the Sawyer gift the fulfillment of no condition precedent was prescribed to entitle the beneficiary to come into possession of this legacy. The time of payment of it was only postponed. That this time might not come until after his death does not make his interest a contingent one. It was vested, and the legacy should be paid to those persons who under such circumstances are found to be entitled to it.

As to the bequest to The President and Trustees of Bowdoin College, there is nothing to show that the testatrix, Mrs. Hasty, had any impelling desire to aid that particular institution known as the Medical School of Maine. Rather she was concerned with its work, and wished to make a contribution to further the objects to which it was devoted. It was to her the medium by which her hope might be fulfilled that she could make a permanent contribution toward the education of those desiring to minister to the sick.

By providing that the income should be used not for the school but for the purposes of the school, she indicated an interest not so much in the school as in its work. The gift was to the objects of the school, rather than to the school itself.

There was apparent here a general charitable intent on the part of the testatrix, and the rights of the heirs at law to share in the fund have been divested.

Under the changed conditions which now exist the purpose of the donor can be more nearly carried out by directing the present trustees to pay the balance in their hands to The President and Trustees of Bowdoin College, which shall from time to time add the income to the principal until the total sum shall reach fifty thousand dollars, when application may be made to the court for instructions as to its disposition.

On report. A bill in equity by the Trustees of the will of Almira K. Hasty seeking construction of two separate provisions in her will. Case remanded to sitting Justice for a decree in accordance with this opinion. The case fully appears in the opinion.

Snow and Snow,
Philip G. Clifford, for complainants.
Edward W. Wheeler,
Freeman & Freeman,
Robinson Verrill,
Sewall C. Strout,
Donald W. Philbrick,
Skelton & Mahon, for defendants.

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

THAXTER, J. This is a bill in equity brought by the trustees of the will of Almira K. Hasty seeking a construction of two separate provisions of her will. The case is before us on report, on bill, answers and certain stipulations. The facts are not in dispute.

The testatrix died in 1912, and her will was duly admitted to probate in April of that year. Trustees, of whom the plaintiffs are the successors, qualified November 20, 1912. After disposing of a parcel of real estate she made bequests to certain friends, relatives and charities, and left by the eighth clause of her will the balance of her property in trust, the income of which was to be paid to certain enumerated persons during their lives, and on the death of the

last survivor the trustees were required to pay $1,000 each to the Home for Aged Men in Portland, to the Home for Aged Women in Portland, to the Portland Provident Association, and to the President and Trustees of Bowdoin College for a special purpose, and the balance of the fund to the President and Trustees of Bowdoin College in trust under the following terms and conditions:

> "All the said property given and bequeathed by the terms of this will to said The President and Trustees of Bowdoin College, excepting said Hasty Scholarship Fund, shall be and constitute a permanent fund to be called the "Elihu Hasty Fund" to be controlled, invested and reinvested by it, the said The President and Trustees of Bowdoin College, who shall annually or oftener apply and dispose of the income thereof as follows: Two-thirds of said income of said fund in their hands from time to time and all accretions thereof are to be used for the purposes of the Medical School of Maine and the remaining one-third of said income is to be added yearly, or oftener if may be, to said fund, that is to say, said Elihu Hasty Fund, until said fund shall reach the sum of fifty thousand dollars, when the entire income thereof is to be expended and used for the purposes of the Medical School of Maine."

By the same clause of her will the trustees were directed, upon the decease of Almeda P. Sawyer, who happens to have been the last survivor of the beneficiaries having a life interest, to pay the sum of five hundred dollars to her son, Charles Llewellyn Sawyer. The specific terms of this bequest are as follows:

> ". . . upon the decease of said Almeda P. Sawyer, in case she survive me, I direct my trustees to pay her son, Charles Llewellyn Sawyer, the sum of five hundred dollars."

No provision was made for any gifts over on the lapse of any legacy.

The trustees ask the court for instructions as to the payment of this bequest, also as to the status of the bequest to the President and Trustees of Bowdoin College in trust for the purposes of the Medical School of Maine.

The question with respect to the Sawyer gift is whether the beneficiary had a vested interest on the death of the testatrix. Both the son and mother survived Mrs. Hasty but the son died before his mother. If his interest was contingent, it lapsed and became a part of Mrs. Hasty's estate; if it was vested, it is now a part of his estate.

The fulfillment of no condition precedent was prescribed to entitle the beneficiary to come into possession of this legacy. The time of payment of it was only postponed. That this time might not come until after his death does not make his interest a contingent one. It was vested, and the legacy should be paid to those persons who under such circumstances are found to be entitled to it. *Moulton* v. *Chapman*, 108 Me., 417, 81 A., 1007; *Bryant* v. *Plummer*, 111 Me., 511, 90 A., 171; *Davis* v. *McKown*, 131 Me., 203, 160 A., 458.

The disposition of the bequest for the purposes of the Medical School of Maine involves the application of the doctrine of *cy pres*.

This school was incorporated by an act of the legislature in 1820, and placed under the direction and control of the President and Trustees and Overseers of Bowdoin College. Its purpose was to instruct students in "medicine, anatomy, surgery, chemistry, mineralogy and botany." The school continued under the guidance of the college in accordance with its charter purposes until July 1, 1921, when, pursuant to a vote of the Trustees and Overseers of Bowdoin College, it ceased to function. Since that time no instruction in medical courses has been given through such school. The college has, however, provided instruction in chemistry, mineralogy, physics, botany, biology, anatomy, zoology, bacteriology, pathology and embryology. The number and range of these courses is sufficient to give a student a full four years of such medical preparatory work as is required for admission to medical schools.

The heirs of Mrs. Hasty now claim the fund in the hands of the trustees, which has not as yet been turned over to The President and Trustees of Bowdoin College. The college contends that it is entitled to it to hold in trust, and as the exact intent of the testatrix can not be carried out, that it should be applied *cy pres* either for support of the pre-medical courses at the college, or to provide scholarships for deserving students pursuing pre-medical courses

at the college or for graduates pursuing courses at approved medical schools in other states.

The equitable jurisdiction of the court under such circumstances as these is derived from its general power over the administration of trusts. Charitable trusts are objects of its peculiar regard. As these are not subject to the ordinary rules against perpetuities and may continue indefinitely, special problems arise with respect to their administration. However wise a testator may be, it is impossible for him to foresee all the vicissitudes, which may affect the object of his bounty through the passage of time and the happenings of chance. Thus, after the abolition of negro slavery in this country the Massachusetts courts were called on to decide what use should be made of a fund to be expended in creating a public sentiment against slavery. *Jackson* v. *Phillips*, 14 Allen, 539. After the extinction of the plague in England it became necessary to determine what should be done with a trust, the income of which was to be devoted to maintaining a hospital for the victims of that scourge. *Attorney General* v. *Craven*, 21 Beav., 392. Similar instances might be cited where courts of equity have been called on to intervene; and it is perfectly obvious in view of the advances which are being made in science and medicine that many other maladies, which afflict mankind, will be conquered. What shall become of endowments in such cases, when the specific objects of the donors shall have been fulfilled, will constitute problems for the courts for many years to come.

In dealing with this subject equity has a wide discretion. Its power is, however, limited to carrying out the intention of the donor of such a trust. As was said by the court in *Jackson* v. *Phillips*, supra, page 591, "The intention of the testator is the guide, or, in the phrase of Lord Coke, the lodestone, of the court."

That the intent of the donor can not be exactly carried out does not mean that there must be a failure of his general benevolent purpose. The rule has been many time expressed by this court that a fund for a charity will be administered *cy pres*, where there is a failure of the specific gift and a general charitable intent disclosed in the instrument creating the trust. *Bancroft et al* v. *Maine State Sanatorium Association et al*, 119 Me., 56, 109 A., 585; *Doyle* v. *Whalen*, 87 Me., 414, 32 A., 1022; *Brooks* v. *City of Belfast*, 90

Me., 318, 38 A., 222; *Allen* v. *Nasson Institute,* 107 Me., 120, 77 A., 638; *Lynch* v. *South Congregational Parish of Augusta,* 109 Me., 32, 82 A., 432.

The specific gift may fail from two causes, first it may become impossible to carry out the particular object which the donor had in mind, or secondly, the particular institution to which he made his gift may cease to exist. If, however, there is a general charitable purpose evident, the rights of the heirs at law are regarded as divested, and in either case equity will endeavor to carry out the intent of the benefactor as nearly as possible by directing the use of the fund to objects of a similar nature, or by designating some other institution with similar purposes to administer the trust. *American Academy of Arts and Sciences* v. *President and Fellows of Harvard College,* 12 Gray, 582.

That in all such instances the aim is to carry out the desires of the donor is apparent, when we study the cases where the court has refused to apply the fund *cy pres.* If it is clear that the creator of the trust had in mind the carrying out of one particular purpose which is impossible of fulfillment, as in *Gilman* v. *Burnett,* 116 Me., 382, 102 A., 108, and *Teele* v. *Bishop of Derry,* 168 Mass., 341, 47 N. E., 422, or if his dominant motive was to aid a particular institution which no longer exists, as in *Bancroft* v. *Maine State Sanatorium Association,* supra; *Merrill* v. *Hayden,* 86 Me., 133, 29 A., 949; and *Gladding* v. *Saint Matthew's Church,* 25 R. I., 628, 57 A., 860, the fund will revert to his estate or to his heirs at law.

In the case now before us we have nothing but the language of the will to indicate the purpose of the testatrix. There is no extrinsic evidence to suggest that her impelling desire was to aid that particular institution known as the Medical School of Maine. Rather it is apparent that she was concerned with its work, and wished to make a contribution to further the objects to which it was devoted. It was to her the medium by which her hope might be fulfilled that she could make a permanent contribution toward the education of those desiring to minister to the sick. To this end, after making provision for annuities for persons close to her, she left practically her entire estate in trust with no other thought in her mind than that it was to be forever devoted to a charitable use. The Medical School of Maine was a duly organized corporation

with power to hold property, and it is significant that this gift was made not to the school but to The President and Trustees of Bowdoin College as trustee. On this corporation was the responsibility of handling this fund, and of expending and using the income for the purposes of the Medical School of Maine. In attempting to determine her intent from the four corners of her will the particular phrasing which she used has a very potent meaning. The income is to be used not for the school but for the purposes of the school. She indicates an interest not so much in the school as in its work.

Similar language has been construed by a Surrogate's Court in New York. *In Re Mills' Will*, 200 N. Y. S., 701. In this case the court was called on to determine the disposition of a bequest made in the following terms: "I give and bequeath to the New York Medical College and Hospital for Women, Inc., under the laws of the State of New York, of 19 West 101st Street, New York City, the sum of five thousand ($5,000) dollars for the purpose of said institution." The legatee named ceased to function. The court directed the payment of the money to the county treasurer to await the outcome of pending litigation instituted to determine whether the designated legatee could resume the work for which it was chartered. If it could not do so, the surrogate held that it was a proper case for the application of the doctrine of *cy pres*. In referring to the specific language of the will the court said, page 703, "The gift in the instant case was to the objects of the corporation, not to itself."

In the case which we are considering it is not altogether clear from the record whether the Medical School of Maine has ceased to exist as a corporate entity or has merely ceased to function. In either event the aid of equity is properly sought to determine the proper disposition of this fund and its income. If it has become impossible to carry out the exact purpose of the donor, it is entirely immaterial whether such failure has been caused by the demise of the corporation designated by her as the vehicle to execute her desire or by its total incapacity to do what was expected of it. In neither case will equity permit the failure of her general charitable benefaction.

The President and Trustees of Bowdoin College, a corporation, is made trustee. It is a party to this bill in equity and by its an-

swer admits the allegations of it. In effect it is asking for instructions from the court as to the disposition of the income of this fund which it claims the right to administer. Such procedure is a proper one by a trustee, which is in doubt as to its duties.

One evident desire of the testatrix was that this fund should be permitted to accumulate until it should constitute an endowment of respectable size. She provided that one-third of the income should be added to the principal until the total should reach fifty thousand dollars. Under the changed conditions which now exist, it seems to the court that the purpose of the donor can be more nearly carried out by permitting the entire income to accumulate until the principal shall reach this sum.

There was apparent here a general charitable intent on the part of the testatrix, and the rights of the heirs at law to share in the fund have been divested. The present trustees should be directed to pay the balance in their hands to The President and Trustees of Bowdoin College, which shall from time to time add the income to the principal until the total sum shall reach the fifty thousand dollars, when application may be made to the court for instructions as to its disposition.

If in the interval conditions shall so change that a different use of the income shall more nearly approximate the purpose which the testatrix had in mind, the door of the court is always open to the trustee, The President and Trustees of Bowdoin College, to apply for a modification of such decree as may be entered.

Case remanded to sitting Justice for a decree in accordance with this opinion. Costs and reasonable counsel fees to be fixed by sitting Justice, paid by the trustees and charged in their probate account.

BENJAMIN H. FRANKLIN *vs.* MAINE AMUSEMENT COMPANY.

Cumberland. Opinion, November 15, 1934.

NEGLIGENCE. INDEPENDENT CONTRACTOR.

In an action wherein the plaintiff, a vaudeville actor, was injured while carrying on his act on the stage of Keith's Theatre in Portland which was controlled and operated by the defendant; and wherein his act consisted of an exhibition of marksmanship carried through with great rapidity and the accident was caused by his striking a damp spot on the stage while sliding across it in one feature of his act, his claim being that this dampness was the result of water not mopped up by the defendant, which had been spilled in a preceding act:

HELD

The plaintiff was an independent contractor, and invitec of the defendant, and as such the defendant owed him the duty to have the stage on which he was to perform free from all hidden defects, which by the exercise of reasonable care could have been discovered and guarded against.

What may be apparent in the daytime may become a pitfall in the darkness or when the light is dim, and a condition obvious to one with an opportunity to investigate may be a trap to him who is precluded by the nature of his work from making a careful examination.

Whether a danger is obvious depends on the circumstances of each particular case and on the opportunities which each party had to observe the defect.

In this case the issues of the plaintiff's due care and the defendant's negligence were for the jury to determine.

On exception by plaintiff. An action of tort for negligence. The plaintiff, a vaudeville actor, was injured while performing his act in Keith's Theatre, Portland, Maine. He alleged that the injuries were occasioned by the negligence of the defendant in failing to properly prepare the stage for his act and in allowing water which had been used in a previous act to remain on the stage. Trial was had at the June Term, 1934, of the Superior Court for the County of Cumberland. At the conclusion of the testimony, defendant moved for a directed verdict, which was granted by the presiding

Justice. Exception was seasonably taken by the plaintiff. Exception sustained. The case fully appears in the opinion.

Bernstein & Bernstein, for plaintiff.

William B. Mahoney,

Theodore Gonya, for defendant.

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

THAXTER, J. This action of tort for personal injuries is before us on the plaintiff's exception to the direction by the presiding Justice of a verdict for the defendant.

The plaintiff, a vaudeville actor, was injured while carrying on his act on the stage of Keith's Theatre in Portland, which was controlled and operated by the defendant. The plaintiff's engagement called for three performances a day for three days, and the accident happened during the last performance. The act was billed as "Trifles With Rifles in Class and Speed," and was an exhibition of marksmanship carried through with great rapidity. It consisted of shooting a piece of chalk from his assistant's mouth, shooting out candles, shooting a cape from a woman's back, and several other feats, which unquestionably required not only a high degree of skill, but a steady nerve and strict attention to the work at hand. In the six minutes, during which the act continued, there were fired approximately a hundred and fifty shots. In one of the features the plaintiff ran from the wings on the left of the stage as the audience faced it, and, as he neared the opposite side, sliding on his feet and leaning backwards on his left hand, he fired at a target in the back of the stage. According to his story, as he was doing this stunt, his feet struck a wet spot on the stage, and he was thrown forward so suddenly that his left leg was broken. His claim is that this dampness was caused by water, which had not been wiped up, spilled on the stage in an earlier act, which went on about two hours and a half before his. It appears that in this act some water was spilled. The defendant contends that the amount was less than a teacupful, and was dropped on the opposite side of the stage from where the plaintiff was injured. The plaintiff claims that the water was left on different parts of the stage and in a much larger amount. It is

apparently conceded that the stage between acts was in the control of the defendant, and that it was its duty to do whatever was necessary to clean it at the conclusion of each act and to prepare it for the one to come. The plaintiff testified that on previous occasions the water had been mopped up at the conclusion of the act in question. However that may be, it seems to be unquestioned that on the night of the accident this precaution was not taken. The defendant argues that in a steam heated theatre the small amount of water left would disappear in two and a half hours. The plaintiff's own testimony, that of his stepdaughter, who assisted him, and of his chauffeur is that the stage was damp where he fell. The defendant does not seriously maintain that this particular question was not for the jury. The principal claim is that this dampness was not such a hidden danger as to render the defendant liable, and that the plaintiff was himself negligent in not observing the condition of the stage.

The plaintiff was not an employee of the defendant. He was an independent contractor, an invitee; *Miller & Rose et al* v. *Industrial Commission of Wisconsin and Rich*, 195 Wis., 468, 218 N. W., 716; *Edwards* v. *Alhambra Theatre Company*, 198 Wis., 228, 224 N. W., 104; and as such the defendant owed him the duty to have the stage on which he was to perform free from all hidden defects, which by the exercise of reasonable care could have been discovered and guarded against. *Indermaur* v. *Dames*, L. R. 1 C. P., 274; *Mayhew* v. *Sullivan Mining Company*, 76 Me., 100; *Low* v. *Grand Trunk Railway Company*, 72 Me., 313. It must be borne in mind that in speaking of hidden defects we use a relative term. What may be apparent in the daytime may become a pitfall in the darkness or when the light is dim; and, likewise, a condition obvious to one with an opportunity to investigate, may be a trap to him who is precluded by the nature of his work from making a careful examination. *Low* v. *Grand Trunk Railway Company*, supra.

The case before us is with respect to the defendant's negligence not unlike *Brown* v. *Rhoades*, 126 Me., 186, 137 A., 58, in which the sufficiency of a declaration was challenged by a demurrer. The declaration alleged in substance that the defendant was the operator of an amusement parlor in which there was a steep chute extending from the ceiling to the floor. The plaintiff, a child, who

was wearing rubber sneakers, in sliding down this chute attempted to check his speed by bracing his feet. The friction was so great that his momentum was suddenly stopped, and he was thrown and injured. The opinion of the court holds that on the admitted facts different inferences could be drawn as to the duty of the defendant to warn a child of tender years of such a danger, and that the issue should be submitted to a jury for determination. In other words, the risk may have been a hidden one to this child because of his immaturity; in the case before us the plaintiff claims that it was hidden from him because of the conditions under which he was forced to operate.

Likewise the extent of the plaintiff's obligation to exercise care for his own safety is measured by the particular circumstances connected with his work. In so far as he himself had the opportunity to examine approaches, equipment, and the place where his act was to be carried on, he and not the management may be responsible for his failure to guard against a dangerous situation.

In this case it seems to us that these issues were all for the jury. Was there in fact a damp spot on the floor? Was this the cause of the accident? Was it a risk which the plaintiff assumed as naturally incident to his work, or a condition for which the management was answerable? Also the jury must decide the issue of his own due care. If his contention is correct that he fell on that part of the stage known as the apron, which was concealed from him by the curtain as he prepared for his act, should he have taken precautions before making his slide to see that conditions were safe for him?

It was the province of the jury to pass on the conflicting testimony in this case, and to draw inferences from such facts as should be proved or admitted.

Exception sustained.

NELLIE M. BOURISK *vs.* THE MOHICAN COMPANY.

JOHN M. BOURISK *vs.* SAME.

Androscoggin. Opinion, November 17, 1934.

REFERENCE. RULES OF COURT. PLEADING AND PRACTICE. NEW TRIALS.

Reports of referees made under a rule of court, pursuant to the statute, may be recommitted by the court from which the rule issued.

The practice of recommitting reports of referees is not confined to the amendment of mere matters of form, but is extended to the substantial merits of the matter in controversy whenever a re-examination of the whole subject is deemed expedient.

Newly-discovered evidence may be a good reason for the recommitment of a report of referees.

The question of recommitting a report of referees is addressed to the discretion of the Court.

This discretion must be exercised judicially and upon consideration of the facts and circumstances of the case.

Judicial discretion must be exercised soundly and according to the well-established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice.

Judicial discretion is magisterial, not personal discretion.

It is when judicial discretion is exercised in accordance with this rule that it is final and conclusive. When some palpable error has been committed or an apparent injustice has been done, the ruling is reviewable on exceptions.

A hearing and report of referees is equivalent to a finding by a single Justice with jury waived, or the verdict of a jury. It is prima facie *correct.*

A motion to recommit the report is similar to a motion for a new trial at common law and should conform substantially in form and substance and be supported by the kind and degree of proof required on motions for new trials addressed to the trial or appellate courts. The established rules of practice and procedure applicable thereto should be followed.

Under the settled rule of practice, a motion for a new trial on the ground of newly-discovered evidence will not be entertained unless accompanied by a statement under oath comprising the names of the witnesses whose testimony is desired and the particular facts they are expected to prove, with the grounds of such expectation.

Evidence taken without such reasonable notice and information to the opposing party will not be received in support of such a motion for a new trial.

When newly-discovered evidence is the ground relied upon in a motion for a new trial, the evidence must be of such character, weight and value as to make it appear to the Court that it is probable that a different verdict would be arrived at were the case to be tried anew.

In order for the Court to determine whether the alleged newly-discovered evidence is in fact new evidence, and if admitted in connection with that before in the case a different result would probably be produced, it is necessary that a full report of the evidence produced on the former trial or hearing be presented.

In the cases at bar, lacking a disclosure of the name of the new witness and a particular statment of the facts expected to be proved, the motions to recommit are insufficient.

The weight and sufficiency of the proof offered in support of the motions for new trials in the cases at bar is doubtful. No rule of necessity is known which justifies a resort to it as a substitute for evidence taken out under approved methods.

Whether the purported new evidence was in fact newly-discovered is not decided.

On exceptions by defendant. Actions of negligence referred under rule of court with right of exceptions to rulings of law reserved. The Referees found for the defendant. At the next term, the plaintiffs moved that the Referees' report be recommitted for further hearing upon the ground of newly-discovered evidence. The motions were granted and exceptions reserved. Exceptions sustained. The cases fully appear in the opinion.

Harris M. Isaacson,
Benjamin L. Berman,
David V. Berman, for plaintiffs.
Locke, Perkins & Williamson, for defendant.

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

STURGIS, J. These actions for negligence, by agreement of the parties, were referred under rule of court with the right of exceptions to rulings of law reserved. The Referees found for the defendant. At the next term, the plaintiffs moved that the Referees' report be recommitted for further hearing upon the grounds of newly-discovered evidence. The motions were granted and exceptions reserved.

The plaintiffs' motions to recommit allege that since the former hearing an unnamed witness, now resident in another jurisdiction, has been discovered who saw the accident out of which these actions arise and can testify as to material facts supporting the plaintiffs' claims. The motions give a resume of "the facts to be developed by such newly discovered evidence," but do not otherwise state the particular facts the witness is expected to prove or the grounds of such expectation.

The bill of exceptions shows that no transcript of the evidence offered at the former hearing was prepared or available. The Referees made no findings of fact in their reports. The motions were supported only by the testimony of one of the attorneys of record for the plaintiffs who, taking the stand as a witness, against objection, was allowed to summarize a part of the evidence taken out before the Referees and state his opinion of its scope and effect. He testified that he was unable to locate the newly discovered witness before or during the hearing, but later did so, obtained a personal interview and took a written statement from him. Although opposing counsel requested that the statement be produced, the court made no order and it was withheld. The attorney was asked to repeat the statement made by the new witness and his answer was, "We sincerely and in good faith believe that this witness will substantiate the following statement of facts," which were then recited at length. The attorney further stated that in his opinion the testimony of the new witness "may well support the plaintiffs' burden of proof" of the disputed allegations, and "may cause a different conclusion to be arrived at by the triers of fact." He asserted that this testimony would lay a foundation for the introduction of pertinent evidence not otherwise admissible.

Upon a consideration of the pleadings and report and the sworn statements of counsel as already outlined, the presiding Justice

ordered the cases recommitted to the same Referees "for further hearing of the newly discovered evidence and such other evidence as the newly discovered evidence makes material and admissible."

It was early decided and has been since uniformly held that reports of referees made under a rule of court, pursuant to the statute, may be recommitted by the court from which the rule issued. The practice of recommitting reports has not been "confined to the amendment of mere matters of form, but has extended to the substantial merits of the matter in controversy whenever a re-examination of the whole subject has been deemed expedient." *Cumberland* v. *North Yarmouth*, 4 Me., 459; *Harris* v. *Seal*, 23 Me., 435, 437; *Mayberry* v. *Morse*, 39 Me., 105; *Farmers' Union* v. *Hunt*, 117 Me., 217, 103 A., 164. "Newly discovered evidence may be a good reason for a recommitment." *North Yarmouth* v. *Cumberland*, 6 Me., 21, 25.

The question of recommitting a report of referees is addressed to the discretion of the Court, and it has been held in some cases that an order to recommit is not open to exceptions. *Walker* v. *Sanborn*, Me., 288; *Farmers' Union* v. *Hunt*, supra. That statement of the rule is too broad. The discretionary power of the court to recommit reports of referees for further consideration "must be exercised judicially and upon consideration of the facts and circumstances of the case." *Long* v. *Rhodes*, 36 Me., 108. And it is well settled that judicial discretion must be exercised soundly according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. When some palpable error has been committed or an apparent injustice has been done, the ruling is reviewable on exceptions. *Charlesworth* v. *American Express Company*, 117 Me., 219, 103 A., 358; *Fournier* (*Hutchins*) v. *Tea Company*, 128 Me., 393, 148 A., 147. It is when judicial discretion is exercised in accordance with this rule that it is final and conclusive. *Chasse* v. *Soucier*, 118 Me., 62, 63, 105 A., 853.

The submission of cases to referees is and has long been a common practice. It permits the parties to have their controversies heard in a tribunal of their own selection and more or less at their own convenience. If the submission is general and unrestricted, it

ensures a speedy and generally satisfactory termination of the litigation. This is usually true even when exceptions on questions of law are reserved. A hearing and report of referees is equivalent to a finding by a single Justice with jury waived, or the verdict of a jury. *Hanson* v. *Loan Association*, 132 Me., 397, 171 A., 627. The report, as the decision of the referees selected by the parties to determine their controversy, is *prima facie* correct. *Long* v. *Rhodes*, supra. A motion to recommit the report is similar to a motion for a new trial at common law. *Harris* v. *Seal*, supra. Motions for new trials in actions allowed to proceed regularly to trial in the courts must follow and conform with the rule of court and provisions of the statute. Rule XVII; R. S., Chap. 96, Secs. 59, 60. Except as limited by the rule or statute, however, common law rules of practice and procedure remain in force. We are of opinion that motions to recommit reports of referees on the ground of newly discovered evidence should conform substantially in form and substance and be supported by the kind and degree of proof required on motions for new trials addressed to the trial or appellate courts. The established rules of practice and procedure applicable thereto should be followed.

Measured by these rules, the motions to recommit in the cases at bar are insufficient in themselves and furnish no basis for the introduction of the evidence offered in their support. The name of the new witness was not disclosed. The statement of the facts expected to be proved was of doubtful particularity. The rule is, "A motion for a new trial on the ground of newly discovered evidence will not be entertained unless accompanied by a statement under oath comprising the names of the witnesses whose testimony is desired and the particular facts they are expected to prove, with the grounds of such expectation. Evidence taken without such reasonable notice and information to the opposing party will not be received in support of such a motion." *Fitch* v. *Sidelinger*, 96 Me., 70, 51 A., 241; *Kelley* v. *Thibodeau*, 120 Me., 402, 406, 115 A., 162.

When newly discovered evidence is the ground relied upon in a motion for a new trial, the evidence "must be of such character, of such weight, and of such value as to make it appear to the Court, not that a different conclusion necessarily must be reached, but in

probability that an unlike verdict would be arrived at, were the case to be tried anew." *Rodman Company* v. *Kostis*, 121 Me., 90, 115 A., 557, 558.

In *Brann* v. *Vassalboro*, 50 Me., 64, it is said that,

> "It is necessary in motions for new trials, on the ground of newly discovered evidence, not only to present the evidence alleged to have been newly discovered, but also a full report of the evidence produced on the former trial, that the Court may be able to determine whether the additional facts proposed to be proved, are in fact *new evidence*, and also whether, if admitted in connection with that before in the case, a different result would have been produced."

In *State* v. *Verrill*, 54 Me., 581, 584, this court said:

> "The general rule, founded alike in reason and experience, which regulates the exercise of judicial discretion upon a motion for a new trial on account of newly discovered evidence, requires that the evidence shall be distinct in its character from the evidence introduced at the trial, and not cumulative, that it could not have been known to the party by proper diligence, that it appears to the Court to be true, and is calculated, with the other evidence, to reverse the verdict. If either of these requirements is wanting in the evidence offered, a new trial will not be granted. It is not the business of courts to relieve parties from the consequences of their own negligence, or of the unskilfulness of their counsel, and it would be a mockery of justice to send back a case for a second trial, upon newly discovered testimony, which ought not to influence the action of a jury, or to ask a jury to pass upon evidence which the Court itself has not probable grounds for believing, and which is insufficient to change the result. Hence, in determining the question before the Court, it becomes necessary carefully to scrutinize, not only the new evidence offered, but also the evidence introduced at the trial."

It is unnecessary to cite other authorities. The reported decisions of this Court uniformly affirm the rule that new trials can not be granted on the ground of newly discovered evidence in the absence

of a report of the evidence produced on the former trial and a determination that the additional evidence offered is in fact new evidence.

It seems proper to add that we entertain grave doubts as to the weight and sufficiency of the proof offered in support of the motions in the cases at bar. It did not rise even to the dignity of hearsay. Counsel interpreted its purport and asserted its probative value, and no more. We know of no rule of necessity which justifies a resort to such inconclusive proof as a substitute for the testimony of the alleged newly discovered witness taken out by deposition or other approved method. Whether the purported new evidence was in fact newly discovered, we do not decide.

The rules of practice and procedure were not complied with in the trial court. The ruling must be set aside on these exceptions. The entry is

Exceptions sustained.

CITY OF AUBURN

vs.

INHABITANTS OF THE TOWN OF FARMINGTON.

Androscoggin. Opinion, November 21, 1934.

MUNICIPAL CORPORATIONS. PAUPERS.

The obligation of towns and plantations in reference to the support of paupers originates solely in statutory enactment and has none of the elements of a contract, express or implied.

There are no equitable considerations out of which presumptions in favor of either party will arise.

The pauper statutes can not be modified or enlarged by construction, and nothing is to be deemed within their spirit and meaning which is not clearly expressed in words.

There is no statutory authority for the employment of a pauper without compensation, by a town in which he has no pauper settlement.

Sec. 10 *and Sec.* 20 *of Chap.* 33, *R. S., authorizing overseers of the poor to cause paupers to be employed and the town to direct their employment, and to set them to work or by deed bind them to service for a time not exceeding one year, apply only to towns chargeable for the pauper's support and in which he has a settlement.*

R. S. Chap. 33, *Sec.* 39, *giving a town which incurs expense for the support of a pauper a right of recovery from him, his executors or administrators, whether he has a settlement there or not, creates an implied promise on the part of the pauper to make reimbursement.*

Reimbursement in money or other approved medium by the pauper extinguishes the debt as against him and the town of his settlement.

In the case at bar, the City of Auburn having appropriated the labor of the pauper here relieved, of a value equal to the expenditures made in his behalf, it may be held to have impliedly consented to accept payment for the supplies furnished in the medium of labor and, having received it, has now no cause of action for the supplies.

On exceptions by defendant. An action of assumpsit by the plaintiff city for recovery of certain sums alleged to be due on account of supplies furnished by it to one whose legal settlement was in the defendant town. The issue involved the legal effect of the performance by the pauper of labor for the plaintiff city under the direction of the Overseers of the Poor of the plaintiff city. Decision for the plaintiff was filed and exceptions reserved. Exceptions sustained. The case fully appears in the opinion.

Donald W. Webber, for plaintiff.

Sumner P. Mills,

Samuel O. Foss, Jr., for defendant.

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

STURGIS, J. Action of assumpsit for supplies furnished a person having a pauper settlement in the town of Farmington found destitute in the City of Auburn. The case, submitted on an agreed statement of facts, was heard by the trial judge at *Nisi Prius* with jury waived. Decision for the plaintiff was filed and exceptions reserved.

There is no controversy as to the material facts. The pauper fell

into distress in Auburn and supplies were furnished him as alleged in the writ. For the purposes of this trial, it is admitted that his pauper settlement was then in Farmington. The statutory notice was given the town of settlement and denial duly made as required by R. S., Chap. 33, Secs. 31, 32.

The further facts stated in the reported case are as follows:

> "It is further agreed that the said (pauper) did perform labor for the City of Auburn a sufficient number of days to offset the amount of supplies furnished, upon a fixed standard of $2.00 per day then in operation as a yardstick for quantity of labor to be done by paupers for the City of Auburn, under the direction of the Poor Department.
>
> "It is agreed that the labor of the said (pauper) was performed under the direction of the Overseers of the Poor because the said (pauper) had applied for supplies and aid."

At common law, public authorities were not liable for the support of paupers. The obligation of towns and plantations in reference to their support originates solely in statutory enactment and has none of the elements of a contract, express or implied. There are no equitable considerations out of which presumptions in favor of either party will arise. The statutes upon the subject are not to be modified or enlarged by construction and nothing is to be deemed to be within their spirit and meaning which is not clearly expressed in words. *Davis* v. *Milton Plantation*, 90 Me., 512, 514, 38 A., 539; *Augusta* v. *Waterville*, 106 Me., 394, 398, 76 A., 707; *Plymouth* v. *Wareham*, 126 Mass., 475, 477.

A search of the statutes in force in this jurisdiction discloses no authority for the employment of this pauper without compensation by the town where he fell into distress. The law is found in Chapter 33 of the Revised Statutes as amended, which relates to paupers, their settlement and support. The overseers of the poor have the care of persons chargeable to their town and may cause them to be employed at the expense of the town and the town may direct their employment. Section 10 as amended. They may "set to work, or by deed bind to service upon reasonable terms, for a time not exceeding one year, persons having settlements in their towns . . ." Section 20. No other provision for the employment of paupers ap-

pears in the statutes. The express authority found there applies only to towns in which the pauper has a settlement.

The town relieving destitute persons having no settlement therein, however, is not without remedy. If the pauper has a settlement in the state, expenses incurred for his relief may be recovered from the town chargeable with his support. Section 29 as amended. Reimbursement of expenditures made for relief of destitute persons having no legal settlement in the state may be had from the State in such amount as the governor and council shall adjudge to have been necessarily expended therefor. Section 22. If the town incurs expense for the support of a pauper, whether he has a settlement there or not, it may recover it of him, his executors or administrators. Section 39. These are the only remedies available when the pauper has no settlement in the town. The overseers of the poor do not have the care of the person of such paupers, nor the direction of their employment.

Section 39 of the Pauper Law, giving a right of recovery against the pauper, is remedial. It gives the inhabitants of a town the right to be reimbursed by the recipient of the benefit for an expenditure incurred by authority of law. It creates an implied promise on the part of the pauper to make the reimbursement. *Kennebunkport* v. *Smith*, 22 Me., 449; *Peru* v. *Poland*, 78 Me., 215, 217, 3 A., 284. Repayment of such expenditures in money or other approved medium by the pauper extinguishes the debt. It no longer exists as against the pauper or the town of his settlement. It is elementary law that the payment by one of two or more co-debtors extinguishes the debt.

The City of Auburn appropriated the labor of the pauper here relieved because it had furnished him with supplies. The value of his labor, measured by the established standard of wages for that kind of work, equalled the expenditures made in his behalf. On the case stated, we are of opinion that Auburn may be held to have impliedly consented to accept payment for the supplies in the medium of the pauper's labor and, having received it, has no cause of action either against the pauper or the town chargeable with his support.

The ruling below presents an error of law. It is reviewable on exceptions. The entry is

Exceptions sustained.

CLEVELAND M. STETSON, ADMINISTRATOR OF THE ESTATE OF KATHERINE A. STETSON

vs.

ORREN G. CAVERLY, EXECUTOR OF THE WILL OF ERASTUS I. TIBBETTS.

Androscoggin. Opinion, November 22, 1934.

EXECUTORS AND ADMINISTRATORS. QUANTUM MERUIT. PLEADING AND PRACTICE. EVIDENCE.

An administrator, once duly appointed and qualified, unless he becomes permanently insane, has been discharged by due process or upon his petition, or has died, can, when property of his intestate comes to his possession or is known to him to exist, come to the proper court of probate and proceed to distribution.

As to whether one deceased, expected to pay his housekeeper and nurse and his knowledge of his ability to do so, the value of his estate is admissible in evidence.

In the case at bar, the court holds the proof of claim signed by Stetson, Adm'r. d.b.n. was in fact and in law a petition of the same Stetson as administrator, and its reception by the probate court as a proper step in procedure towards completion of the settlement of an estate erroneously deemed closed.

Testimony of the defendant, Orren G. Caverly, as to whether or not his wife was the chief beneficiary under the will of Mr. Tibbetts as administrator, as bearing on the effect of bias or prejudice on the part of the witness, was admissible.

Whether the estate was puny or of substantial size was a fact which the jury were entitled to know.

The refusal of the presiding Justice to give the requested instructions, "except as given in the charge" was proper.

On exceptions to admission of evidence and upon motion for a new trial. A jury returned a verdict for services rendered by plain-

tiff's intestate to defendant's testate, in expectation of reward by will of latter. Exceptions and motion overruled. The case appears fully in the opinion.

Clifford & Clifford, for plaintiff.

Ralph W. Crockett, for defendant.

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

BARNES, J. This case comes up on motion and exceptions. It is an action in assumpsit to recover, in *quantum meruit*, for services as housekeeper and nurse over a period of five years and forty-eight weeks, broken twice only and each time for but a few days.

Service, as housekeeper, was begun some years before the beginning of the period contemplated in the writ. In the beginning Mr. Tibbetts was a mill worker, caring for his house and grounds, a cow and some poultry; and for a time he paid Katherine A. Stetson, plaintiff's intestate, a small wage.

Later he ceased work and required more of his housekeeper, with the result that she left his employ in 1926 and returned to her home.

After several interviews at her house, Mr. Tibbetts induced her to go back into his service.

It is admitted that the precise terms of re-engagement can not be given, and it is agreed that Mr. Tibbetts promised her he would take care of her in his will. The evidence shows that she was a robust woman, a good housekeeper, and an excellent nurse of the old type. In December of 1927 the old gentleman suffered an apoplectic shock, characterized by his physician as "very severe." His speech was severely affected, his right side was paralyzed and he was for a time confined to his bed, with no control of elimination.

After some weeks he regained strength sufficient to sit in a chair, and in the course of time was able to get around the house with help. The doctor testified that he needed a great deal of care, had to be watched, from danger of falling, and that it was very difficult for him to eat.

On the fourteenth of December, 1927, he made a will, leaving to Mrs. Stetson all his real estate, "for the term of her natural life,

to occupy the same, or to rent and receive the income," also the sum of three thousand dollars.

Many witnesses testified to Mrs. Stetson's statements that she was not to receive wages, but was to be taken care of through the provisions of her employer's will.

Some of the conversations, one as late as in 1929, were testified to as having been had in the presence of Mr. Tibbetts.

It is in the record that, in the winter of 1928, Mr. Tibbetts said, in the presence of Mrs. Stetson and the witness, "Katie, I have made my will, and I have left you $3,500 in money and also the home place . . . you have been well taken care of."

About the first of June, 1931, a professional nurse was required. Mr. Tibbetts was then in a condition of pitiable helplessness.

For a week the nurse directed the care of the patient, Mrs. Stetson leaving the house but twice, on one occasion to visit her son then in a hospital.

She was the sole caretaker for a period of about six weeks after the "second shock," then sickened, and died, August 17, 1931.

Thus the devise and legacy to her lapsed, and we have to consider the claim of her administrator to recover for her estate, in *quantum meruit*, the fair value of her services performed between the time of her return to service and her fatal illness.

The jury returned a verdict of $3,045.

Defendant's counsel does not discuss the amount of the verdict, and that feature is not in issue.

His contention is that she rendered the services proven for the privilege of a home and under an agreement with Mr. Tibbetts that he would provide for her in his will, and that the evidence, as matter of law, does not warrant a verdict for the plaintiff.

On the motion for new trial, the Court is convinced that, unless evidence incurably prejudicial is found to have been admitted over exception, or that exception to a portion of the Judge's charge should be sustained, the verdict will stand.

The exceptions are ten in number, and their consideration requires a recital of certain procedure in probate of the Stetson estate.

On September 8, 1931, the plaintiff, Katherine's son, qualified as administrator of his mother's estate.

September 23, 1931, Mr. Tibbetts executed his last will, making legacies to people of his blood, Edith G. Caverly, a half-sister being residuary legatee.

September 25, 1931, this Mrs. Caverly was duly appointed Conservatrix of the estate of Mr. Tibbetts.

Bill for $6,123, balance for Katherine's services was presented to the Conservatrix, on or about October 1, 1931.

Inventory of estate of Mrs. Stetson, containing no item of bill payable to the estate of plaintiff's intestate, and with affidavit of Stetson, Administrator that it "contains a true Inventory of all estate of said Katherine A. Stetson that has come to his possession or knowledge," was filed on or about March 23, 1932, the same showing nothing to distribute.

A first and final account was prepared on March 9, 1932, and allowed by the Court, April 12 following.

Orren G. Caverly, husband of the Conservatrix of Mr. Tibbetts, was duly commissioned as executor of the last will of Mr. Tibbetts and qualified for the trust, on July 25, 1932.

Process entitled Pet'n for Administration D.B.N. in the estate of Mrs. Stetson was filed sometime after November 26, 1932, by Mr. Stetson, who was administrator, and the same was allowed in Probate Court on January 10, 1933.

Proof of claim against the estate of Mr. Tibbetts was, on January 24, 1933, filed by Stetson, Administrator, designating himself "Administrator D.B.N.," for balance for services of Mrs. Stetson, in the sum of $7,083.00.

Motion to amend Proof of Claim by striking out the words *de bonis non* where they appear in the original was filed and allowed by the Probate Court on September 25, 1933, and the Proof of Claim was amended.

It then appearing that in the motion to amend the Proof of Claim two signatures were by typewriter, instead of by the hands of the persons who should have signed, a motion to amend by inserting, in lieu of the typewritten signatures, true signatures of the persons involved was filed, and allowed on November 23, 1933, and the motion to amend was amended.

The first five exceptions are based on conclusion of counsel that certain of the irregularities in probate proceedings, above set out,

vitiated the proceedings and rendered the papers offered as exhibits in amended form inadmissible.

No recovery in our courts of law can be had in suit on a claim against the executor of one deceased testate (with exceptions not of moment here) unless the claim, properly supported by affidavit, shall have been presented to the executor in writing, either before or within twelve months after his qualification as such executor. R. S., Chap. 101, Sec. 14.

It is argued that because the claim for services was signed: "Cleveland M. Stetson Administrator De Bonis Non Katherine A. Stetson Estate," it is not a "claim" within the statute above quoted.

Without citing authorities to the fact that an administrator, once duly appointed and qualified, unless he becomes permanently insane, has been discharged by due process or upon his petition, or has died, can, when property of his intestate comes to his possession or is known to him to exist, come to the proper court of probate and proceed to distribution, it is sufficient for the purposes of this discussion to state that this Court regards the proof of claim signed by Stetson, Adm'r. d.b.n. as in fact and law a petition of the same Stetson as administrator, and its reception by the probate court as a proper step in procedure toward completion of the settlement of an estate erroneously deemed closed.

We regard the words *de bonis non* as surplusage wherever they occur in the proceedings underlying this action.

Hence the first five exceptions fail.

Exceptions, Nos. 6 and 8, arose in this wise: the defendant Orren G. Caverly, was asked on cross-examination with reference to Mr. Tibbetts' last will, "And your wife is the chief beneficiary under the will of Mr. Tibbetts?" Over objection his answer was admitted and exception taken. And when the last will of Mr. Tibbetts was offered by plaintiff as an exhibit, it was admitted over objection.

The evidence objected to was clearly admissible as bearing on the effect of bias or prejudice on the part of the witness; and subsequently, when Mrs. Edith G. Caverly was recalled, for defendant, she was asked, in cross-examination, "And you were named chief beneficiary under that new will, weren't you?" and, without protest of counsel for defendant, she answered, "I was."

Over the objection of defendant Mr. Caverly was required to state the amount of Mr. Tibbetts' estate.

There was evidence of an arrangement or understanding between Mrs. Stetson and Mr. Tibbetts that she was to receive pay for her services in his behalf.

This was an issue of major importance; and whether the estate were puny or of substantial size was a fact which the jury were entitled to know.

As to whether Mr. Tibbetts expected to pay his housekeeper and nurse and his knowledge of his ability to do so, the value of his estate is admissible in evidence. The jury properly took this evidence, with instruction from the Court, "The only legitimate purpose of the testimony in that respect is its claimed tendency to corroborate what the plaintiff asserts,—that here was a man who had the means and the ability to pay for such services as were rendered; but in no sense is it to be taken by you as a gauge of what (amount) he should pay."

Exception No. 9 is to expressions in the charge of the Court, explanatory of the nature of the contract or understanding under which Mrs. Stetson returned to her work for Mr. Tibbetts in 1926.

In our view the instructions given on this point were admissible and it is difficult to perceive how language referring to the time when the reward was to be receivable could be better stated to the lay mind than by the use of the word the Court chose, "postponement."

Nine written requests for instructions to the jury were presented to the Court. They were, each of them, directed to matter objected to during the introduction of the evidence, all of which have been presented above in reasonable fullness, and the substance of each had been considered in the charge. The Justice refused to give such instructions, "except as given in the charge," and we conclude them properly denied. So the exceptions fail, and the motion, as above suggested, falls with them.

Motions and Exceptions overruled.

SANGER N. ANNIS *vs.* SECURITY TRUST COMPANY.

Kennebec. Opinion, November 30, 1934.

BANKS AND BANKING. BANKRUPTCY. TRUSTS.

The general rule is that acceptance of general deposits by a bank, hopelessly insolvent to the knowledge of its officers, constitutes such a fraud as will entitle the unsuspecting depositor as a preferred creditor to rescind and recover back his money or its proceeds if traced into the hands of one not an innocent purchaser for value.

The fraud must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of it, if it exists, negative the fraud.

Hopeless insolvency describes a bank in such financial difficulty that there are no genuine and reasonable hope, expectation and intention of its officers that the bank will carry on its usual business, meet its obligations, and recover sound financial standing.

A bank insolvent in comparatively so small an amount that its officers are justified in believing that it will return to complete solvency upon a reasonably-to-be-expected upturn in values of securities from the depth of an extraordinary depression is not hopelessly insolvent.

Knowledge upon the part of a bank's officers that the bank is simply insolvent but not hopelessly so at the time money is received for deposit does not constitute such a fraud as to allow the depositor a preference in liquidation proceedings as against its general creditors.

Known simple insolvency, that is, when there is a reasonable hope of a return to solvency at the time of the deposit, is not enough to justify and make equitable the creation of a preference, although the receipt of a deposit even then is reprehensible and most certainly is not to be condoned.

It is only when actual hopeless insolvency obtains, with knowledge thereof upon the part of the officers, that the wrong is so great that there is justification in equity for the establishment of a preference at the expense of the general creditors.

For the establishment of a preference the trust fund or its proceeds must either be identified in the hands of the receiver or conservator or be traced in some manner into his hands.

The use of trust funds by a bank to pay its own indebtedness dissipates those funds and does not allow necessarily a recovery of a preference.

Where, however, the debt paid by said trust funds is secured by collateral and this collateral is released and traced into the hands of a receiver, it will be impressed with a trust for the benefit of the defrauded trustor.

The decision of a Master in disallowing a preference has the effect of a jury verdict and, unless clearly wrong, must stand.

In the case at bar, the Court holds the facts in the agreed statement do not show that the claimant has sustained his burden of proof so as to justify overturning the Master's decision in disallowing the preference.

On report on an agreed statement of facts. The issue involved the question whether the intervenor Lionel F. Jealous was entitled to a priority in the assets in the hands of the receiver of the Security Trust Company by reason of his checks deposited in the Security Trust Company on the two days just preceding the final closing of the bank on May 1, 1933. His claim was disallowed by the Special Master. The conservator then moved for a confirmation of that report. Cause remanded to the sitting Justice for a decree in accordance with this opinion. The case fully appears in the opinion.

Harvey D. Eaton, for Intervenor.

Locke, Perkins & Williamson,

Sanford L. Fogg, Jr., for defendant.

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

HUDSON, J. Report on agreed statement of facts. The Security Trust Company is in process of liquidation. One Lionel F. Jealous has intervened as claimant of a preference. His claim "was disallowed by the Special Master." Thereupon the Conservator moved for confirmation of this report. Shall the motion be granted?

The bank "closed March 4, 1933, reopened March 15, 1933, and finally closed April 29, 1933."

The claimant "had on deposit at the Security Trust Company in its Warren Branch on April 28, 1933 — $1,213.78. During that day he deposited check for $6,961.93, drawn on the First National

Bank of Boston. . . . On April 29, 1933, he deposited checks drawn on the First National Bank of Boston for $172.04. . . . The 30th day of April was Sunday and the bank did not open on Monday, as a telegram from the Bank Commissioner was received Monday morning ordering it not to re-open.

"The Security Trust Company had an account with the First National Bank of Boston. The check deposited April 28th was sent to Boston the same day and the Trust Company received credit for same at First National on April 29th. Checks deposited April 29th were sent to Boston and credited to Trust Company May 1st.

"The Trust Company was indebted to the First National Bank of Boston, on certain promissory notes, in the sum of $125,000.00. The Trust Company had on deposit in First National on May 1st the sum of $99,000.00 (including the checks in question). The Trust Company's deposit with First National was offset against indebtedness by First National and the balance due the First National was paid by order of Court on May 11th."

The intervenor claims to recover as a preference the unpaid balance of his said deposits of April 28th and 29th.

Until now we have had no Maine decision involving the rights of a depositor who claims a preference in an alleged hopelessly insolvent bank. In other states there have been many such cases and an examination of them convinces us that the general rule is that acceptance of general deposits by a bank, hopelessly insolvent to the knowledge of its officers, constitutes such a fraud as will entitle the unsuspecting depositor as a preferred creditor to rescind and recover back his money or its proceeds if traced into the hands of one, not an innocent purchaser for value.

The reasoning underlying these decisions has been correctly and well expressed by Chief Justice Rugg in *Steele* v. *Commissioner of Banks*, 240 Mass., 394, 397, 134 N. E., 401, as follows:

> "Acceptance of deposits by a bank is a representation of solvency. A bank hoplessly insolvent receiving deposits from those who confide in its good reputation or in its representations, is held to knowledge that it cannot meet its obligations. Taking deposits under such circumstances is the equivalent of a preconceived purpose not to pay and is a fraudulent act. The contract of deposit may be rescinded by the depositor and

the deposit, or its proceeds, if traced, may be recovered in like manner as other trust funds. On the other hand, simple insolvency, even of a bank, does not warrant the rescission of deposits if there are genuine and reasonable hope, expectation and intention on the part of the officers of the bank to carry on its business and to recover sound financial standing. To warrant such rescission there must be the further fact that it is reasonably apparent to its officers that the concern will presently be unable to meet its obligations as they are likely to mature and will be obliged to suspend its ordinary operation. The facts must establish the conclusion that the trust company accepted the deposit knowing through its officers that it would not and could not pay the money when demanded by the depositor."

New York, holding with Massachusetts, in dealing particularly with the character of the fraud, has stated:

"It is fraud that must be proved. An honest mistake as to the condition of the bank and an honest belief in the solvency of the institution, if it exists, negative the condition of fraud upon which the plaintiff's cause of action must depend." *Williams* v. *Van Norden Trust Company*, 93 N. Y. Supp., 821, 823, 104 App. Div., 251. Also see *Byrd* v. *Ross*, 58 Fed. (2d), 377 (1932).

"To invoke the rule, plaintiff must prove hopeless insolvency, irretrievable insolvency, and knowledge thereof on the part of the management. This is essential to establish the resultant fraud. Hopeless insolvency refers to insolvency of such character that it is manifestly impossible for the bank to continue in business and meet its obligations; and that fact must be known to the officials so as to justify the conclusion that the deposit was accepted knowing that they would not, and could not, respond on demand of the depositor. It is fraud that is to be proved, not an honest mistake which would negative the conclusion of fraud upon which plaintiff's cause of action must depend." *Forsythe* v. *First State Bank* (Minn.), 241 N. W., 66, 68, 81 A. L. R., 1074 (1932).

The law as above declared and by us adopted must now be applied to the somewhat meager facts contained in the agreed statement. In it there appears no balance sheet showing its assets and liabilities, its solvency or insolvency, either at the time of the bank's closing or at the time of the making of these deposits. We are not apprised as to the character and soundness of its investments. It is admitted, however, that "taking the securities and assets of the bank at book value (which was with the knowledge and acquiescence of the State Bank Commissioner) the bank was solvent" but "taking the securities and assets at market value, the bank was insolvent for a considerable time before it closed."

It may well be that their real true value, which would determine solvency or insolvency, was more than market and less than book value, considering the extent and the effect of such a devastating depression. Their intrinsic value the record does not disclose. If there can be said to appear in it, facts, importing even simple insolvency, with business conditions as they then were, it contains no satisfying evidence that the bank was irretrievably and hopelessly insolvent and that there was no genuine, reasonable hope, expectation and intention on the part of its officers to carry on its business and the bank to recover sound financial standing.

For the purpose of showing hopeless insolvency and knowledge of it by the bank's officers, the claimant relies strongly upon a letter written by the bank to the Bank Commissioner of Maine sometime between March 4 and March 15, 1933, to which letter there was an attached statement showing its savings and demand deposits, its segregated and unsegregated assets, as well as a net depreciation from book value to market of about 20% of its deposits. The purpose of the letter was to obtain from the Bank Commissioner license to re-open, which was granted. In the letter it is stated:

> "In the opinion of the officers signing this application, the undersigned Trust Company is solvent. According to the last report of examination this institution, even if all actual market bond depreciation, all doubtful paper and all losses were charged off, would still have assets of sufficient value to more than cover all liabilities other than its own stock liabilities, and if permitted to reopen as requested hereby, will in the

opinion of the officers signing this application be able to continue as a going bank."

A careful examination and analysis of the figures contained in this attached statement do not warrant us in finding as a fact that this bank was hopelessly and irretrievably insolvent and was so known to be by its officers when these deposits were received. If shown actually to be insolvent, it was insolvent in comparatively so small an amount that its officers might have been justified in believing that there would be a return to complete solvency upon a reasonably-to-be-expected upturn in values of securities from the then depth of the depression. A significant and convincing bit of testimony bearing upon the good faith and honesty of one of the officials, as well as showing his confidence in the bank's solvency, is revealed in the fact that the "auditor and the Vice President of the Bank, who knew the condition of the Bank, deposited a month's salary in the commercial department of the Trust Company the morning of April 29th."

The claimant likewise relies upon a tabulation made up of statements, all of which save one, dated November 19, 1932, were sent to the Bank Commissioner subsequently to March 4, 1933, showing "demand deposits, unsegregated assets, and percentage of those assets to those deposits." It is true that from November 19, 1932, to the date of the last statement, April 29, 1933, this tabulation shows a drop from 75% to 39% of the unsegregated assets to the demand deposits. This, however, tells little, if anything, in regard to the financial condition of this bank in the absence of evidence of the amount of the savings deposits and the assets segregated therefor.

Also included in the report are certain votes of the Directors and the Executive Committee, relating to the conduct of the bank's business, the purchase and sale of securities, the segregation of certain assets, and withdrawal of assets from segregation and substitution of other assets therefor, but accompanying these votes there is in the agreed statement no sufficient evidence to show that the votes were taken by the bank when insolvent and certainly not when hopelessly insolvent or from which any reasonable deduction of hopeless insolvency may be drawn, or even what action, if any, was taken as a result of these votes.

On the other hand, we find much evidence in the agreed statement to support the defendant's contention that this bank was not hopelessly insolvent. Thus, it appears that the bank had no pressing creditors or heavy indebtedness. While it owed the Boston bank $125,000.00, this loan was not contracted until after the banking holiday, part of it only within a week before these deposits were made. Besides, it appeared that it had a credit with the Boston bank of nearly the amount of the debt and that the debt was secured by collateral. The ability to obtain this loan, after the holiday, indicates solvency. Since January 1, 1933, its net loss from withdrawals from savings accounts was less than one per cent. The closing of the bank on March 3rd does not indicate insolvency as the cause of it, for it was part and parcel of the general closing of banks, not only in the State but in the Nation. There is no claim that any official of the bank expected the bank to be closed by the Commissioner on May 1st.

When these checks were received for deposit and sent to the Boston bank, it was with full expectation that they would be paid by it and the depositor receive full benefit thereby. Application upon the debt to the Boston bank was not anticipated. Pay day for this debt in the minds of the officers had not arrived.

It has not been made to appear that this bank was in urgent need of funds in order to carry on its usual and customary business. The act of the Bank Commissioner in allowing this bank to reopen on March 15, 1933, militates against the hopeless insolvency of the bank at that time, and thereafter, at least, this bank was in constant communication with the State Banking Department. It is not shown that at any time any misrepresentation was made to the Department or that there was any withholding of any information from it, whose duty it was in the interests of all concerned to inspect closely and discover the bank's true financial condition as to solvency.

These facts tend strongly to show that the bank's officers reasonably believed and expected that it could carry on as usual, meet its obligations, and honor its depositors' accounts.

It should be borne in mind that we are now in equity and the case must be decided on equitable principles. We are not determining the rights of the bank's stockholders on the one side and on the

other its depositors' but equities are being considered and declared between two classes of creditors, both innocent in their dealings with the bank. The allowance of a preference necessarily means less for the unpreferred. Shall the one suffer for the benefit of the other, although each is equally blameless? Yes, but only if the preferred's deposit is received by the bank when it is hopelessly insolvent and its officers know that fact. Then only does the law say that there is such fraud as will enure to the benefit of such a depositor over the other.

Known simple insolvency, that is, when there is a reasonable hope of a return to solvency at the time of the deposit, is not enough to justify and make equitable the creation of a preference, although the receipt of a deposit even then is reprehensible and most certainly is not to be condoned. But it is only when actual hopeless insolvency obtains, with knowledge thereof upon the part of the officers, that the wrong is so great that there is justification for the establishment of a preference at the expense of the general creditor.

We might stop here in this opinion, for in the absence of sufficient proof of hopeless insolvency and knowledge thereof, the intervenor can have no priority. Counsel, however, argued the third claimed essential, viz.: "that it must appear that the deposits came to the Conservator." Because of its importance and the probability that the question will arise out of the mass of present bank liquidations in this state, there heretofore having been no Maine decision on it involving a conservatorship or receivership, we have decided to deal with it.

Many courts out of Maine have held that for the establishment of a preference the trust fund, or its proceeds, must either be identified in the hands of the receiver or conservator or at least be traced in some manner into his hands. The great weight of authority is to that effect. 82 A. L. R., 52 to 58. Indispensably this must appear, else the claimant has the rights only of an ordinary creditor.

> "A claimant who seeks a preference by reason of a trust is called upon to prove the existence of the trust. . . . Proving that there was a trust at one time in particular property does not prove that the trust is impressed upon other property at a

later time, without showing that the latter is the proceeds or substitute of the former. . . . The money may have been lost, used in the payment of expenses or debts, or invested in securities which turned out to be worthless. The payment of debts with the money would simply transfer the defendants' indebtedness from one person to another. It would not increase the value of their estate as a whole, or the value that would be left after the payment of debts. The money would go into the debt, and if a trust was impressed upon anything by the change it must be upon that. This, however, would be of no practical benefit to the beneficial owner of the money unless the debt was secured in some way. In that event the debt with its security, if in existence, might be revived and charged with a trust in his favor. . . . From these considerations it appears that it is necessary to trace the money through the various changes in its investment to specific property, in severalty or in mass, in the possession of the assignee, to create a trust or charge in favor of the claimant. The tracing is a matter of fact, not law." *Bank Commissioner* v. *Security Trust Co.*, 70 N. H., 536, 550, 551, 49 A., 113, 121.

The doctrine of this New Hampshire case is confirmed in *Sloane* v. *Peoples Trust Company, et al.*, 83 N. H., 583, 145 A., 670.

"According to the overwhelming weight of authority, the extent of the cestui que trust's preferential recovery is limited to the trust property that he can trace into the assets of the insolvent estate, and no right of recovery or priority exists if the trust property can not be traced into, or identified as, some specific fund or thing forming part of the estate of the insolvent trustee." 65 C. J., Section. 909, pages 982, 983.

In support thereof are cited many cases. The reason for this principle is aptly stated in *Slater* v. *Oriental Mills*, 27 A., 443, 18 R. I., 352, as follows:

"Undoubtedly, it is right that every one should have his own; but, when a claimant's property cannot be found, this same principle prevents the taking of property which equitably belongs to creditors of the trustee to make it up. The

creditors have done no wrongful act, and should not be called upon, in any way, to atone for the misconduct of their debtor. It is an ordinary case of misfortune on the part of claimants, whose confidence in a trustee or agent has been abused."

Massachusetts holds to the same effect and requires the tracing of the trust property into some other specific property or fund as distinguished from the general assets of the estate. *Lowe* v. *Jones*, 192 Mass., 94, 78 N. E., 402, 404.

"When, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the Court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such case the cestui que trust can only come in and share with the general creditors." *Little* v. *Chadwick*, 151 Mass., 109, 110, 23 N. E., 1005.

Our own Court in *Sawyer* v. *Sawyer*, 119 Me., 87, 89, 109 A., 378, has stated:

"It is settled law that the identity of the trust fund having been lost the beneficiaries can stand in no better position than other creditors. . . . As was said in *Little* v. *Chadwick*, supra, 'the Court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it can not be traced, the equitable right of the cestui que trust to follow it fails.'"

Let us now trace the deposits in the instant case. The checks immediately upon deposit were sent by the defendant Trust Company to Boston and there, before failure and the appointment of the conservator, credited to its account by its correspondent Boston bank. Thus, then and there the original trust property was dissipated and never as such came into the hands of the conservator.

It appears, however, that the debt in part reduced by these checks was secured by collateral and that ultimately, by order of Court, the balance due on it was paid by the conservator.

"While, according to the great weight of authority, the use of trust funds to pay the debts of the trustee bank amounts to a dissipation of the funds and does not augment the assets coming into the hands of the bank's receiver, it is well settled that where the trust fund is used to redeem the bank's property from a lien or pledge on account of the bank's indebtedness to another bank, the property thus redeemed, *where recovered by the receiver of the trustee bank*, is subject to the trust." 82 A. L. R., 121, *State ex rel Rankin* v. *Montana Banking Corp.*, 77 Mont., 134, 251 Pac., 151.

And so it is held where such an indebtedness is reduced in part by trust funds and in part by money belonging to the trustee bank, *the collateral returned to the receiver* is impressed with a trust to the extent to which the trust money had contributed to the payment of the indebtedness secured thereby, the presumption being that no more of the trust money was used in discharging the obligation than necessary to make up the balance due after applying all that part of the deposit belonging to the trustee bank and that the balance *turned over to the receiver* was the money of the cestui que trust. *Fokken* v. *State Bank & Trust Co.*, 52 S. D., 342, 217 N. W., 512.

The foregoing principles of law may now be applied to the facts in this case. Had the Security Trust Company been hopelessly insolvent within the knowledge of its officers, (an assumption contrary to proven fact) it had no right to accept these checks for deposit. Doing so, it would perpetrate a fraud on the depositor and thus hold the deposits in trust for the depositor. As trustee, then, it would have had no right to have had these deposits credited on its indebtedness to the Boston bank, although the Boston bank, acting in good faith and without knowledge of the trust, would have had the right so to apply them. Such a legal application would have ended the existence of the trust fund itself. The fund would have merged in the debt and become dissipated in it. Later, however, the payment of the secured debt and the consequent release of its collateral would have then created a new right in the intervenor to impress a trust upon it, if traced into the hands of its conservator.

This agreed statement contains insufficient facts to show such a tracing. It contains no definite statement as to what became of this security when and if it did pass out of the possession of the Boston bank. It is entirely silent as to what it was and its value. If the collateral had no value, it might or might not have passed to the conservator. If it were bank stock, subject to a declared assessment, it would have been a liability rather than an asset, and in such an event most likely would not have been taken over by the conservator though the debt were paid. Redemption by the conservator was not compulsory as a matter of law.

It is not a defensible proposition to claim that the conservator upon payment of the debt must be presumed to have taken into his possession the security, especially where it does not appear to be advantageous so to do. In such a situation, where the claimant is setting up a preference as against other innocent depositors, he is not entitled in equity to such a presumption. Furthermore, the record informs us in no way as to how this debt was paid. We do not know that this collateral was not sold by the Boston bank and applied to the debt, (as it had previously applied the deposits to the same debt) and that the conservator did not pay the then balance of the debt. If this were done, the security never came into the hands of the conservator.

The fact is that the agreed statement permits us only to grope in the dark, merely to surmise in attempting to follow this collateral, and does not furnish enough facts on which to warrant a reasonable inference even, that it ever actually came into the hands of the conservator. The burden of proof to have traced this collateral into the conservator's hands was on the intervenor, a burden which he did not sustain.

In conclusion, it may be stated that the decision of the Master in disallowing the preference has the effect of a jury verdict and so, unless it be clearly wrong, it must stand. *Stewart* v. *Grant*, 126 Me., 195, 137 A., 63. Such wrong not having been made to appear, we hold that the Special Master's Report should be confirmed.

Cause remanded to the sitting Justice for a decree in accordance with this opinion.

FRASER SHANNON *vs.* GEORGE R. DOW.

Somerset. Opinion, December 11, 1934.

NEGLIGENCE. PUBLIC GARAGES. EVIDENCE.

The proprietor of a public garage is bound to use reasonable care to keep his garage safe for all persons coming into it by invitation, express or implied, and if it is in any respect dangerous, he is bound to give such invitees warning of the danger. They are bound to exercise due care on their own part in their use of the garage.

A garage proprietor who permits gun powder to be brought in and deposited in his garage and used to load a cannon brings himself within this rule.

The weight of evidence is not a question of mathematics. One witness may be contradicted by several and yet his testimony may outweigh all of theirs. The question is what is to be believed, not how many witnesses have testified.

In the case at bar, the verdict of the jury, resting upon disputed facts, dependent upon the credibility of witnesses, and not appearing to be the result of bias or prejudice, can not be set aside on a general motion.

On general motion for new trial by defendant. A tort action to recover damages sustained by plaintiff, as a result of an explosion of an improvised gun or cannon in the garage of the defendant. Trial was had at the January Term, 1934, of the Superior Court for the County of Somerset. The jury rendered a verdict for the plaintiff in the sum of $6181.81. A general motion for new trial was thereupon filed by defendant. Motion overruled. The case fully appears in the opinion.

Fred H. Lancaster,
Lloyd B. Stitham, for plaintiff.
D. I. Gould, for defendant.

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

STURGIS, J. Action of negligence to recover for injuries resulting from the accidental discharge of an improvised cannon. At the

trial before a jury, the plaintiff recovered a verdict. The case comes forward on the defendant's general motion.

The defendant, George R. Dow, is the owner and proprietor of a public garage in East Cornith, Maine. In the late evening of July 3, 1932, in preparation for the Fourth of July celebration of the next day, several pounds of black gun powder and a small quantity of yellow powder were brought into the garage and put in cans. Later, a cannon made out of the drive shaft of an engine was produced and at midnight and during the next hour it was repeatedly loaded in the garage, taken outside and fired. The last time the cannon was loaded, it exploded, setting the garage on fire and injuring those who were in the building.

The plaintiff, Fraser Shannon, a resident of Pittsfield, Maine, told the jury that on the day before this Fourth of July he brought his wife and children over to East Corinth to visit the family of one Alfred Jackson. They arrived in the forenoon, stayed into the evening and, deciding to remain overnight, he drove his automobile to the defendant's garage for storage. Finding the entrance blocked by a truck, he got out of his car, went to the rear of the garage in search of a toilet, spent a little time there finding a gauge he had dropped, returned to the front door, waited until the entrance was cleared, and drove his car into the garage, down the right side and to the back almost against a work bench along the wall. He says he then got out of his car and started towards the front entrance but turned and, going back to his car, hid some of his tools, arranged other articles which had been left in the car, and stepping off the running board, had started to walk around a puddle of water when there was an explosion which hurled him to the floor and rendered him unconscious. When he regained his senses, his left leg was useless and he was unable to rise. The rear of the garage was in flames. His outcries brought men to his assistance who helped him out and across the street where he was given first aid by the local physician. The plaintiff insists that he does not know what caused the explosion by which he was injured. He testifies that as he went back to his car to hide his tools he saw a man over in the left rear corner of the garage with what appeared to be a broomstick in his hand standing over something, but he was not acquainted with the man and did not see what he was doing.

The physician who attended the plaintiff states that a piece of metal was driven through the front of the plaintiff's left leg severing the muscles and shattering the bone. His pants were badly burned below the knees, the left leg being in shreds. The plaintiff was blackened in places over the face, neck and body. His injuries were such that he was sent to the Eastern Maine General Hospital where his leg was kept in a cast twenty-seven days, and then amputated above the knee. He stayed in the hospital twelve weeks. At the time of the trial, he had been fitted with and was using an artificial leg.

A fifteen-year-old boy named Jack Brown describes the explosion, its causes and some of the incidents which led up to it. This witness apparently is wholly disinterested. He testifies that after he came down to the village that night a bag of black gun powder was brought into the defendant's garage, taken out, rolled fine and put in cans. About a pint of yellow powder was also brought in and left with the black powder in the back corner of the garage, both being used to load a so-called cannon which was fired from time to time during the night and before the accident. He says that after the celebration had been going on for a time he went across the street to a bowling alley, where one Morris Towne proposed that they load the cannon again and they returned to the garage. Towne went in first, poured powder into the cannon and started to drive the wadding in with a piece of iron which he hit with a sledge hammer. This witness says that when he entered the garage there was no one in there except Towne and himself, but while the cannon was being loaded a man came in and went over back in the direction of the bench. The testimony of this boy, when carefully analyzed, shows that he does not know what the man did after he went to the bench. He thinks the man came back and stood a few seconds or minutes, but on further examination says, "I didn't notice what he did." This statement appears to be the full measure of his knowledge on this point. Being asked, "Then what happened?" the boy replied, "The cannon exploded," and states that the garage burst into flames and, not being seriously injured, he ran out the back door to his home without stopping to see what happened to the other man. While he does not identify the man who came into the garage just before the cannon exploded, the coinci-

dence of circumstances points to the plaintiff as the man the boy saw.

The young man, Morris Towne, who was driving the wadding into the cannon when it exploded, died from his injuries without making any statement as to what happened. The remaining witness for the plaintiff is his wife. She confirms his claim that he took his car down to the defendant's garage for storage a little while before midnight and says that he was with her up to that time during the evening. She did not see him again after he left the house until he was injured and has no knowledge of what happened at the garage. She describes his injuries, suffering and present incapacity.

The defendant admits that he permitted the gun powder and cannon to be brought into and used in his garage that night, but charges the plaintiff with full knowledge of its presence and goes so far as to say that the plaintiff was helping load it himself when the explosion occurred and he was injured. He claimed that a little while before the explosion the cannon was fired outside and the plaintiff helped him load it. He told the jury that sometime after half past twelve he took what powder remained out of the garage and put it back of a small building at the rear, came in the back door and, seeing Morris Towne and the plaintiff apparently loading the cannon, asked them to take it out of the garage as he wanted to close up, went outside to sell some gas and left them in the garage. He says that they brought the cannon out and fired it again. He claims that he then started for home and had gone about fifteen rods when he heard a noise, came back, looked in the garage and saw Towne and Shannon loading the cannon again. The explosion followed and the building caught on fire. He rushed in, found Towne and Shannon on the floor with their clothing afire, which he brushed out, and others having come in, gave his attention to the flames.

The defendant called numerous witnesses to corroborate his testimony. Several testified that the plaintiff was at the garage when the powder was brought in. Some said he rode in the automobile when they went to get it. Others said the plaintiff helped make a bomb and they saw him help load the cannon, getting cotton waste from the floor of the garage, wetting it and handing it

to the man who was putting in the wadding. But from the defense witnesses themselves came testimony that the plaintiff was not in the garage just before the explosion and, although the defendant claimed to have taken the powder out of the garage, his employee got a can of it to load a small cannon he was firing, and enough was left there to load the cannon when it exploded.

The plaintiff, in rebuttal, flatly denied the stories told by the defendant's witnesses. He said he was not down to the garage when the powder was brought in, did not go after it and had no knowledge it was there. He insisted that he did not make any bombs, nor did he see the cannon there, much less help load it. And it was brought out in cross examination of one of the witnesses for the defense that the explanation of the accident given by the plaintiff at the hospital was similar in all respects to the story he told on the stand.

There was evidence tending to show that there were at least twenty or twenty-five men and boys in and out of the defendant's garage taking part in this celebration. They came singly and in groups. Some went across the street to a bowling alley, while others remained in the garage or just outside. At times, there was a ring of people, as it is described, around the cannon when it was loaded, and at other times, a few persons handled it and were alone. A number of men and boys were present when the bombs were made and exploded. And it is argued on the brief that the situation was such that it is impossible for any one to remember just who took any particular part in the celebration and that the witnesses are mistaken who identify the plaintiff as the man who helped load the cannon and make the bombs. It is also pointed out that the witnesses who testified for the defendant in an attempt to prove that the plaintiff had knowledge of the presence of the gun powder and the use of the cannon in the garage were relatives, an employee, patrons and friends of the defendant, some of whom had talked the case over among themselves and with others, and in some instances, with doubtful opportunity for observation, recited the events of the evening with unusual exactness and concurrence. These matters were undoubtedly considered by the jury in weighing the conflicting evidence presented to them.

The law of the case is well settled. The proprietor of a public garage is bound to use reasonable care to keep his garage safe for all persons coming into it by invitation, express or implied, and if it is in any respect dangerous, he is bound to give such invitees warning of the danger. They are bound to exercise due care on their own part in their use of the garage. *Parker* v. *Portland Publishing Company*, 69 Me., 173; *Robinson* v. *Leighton*, 122 Me., 309; *Graham* v. *Ochsner*, 193 Iowa, 1196; *Campbell* v. *Sutliff*, 193 Wis., 370; 1 *Thompson on Negligence*, 904. A garage proprietor who permits gun powder to be brought in and deposited in his garage and used to load an improvised cannon brings himself within this rule.

The burden was upon the plaintiff to sustain the allegations of his writ by the weight of the evidence. His witnesses were far outnumbered by those brought in by the defendant and contradicted in many of the material facts stated in their testimony, but they were believed by the jury. The weight of evidence is not a question of mathematics. One witness may be contradicted by several and yet his testimony may outweigh all of theirs. The question is what is to be believed, not how many witnesses have testified. *Chenery* v. *Russell*, 132 Me., 130; *Ladd* v. *Bean*, 117 Me., 445. The verdict of the jury rested upon disputed facts and was dependent on the credibility of witnesses. It is not made to appear that it resulted from bias or prejudice. It is not the province of this Court to set it aside on a general motion. *Chenery* v. *Russell*, supra; *Sheriff* v. *Murray*, 121 Me., 599.

It is not claimed that the verdict is excessive. On the case presented, the defendant is not entitled to a new trial. The entry is

Motion overruled.

AUGUSTA TRUST COMPANY

vs.

JOHN N. GLIDDEN, ROSE E. GLIDDEN AND ALLISON T. GLIDDEN.

Lincoln. Opinion, December 28, 1934.

PLEADING AND PRACTICE. DEMURRER.

Sustaining a demurrer to a dilatory motion to dismiss a writ, in effect overrules it.

An exception taken to a ruling, whereby a demurrer is sustained overruling a dilatory motion to dismiss an action, should await conclusion of trial of the case on its merits, and if, before then, it is presented to the Law Court, should be dismissed as prematurely brought up.

When defendant's dilatory motion to dismiss is overruled, he has the right to answer over on the merits and, unless he refuses to do so or waives his right so to do, the case should proceed to trial and be concluded on its merits.

Neither the filing of exceptions to the sustaining of such a demurrer nor the erroneous certification of the case to the Law Court is a waiver of the right to plead anew.

An exception to a ruling on a preliminary motion for an order of new service being dilatory in its nature, unless the ruling is adverse to the proceedings, is prematurely before the Law Court, if presented before the conclusion of the trial of the case on its merits, and hence should be dismissed.

On exceptions by defendants. An action of assumpsit. Because of alleged improper service of the writ, defendants filed a motion to dismiss the action. To the sustaining of plaintiff's demurrer to this motion, and to an order of new service defendants seasonably excepted. Exceptions dismissed. The case sufficiently appears in the opinion.

Charles P. Nelson, for plaintiff.

Emerson Hilton and Weston M. Hilton, for defendants.

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

HUDSON, J. Law on exceptions. Action of assumpsit. Defendants' real estate was attached on the writ but no service of it was made before entry. On motion of the conservators of the plaintiff company, who were permitted to come in and prosecute the action, at the return term the Court ordered notice given to the defendants, in consequence whereof summonses, not bearing its seal although signed by its clerk, were served on the defendants. At the following term, the defendants appeared specially and filed a motion to dismiss the action for lack of legal service, to which motion the plaintiff demurred. The Court sustained the demurrer and at the same time on proper motion for an order of new service, based on Section 23 of Chapter 95, R. S. 1930, granted it. Defendants except to both of said rulings.

The effect of sustaining the demurrer was to overrule the motion to dismiss which in its nature was a dilatory plea. Plaintiff contends this exception is prematurely brought forward, which contention we uphold. R. S. 1930, Section 28, Chapter 91; *Klopot* v. *John Scuik and Augusta Trust Company*, 131 Me., 499; *Jordan et al.* v. *McKay*, 132 Me., 55, 56.

The motion overruled, the defendants had the right to answer over on the merits and unless they refused to do so, or waived their right so to do, the case should have proceeded to trial and been concluded on its merits. Neither the filing of exceptions to the sustaining of such a demurrer nor the erroneous certification of the case to the Law Court is a waiver of the right to plead anew. *Stowell* v. *Hooper*, 121 Me., 152. Nothing in the record discloses a refusal by the defendants to plead over.

Like objection is taken to the consideration *now* of the exception relating to the order for new service. That the motion therefor was preliminary to the consideration of the case on its merits is without question, even though it, it might be claimed, does not, strictly speaking, constitute a dilatory plea within the meaning of the statute above referred to. Reasons, however, that could be urged for the enactment of such a statute would demand that the prac-

tice be the same with reference to preliminary motions, dilatory in their nature, as is provided by the statute.

> "It is the better practice to allow exceptions to rulings on preliminary motions in cases of this kind (unless the rulings are adverse to the proceedings) to rest in the Court below until trial is had and all questions considered when all issues can be finally determined once for all by the Law Court. A case should not be brought to this Court by piece meal when it can be avoided." *Perley* v. *South Thomaston*, 101 Me., 538, 540.

In conclusion, we hold that both exceptions are prematurely before the Law Court and hence must be dismissed "so that the case may be restored to the docket to be proceeded with 'as if no exceptions had been taken.'"

Exceptions dismissed.

ALICE N. TARR

vs.

VIOLET C. DAVIS, GEORGE W. MOORE, JR., AND JOHN P. BREEN.

Androscoggin. Opinion, January 1, 1935.

POOR DEBTORS. STATUTORY BONDS.

A heavy responsibility rests on those chosen as members of a disclosure tribunal, for in their hands rests the liberty of the individual who appears before them. At a time, when, because of conditions beyond their control, many persons are unable to meet, when due, claims against them, it is more than ever a duty to see that rights guaranteed them by our statutes shall be respected.

There is no question that to authorize the discharge of the debtor there must be a strict compliance with the condition of the statute unless performance is prevented by the obligee, or the law, or the act of God.

The statute provides that if at the time appointed the creditor refuses or unreasonably neglects to appoint, or to procure the attendance of his justice an-

other may be selected in the mode prescribed by the statute. This provision of the statute must be construed in accordance with the broad legislative intent to give relief to poor debtors. It is the spirit of a law which controls; and the duty rests on the court in so far as possible without doing violence to language used to see that the legislative intent is made effective.

The clear design of Section 67, Chapter 124, R. S., was not only to provide for the selection of justices by the debtor and the creditor, but to place on the creditor the burden of procuring the attendance of the justice selected by him not only at the first meeting of the tribunal but at every lawful adjournment thereof. If the justice chosen by the creditor fails to attend, the contingency contemplated by the statute has arisen; and the officer may choose another to fill the vacancy as provided in Section 67.

In the case at bar, the disclosure justice furnished no good reason for his failure to attend the adjourned hearing. The procedure followed in selecting the new justice was authorized by the statute, and the proceedings thereafter seem to have been regular in every respect.

On exceptions by defendant. An action of debt against the principal and sureties on a statutory fifteen-day poor debtor bond given to release the debtor from arrest in a tort action. The issue involved the question whether or not there had been compliance with the conditions of the bond. The Referee found for the plaintiff. To the overruling of their written objections to the acceptance of the report of the Referee, defendants seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Benjamin L. Berman,
David V. Berman, for plaintiff.
Frank Linnell, for Violet C. Davis.
Harold L. Redding,
Albert E. Verrill, for George W. Moore, Jr.
Clifford & Clifford, for John P. Breen.

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

THAXTER, J. This is an action of debt against the principal and sureties on a bond. The defendant, Violet C. Davis, in an action of tort brought by the plaintiff, had been arrested on a *capias* writ; and the bond in question was given in accordance with the provisions of R .S. 1930, Chap. 124, Sec. 15, to secure her release.

The condition of the bond was that the principal would within fifteen days after the rendition of judgment against her, or after the adjournment of the court in which it should be rendered, submit herself to examination, and make on oath a true disclosure of her business affairs and property, and abide the order of the justices thereon. The plea of the defendants is the general issue with a brief statement setting forth a full compliance by the principal with the condition of the bond with respect to her disclosure, and stating that she received the benefit of the poor debtor's oath as provided by R. S. 1930, Chap. 124, Sec. 55. There is also a further plea that the plaintiff is estopped to deny the performance by the obligee of the condition of the bond.

The case was referred with a right to exceptions reserved. The Referee found for the plaintiff in the sum of $1000, the amount of the judgment in the original action; and to the acceptance of his report exceptions were taken, which are now before us.

The case is important in that it shows a misunderstanding by certain members of the bar of a statute enacted many years ago, which concerns very vitally the liberty of the individual. It is admitted even by counsel for the plaintiff that the principal in the bond did all that she could to bring herself within the protection of the statute, and that if she has failed, it is because of a defect in the legislation in question.

After the rendition of judgment the defendant in the original action proceeded in accordance with sections 4 and 16 of the statute in question; and a citation was duly issued to the creditor, who selected a justice to sit with one chosen by the defendant to hear her disclosure. The justices met on May 11, 1933, organized, and proceeded with the hearing. After the examination of the defendant had been completed, at the request of the attorney for the creditor, an adjournment was taken for three days, exclusive of Sunday, to May 15, 1933, to allow the creditor to present further testimony and for further cross-examination of the debtor. To this point it is conceded by all that the proceedings were regular in every respect. At the adjourned hearing neither the creditor, nor her attorney, nor her justice was present. The justice in attendance communicated with the absent justice, who stated that he understood that another continuance had been agreed on, and re-

quested a further adjournment. This was refused. Under the terms of R. S. 1930, Chap. 124, Sec. 5, it is provided that no adjournments shall exceed three days in the whole, exclusive of Sundays. It was rightly determined by those present that a further continuance beyond such period would preclude the debtor from performing the condition of her bond. *Fales* v. *Goodhue*, 25 Me., 423, 426. Thereupon the officer in charge of the debtor, proceeding in accordance with the provisions of section 67 of the above statute, chose a justice to act in place of him who failed to appear. The new justice attended the hearing, examined the debtor anew, and it was determined by the Court as reconstituted that the defendant was entitled to the statutory oath. This was accordingly administered, the certificate filed, and the debtor discharged.

The plaintiff now contends that the condition contemplated by the statute, which authorizes the summoning of an additional justice, had not arisen, that accordingly there was no valid court to act, and that the condition of the bond had not been complied with. This brings us to a consideration of the provisions of section 67, under which the defendants claim that the justices derived their authority. This section reads as follows:

> "One of the justices to hear a disclosure, may be chosen by the debtor, and the other by the creditor, his agent, or attorney; and if at the time appointed, he refuses, or unreasonably neglects to appoint, or to procure his attendance, the other may be chosen by an officer who has the debtor in charge, or if the debtor is not in charge, the officer who might serve the precept on which he was arrested; and in such case, the justice chosen by the debtor, if he deems it necessary, may adjourn once, not exceeding twenty-four hours, Sundays excluded, to enable the debtor to procure the attendance of another justice.If the justices do not agree, they may choose a third; if they cannot argee on a third, such officer may choose him; and a majority may decide."

The original return of the disclosure commissioners states that the reason for calling in a new justice was because of a disagreement between the first two appointed. This was clearly erroneous, because there was no disagreement, which under the provisions of

section 67 would justify the summoning of a new member of the court. An amended return was, however, filed which correctly set forth that the new justice was summoned because of the failure of the one chosen by the creditor to attend.

The contention of plaintiff's counsel, in which he has been sustained by the Referee, is that the provisions of the statute in question, which authorize the summoning of a new justice, apply only to the first meeting, when the court is organized, and that accordingly after such organization there was no obligation on the part of this creditor to see that her justice was in attendance at any adjournment.

A heavy responsibility rests on those chosen as members of a disclosure tribunal. In their hands rests the liberty of the individual who appears before them. At a time, when, because of conditions beyond their control, many persons are unable to meet, when due, claims against them, it is more then ever a duty to see that rights guaranteed them by our statutes shall be respected. The justice in this instance furnished no good reason for his failure to attend the adjourned hearing. He states that he thought that there was to be a further continuance, that when he found out that there had been no agreement on this point, he started for the hearing but stopped on the way to watch the New Auburn fire, which was then raging, and then returned to his own office. However diverting the spectacle of the fire may have been, it hardly furnishes an excuse for his failure to perform a duty which he had solemnly undertaken, particularly when his neglect might have resulted in the imprisonment of one actually entitled to go free.

There is no doubt that to authorize the discharge of the debtor there must be a strict compliance with the statutory requirements unless performance is prevented by the obligee, or the law, or the act of God. *Moore* v. *Bond*, 18 Me., 142; *Fales* v. *Goodhue*, supra; *Newton* v. *Newbegin*, 43 Me., 293, 297; *Morrison* v. *Corliss*, 44 Me., 97, 99.

Whether there was in this case a compliance with the conditions of the statutory bond depends on the extent of the obligation of the creditor to procure the attendance of the justice appointed by her.

A general statute for the relief of poor debtors was first enacted

in this state in 1835. Pub. Laws 1835, Chap. 195. The present method, by which the debtor chooses one justice to hear his disclosure and the creditor the other, first appears in R. S. 1840-1841, Chap. 148, Sec. 46. It is there provided that one justice shall be selected by the debtor, the other by the creditor. In *Stanley* v. *Reed*, 28 Me., 458, it was held that the statute was not complied with by a mere nomination of a justice by the creditor but that he must go further and procure his attendance. A contrary interpretation of the word "select" "would," said the Court, "be entirely subversive of the rights of the debtor." "Selection, in the statute," it is said, page 461, "implies something more than nomination, it looks not to words only, but to action. The Legislature must have intended a selection, which would be complete and effectual by attendance, and where there was no attendance of a justice, that then there was not a full and perfect selection, and the proper officer could make one." That this interpretation was in entire harmony with the legislative purpose was evident by the passage of an act, while the case was pending, requiring the creditor to procure the attendance of the justice appointed by him. Pub. Laws 1848, Chap. 85, Sec. 1. With full knowledge of the history of this legislation and of the broad interpretation of it by the court, the legislature enacted this provision in substantially its present form in the revision of 1857. R. S. 1857, Chap. 113, Sec. 40.

It is the spirit of a law which controls; and the duty rests on the court in so far as possible without doing violence to language used to see that the legislative intent is made effective. *Holmes* v. *Inhabitants of Paris*, 75 Me., 559; *Carrigan* v. *Stillwell*, 99 Me., 434, 59 A., 683; *Craughwell* v. *Mousam River Trust Co.*, 113 Me., 531, 95 A., 221; *Sullivan* v. *Prudential Insurance Co. of America*, 131 Me., 228, 160 A., 777; *State* v. *Day*, 132 Me., 38, 165 A., 163; *In Re McLay*, 133 Me., —, 175 A., 348.

The whole history of this broad remedial statute, its very obvious purpose, speak in no uncertain manner against the construction claimed for it by the plaintiff in this action. If her contention is upheld, a creditor would need only to persuade the justice selected by him to absent himself from an adjourned hearing of the tribunal of which he would be a member, and then to enforce against the

helpless debtor the forfeit prescribed by his bond. The comments of the Court on this legislation, which now covers the span of a century, give no warrant for such a claim, which, if sustained, would transform that which was intended as a relief for poor debtors into a snare for their entrapment. "Let no Man weakly conceive, that Just Laws, and True Policie, have any Antipathie: For they are like the Spirits, and Sinewes, that One moves with the Other."

The clear design of section 67 was not only to provide for the selection of justices by the debtor and the creditor, but to place on the creditor the burden of procuring the attendance of the justice selected by him not only at the first meeting of the tribunal but at every lawful adjournment thereof. If the justice chosen by the creditor fails to attend, the contingency contemplated by the statute has arisen; and the officer may choose another to fill the vacancy as provided in section 67. In this case, which we are now considering, it was unnecessary for the debtor to avail herself of the right to adjourn for twenty-four hours to procure the attendance of the new justice.

The decisions of this Court are not in disagreement with the views which we have expressed.

Gould v. *Ford*, 91 Me., 146, 39 A., 480, was an action brought on a six-months poor debtor's bond. At the time prescribed by the notice the disclosure tribunal was duly organized, and an adjournment taken until afternoon, when the parties and the Court reassembled. The attorney for the creditor then claimed that because of the adjournment the Court was without jurisdiction, and he persuaded the justice selected by him not to act. The remaining justice adjourned the hearing, and the proper officer selected a new justice for the creditor. In holding that there was a compliance with the conditions of the bonds the Court said, page 152: "The afternoon session must therefore be deemed a legal one. But under the advice of the creditor's attorney the justice chosen by the creditor refused to participate in the examination and withdrew from the room. It would seem that the contingency specified in section 42, chap. 113, had then arisen and that the creditor then 'neglected and refused to procure the attendance of a justice.'"

Counsel for the plaintiff cites in his support the case of *Ross* v. *Berry*, 49 Me., 434. It does not stand for what he claims. It was an action on a poor debtor's bond. At the disclosure hearing the two justices constituting the Court failed to agree and a third trial was called in. The justice chosen by the creditor then withdrew, the hearing proceeded, and the remaining two justices administered the oath. The Court held that there was not a compliance with the statute bond, because it was essential that all of the members of the Court should at least sit, although two could render a decision. The case does not decide that the proper officer could not have filled the vacancy caused by the retirement of the creditor's justice. This point was not raised. Nor was there any determination of the responsibility of the creditor for the retirement of his justice, and the question was not considered whether he had made it impossible for the debtor to perform his obligation. The case holds that the Court as a court must act, and is an authority for nothing more.

In the instant case the procedure followed in selecting a new justice was authorized by the statute, and the proceedings thereafter appear to have been proper and regular in every respect.

Exception sustained.

FRANK L. RAWSON *vs.* HARRY STIMAN.

Cumberland. Opinion, January 1, 1935.

MOTOR VEHICLES. NEGLIGENCE. PRESUMPTIONS.

The area common to one highway and another, entering the first at one side but not emerging therefrom, contains an intersection of ways, within the law of the road.

Any act of a driver of a vehicle upon a highway, when that act is in violation of a law of the road, and is also a proximate cause of injury to another, rightfully upon the road, is a negligent act.

The introduction in evidence of the commission of such act raises at once a presumption of negligence.

In the case at bar, plaintiff attempted to pass defendant's truck on its left. At about that moment the truck turned left to enter a lateral road which joined the main highway on that side, and at or in the junction of the roads the collision occurred.

The Court holds plaintiff's contention that a lateral road entering another highway, but not continuing by emergence from the other side of the highway, does not form an "intersection of ways," incorrect in law.

On exceptions by plaintiff. A tort action to recover for damage to plaintiff's automobile in collision with defendant's truck. Trial was had at the April Term, 1934, of the Superior Court for the County of Cumberland, before the sitting Justice without jury. Judgment was rendered for the defendant. To certain findings and rulings by the sitting Justice in rendering judgment, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Jacob H. Berman,

Edward J. Berman, for plaintiff.

Verrill, Hale Booth & Ives, for defendant.

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

BARNES, J. This case, an action of tort, was heard by the Court without jury. It arose from a collision, on a main highway in New Gloucester.

Plaintiff, driving his automobile, approached a truck, owned by the defendant and then operated by defendant's minor son on the father's business, both vehicles running in the same direction.

Plaintiff attempted to pass defendant's truck, on its left; the truck was turned left to enter a lateral road which joined the main highway on that side, and at or in the junction of the roads the collision, for which damages are claimed, occurred.

The judgment of the Court was for the defendant, and the case is here on plaintiff's exceptions to findings of fact and rulings of law of the Justice.

The record presents none of the pleadings or evidence.

It is a bill of exceptions containing nothing but the plaintiff's requested rulings and the findings and rulings, as given.

The road into which the truck was being directed when the collision occurred did not extend beyond the main highway — it entered the same and merged with it in either direction.

The Justice found and ruled as follows: "I find the following to be the material facts:

> The collision occurred in open country while both motor vehicles were proceeding in the same direction, defendant's truck leading, along a two-track cement highway in the town of New Gloucester, at a point where a country road makes a junction with the cement highway. This country road did not cross the cement road but extended therefrom to the left of the drivers of the vehicles. The collision occurred upon the left side of the center of the cement highway at the junction of these roads. Defendant's truck made a turn to the left, the driver intending to enter the country road, while the plaintiff at the same instant attempted to pass the truck. The driver of defendant's truck gave no warning of his intention to cross the left side of the highway. The plaintiff, before attempting to pass, sounded his horn, and, while passing, was proceeding at a reasonable rate of speed.
>
> Upon these facts I rule:
>
> That the junction of roads described in the findings of facts constitutes an 'Intersection of ways' under the provisions of the statutes of this State prohibiting automobiles from passing other cars at such intersections.
>
> That the violation of the statute prohibiting the passing of automobiles at intersecting ways, by the plaintiff, raises a *prima facie* presumption of negligence on his part which is conclusive unless rebutted by evidence.
>
> Applying the rules of law to the facts, I find that—
>
> 1. The defendant was guilty of negligence.
>
> 2. The plaintiff was guilty of contributory negligence.
>
> Requests by plaintiff for findings of facts and rulings of law not in accordance with the findings herein contained are denied and exceptions to such denial are allowed.
>
> Judgment for defendant."

Two exceptions were argued:

"1. That in view of the fact that the Court found that the collision occurred in open country while both motor vehicles were proceeding in the same direction, the defendant's truck leading, along a two-track cement highway in the town of New Gloucester, at a point where a country road makes a junction with the cement highway, the country road not crossing the cement road, but extending therefrom to the left of the drivers of the vehicles, the Court erred in ruling that the junction of roads described as above constitutes an 'intersection of ways' under the provisions of the statutes of this State prohibiting automobiles from passing other cars at such intersections.

2. The plaintiff excepts to the Court's ruling as a matter of law, 'That the violation of the statute prohibiting the passing of automobiles at intersecting ways, by the plaintiff, raises a *prima facie* presumption of negligence on his part which is conclusive unless rebutted by evidence.' "

Negligence of defendant is conceded, and in this case contributory negligence of plaintiff, if proved, will end the contention of the latter.

The Justice finds as matter of fact (assuming the warning given within a reasonable interval before the attempted passing) that the plaintiff sounded his automobile horn before attempting to pass the truck, and "while passing, was proceeding at a reasonable rate of speed."

But, if the main highway and the lateral road form an intersection of ways where they join, the plaintiff attempted to pass the truck in thoughtless or reckless violation of the law of the road; "The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of ways unless permitted so to do by a traffic or police officer." R. S., Chap. 29, Sec. 71.

The contention of the plaintiff is novel. It has not been ruled on in the decided cases of this state.

It is that where a lateral road enters another highway but does not continue by emergence from the other side of that highway

the two do not form an "intersection of ways", within the meaning of the statute. This court has not heretofore been called upon to determine the precise point raised by this exception, although it seems to have been assumed in *Field* v. *Webber*, 132 Me., 236, 169 A., 732, that a crossing, such as in the case at bar, is an intersection. But determination of it has been had in many other courts of last resort, and it is said to be the almost unanimous decision that statutes and ordinances regulating the conduct of drivers at intersections apply without exception whether a highway completely crosses and extends beyond another or merely enters such other.

Such is the ruling in: *Pangborn* v. *Widdicomb Co.*, 223 Mich., 181, 193, N. W., 817; *Gosma* v. *Adams*, Fla. (1931) 135 So., 806, 78 A.L.R., 1193; *Kelly* v. *Simpson*, 50 R.I., 10, 144A., 435; *Mapp* v. *Holland*, 138 Va., 519, 122 S. E., 430, 37 A. L. R., 478, and in cases cited in the opinions and in the annotations in cited volumes of A. L. R. It is based on the fact that the danger of collision is of the same character at the junction of roads as at the crossing of roads; that the object of the statutory provision is to prevent collision of traffic; and the rule of construction that knowing the evil sought to be remedied, the statute, if the language permits, should be so construed as to embrace all situations in which the evil exists.

Hence we hold that the ruling excepted to below on this point was correct.

As to the second exception: It is self-evident that plaintiff's action in disregard of the prohibition of the statute was a proximate cause of the collision, and, it being admitted that defendant was guilty of negligence, we have concurring, causal acts of negligence on the part of both plaintiff and defendant, both proximate causes of the collision.

It is complained that the Justice erred in law in stating that plaintiff's violation of the prohibiting statute raised a "*prima facie* presumption of negligence on his part", contributory negligence on his part", contributory negligence.

This Court has invariably held that driving on a highway in violation of the law of the road, when the immediate natural result of disobeying the mandate of the statute is a proximate cause of

accident, raises "some presumption" against the driver, *Neal* v. *Rendall*, 98 Me., 69, 56 A., 209; "Unexplained and uncontrolled it would not only be 'strong' but conclusive 'evidence of carelessness' "; *Larrabee* v. *Sewall*, 66 Me., 376; *Dansky* v. *Kotimaki*, 125 Me., 72, 130 A., 871; *Coombs* v. *Mackley*, 127 Me., 335, 143 A., 261, and has termed such act *prima facie* evidence of negligence, *Bragdon* v. *Kellogg*, 118 Me., 42, 105 A., 433; *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872.

In the case at bar there was evidence of negligence on the part of plaintiff.

In the mind and expression of the court there was a "presumption of negligence" on plaintiff's part. Upon its first appearance or the first expression of evidence of it the presumption was but *prima facie*, (if recourse may be had to the language of English courts of former times) for a presumption, upon its first appearance, has but *prima facie* value, if any. Uncontrolled and unexplained, as in the case at bar, that presumption hardens into evidence of negligence.

The learned Justice preferred to use a Latin modifier. It is probable that to him these words, in common use among lawyers, seemed best to convey the idea he wished to express, that any act of a driver of a vehicle upon a highway, when that act is in violation of a law of the road, and is also a proximate cause of injury to another, rightfully upon the road, is a negligent act, and that the introduction in evidence of the commission of that act raises at once a presumption of negligence.

So interpreting his findings of law, we deem them correct.

Exceptions overruled.

ANNIE B. GRANT, PLAINTIFF

vs.

CHARLES CHOATE AND M. H. SIMMONS,

EXECUTORS OF THE WILL OF HANNAH J. WHITE.

Kennebec. Opinion, January 15, 1935.

EXECUTORS AND ADMINISTRATORS. PLEADING AND PRACTICE. NOTICE.

The purpose of the notice of a claim against an estate required to be given to the executor or administrator is to give him, without the formality required in a pleading, such information of the nature and extent of the claim against the estate that he may investigate and determine whether the claimant should properly be paid or the demand rejected.

A claim for services rendered can not be set forth with the same detail as is required in a count for goods sold and delivered, and an item in an account annexed stated to be for labor, with the date and the amount set forth, is sufficient against a demurrer.

In the case at bar, the notice given by the plaintiff was sufficient to apprise the defendants of the nature and extent of her demands.

On exceptions by plaintiff. An action on the case against the executors of the will of Hannah J. White arising out of an alleged contract for services rendered by the plaintiff to the said Hannah J. White. The issued involved the question of proper notice of the claim to the executors. To the granting of a nonsuit plaintiff seasonably excepted. Exception sustained. The case fully appears in the opinion.

Campbell & Reid, for plaintiff.

Melvin H. Simmons, pro se and *Goodspeed & Fitzpatrick*, for defendant.

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

THAXTER, J. The executors of the will of Hannah J. White are the defendants in an action of assumpsit in which the plaintiff has declared in four counts. The first sets forth an employment of the plaintiff by Mrs. White as housekeeper and nurse, a subsequent promise that, if the plaintiff would stay with her and care for her during her life, the testatrix would arrange for the plaintiff to receive on the death of the testatrix a sum of money then on deposit in the State Trust Company. The plaintiff claims a full performance by her of this contract, and sets up as a breach that Mrs. White did not make the necessary arrangements so that the deposit in question was available as agreed. The second count is substantially the same except that the promise of the testatrix is alleged to have been to pay a sum of money equal to such deposit. The third count sets forth a promise by the testatrix to pay the plaintiff for such work and labor and a breach thereof. The fourth count is an enumeration of the common counts, including one claiming compensation for work and labor performed by the plaintiff at the request of the testatrix.

At the trial the notice of claim filed by the plaintiff with the executors to comply with the provisions of Rev. Stat. 1930, Ch. 101, Sec. 14, was offered in evidence. A motion for a nonsuit was thereupon made and granted on the ground that the notice of claim was insufficient to support any of the counts of the plaintiff's declaration. To the granting of the nonsuit the plaintiff duly excepted.

The notice of claims reads in part as follows:

> "I, Annie B. Grant, by my attorneys, George W. Heselton and James L. Reid, hereby make the following claim upon Melvin H. Simmons and Charles Choate in their capacity as Executors named in the last Will and Testament of the late Hannah J. White.
>
> First: I claim the sum of $4,624.97 which now lies in deposit with the State Trust Company of Augusta and in connection with this claim declare—
>
> 1. That Hannah J. White in her lifetime, in consideration for services by me performed at her request gave to me a joint

interest in the said deposit with right of survivorship and that my name appears on the bankbook as proof thereof.

2. That Hannah J. White made herself trustee of the said deposit for my benefit in consideration, as aforesaid, for services by me performed at her request, and that now, after her decease, I am entitled to the same.

3. That the said State Trust Company contracted to pay over to me the said fund, or deposit, upon the decease of the said Hannah J. White and that the said Trust Company would be willing so to do were it not for the wrongful withholding of the said bankbook by the said Executors.

4. That Hannah J. White, in consideration, as aforesaid, for certain services by me performed at her request, promised and agreed to pay me this said fund, or deposit, and that I am therefor entitled to the same.

Second: I hereby claim right, title and possession in the said bankbook upon which my name appears, as legally being my own personal property and therefore wrongfully withheld by the said Executors.

Third: I hereby claim the sum of $5,000 as the just and reasonable compensation for the services, aforesaid, by me performed at the request of Hannah J. White and for which she promised to pay me, the said services having been by me performed from July of 1927 to September 18, 1932."

The defendants contend that those items which assert a title to a particular bank deposit do not support the counts in the declaration, which claim a breach by the testatrix of a contractual obligation, and that the third item is insufficient in that it does not set forth a detailed statement of the nature of the services alleged to have been rendered, or the time when they were performed, or the rate of charges for the same.

In our opinion this item is sufficient. The purpose of the notice is to give to the executor or administrator, without the formality required in a pleading, such information of the nature and extent of a claim against an estate that he may investigate and determine whether the claimant should properly be paid or the demand re-

jected. *Marshall* v. *Perkins*, 72 Me., 343. The purpose of a declaration in a writ likewise is to give to the opposite party and to the court similar notice of the plaintiff's claim, *Wills* v. *Churchill*, 78 Me., 285, 4 A., 693; and it has, accordingly, been held that the notice filed with an executor must contain as much information as is required in a declaration. *Hurley* v. *Farnsworth*, 107 Me., 306, 78 A., 291. The same formality, however, is not necessary, provided the executor is apprised of the true substance of the demand. *Palmer's Appeal*, 110 Me., 441, 86 A., 919. It has been said that the notice may be sufficient even though the circumstances out of which the obligation arose may have been incorrectly stated. *Fessenden* v. *Coolidge*, 114 Me., 147, 95 A., 777. It is important to bear in mind that in all proceedings before probate courts some latitude is given, for as was said in *Danby* v. *Dawes*, 81 Me., 30, 32, 16 A., 255, 256. "Its practitioners are largely persons who do their own business before the court, or unprofessional persons, whom their neighbors have employed to act for them."

It is recognized that a claim for services rendered cannot be set forth with the same detail as is required in a count for goods sold and delivered, *Peabody* v. *Conley*, 111 Me., 174, 88 A., 411; and it has been held that an item in an account annexed stated to be for labor with the date and the amount set forth is sufficient against a demurrer. *Wills* v. *Churchill*, supra.

The motion filed with these executors gives the dates when the services of the plaintiff began and ended, and the amount claimed to be due therefor. It would have been difficult to set forth in detail all of the various work which was performed with the dates and the time consumed. Such prolixity is not required. The defendants were apprised of the nature and extent of the plaintiff's demand. More than that is not necessary.

Exception sustained.

GEORGE GOODWIN *vs.* THE TEXAS COMPANY.

ROBERT STEWART *vs.* THE TEXAS COMPANY.

Cumberland. Opinion, January 23, 1935.

NUISANCE. WATERS AND WATER COURSES.

No one may artificially collect water on his own land and discharge it unlawfully upon his neighbor's property upon which it would not have naturally fallen, and if he does so he is liable for the resulting damages.

There is a public or natural easement in a water course belonging to all persons whose lands are benefited by it, and it can not be stopped up or diverted to the injury of other proprietors.

To constitute a water course as defined by the law, it must appear that the water in it usually flows in a particular direction, by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It must have a well-defined and substantial existence, but need not flow continually or never be dry.

The evidence in the cases at bar showed that some of the salt water which the defendant Corporation pumped from the sea in making its fill seeped over upon the plaintiffs' lands. The plaintiffs were entitled to recover such damages as resulted from this seepage.

Also the jury were fully warranted in finding that the plaintiffs' lands were flooded by the defendant's obstruction of a natural water course by which they were drained, and that the damage which resulted was directly traceable to this cause.

On general motions for new trials by defendant. Actions on the case for nuisance. Trial was had at the February Term, 1934, of the Superior Court for the County of Cumberland. The jury rendered a verdict for $970.01 for the plaintiff Goodwin, and $949.03 for the plaintiff Stewart. General motions for new trials were thereupon filed by defendant. Motions overruled. New trials denied. The cases fully appears in the opinion.

Robert J. Milliken, Milan J. Smith, for plaintiffs.

Strout & Strout, for defendants.

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

STURGIS, J. Actions on the case for flooding the plaintiffs' lands and obstructing a natural water course by which they were drained. In the Court below, where the cases were tried together, the jury returned verdicts for the plaintiffs and the defendant filed general motions for new trials.

The Texas Company, in 1930, built a bulkhead out on the flats in front of its lands at South Portland, Maine, made nearly ten acres of new land by filling in shore with dredgings pumped from the bottom of the ocean, and inside the fill constructed a gravel dam designed to hold in the mud and water it had collected. The plaintiffs own two adjacent lots of land with the buildings thereon lying several hundred feet southwesterly of The Texas Company's property. When the fill was made, some of the sea water which came in with the mud overflowed and seeped through the gravel dam and flooded the adjacent properties. Although this overflow was pumped out, there is proof that some seepage continued, and this with collecting surface waters, except in the dry seasons, kept the plaintiffs' lands saturated and at times partially overflowed. As a result, the vegetation and trees were destroyed and the garden plots became unfit for cultivation.

There was also evidence which tended to prove that when The Texas Company constructed its new land it filled up the mouth of a natural water course which formerly drained the flooded area. Witnesses affirm the existence of a small stream which, in former years, ran through the plaintiffs' lands. They describe it as being about five feet wide and two feet deep, with a well-defined channel through which a fresh water current regularly flowed, and they agree that until it was obstructed it emptied into the ocean and furnished drainage for the lands along its course.

Engineers for the defendant Corporation describe the construction of the fill and the gravel retaining dam and exhibited topographical drawings of the lands involved, with elevations and measurements. They deny that there was any substantial overflow or seepage over or through the dam and profess ignorance of the existence of a water course. A chemist testified that an examina-

tion of the plaintiffs' lands made two years after the fill was completed showed that the water found there was fresh, and advanced the opinion that it had never been salt water. The further evidence offered by the defense related, in the main, to the existence of the water course and the amount of the damages which the plaintiffs suffered.

It is a settled rule of law that no one may artificially collect water on his own land and discharge it unlawfully upon his neighbor's property upon which it would not have naturally fallen, and if he does so he is liable for the resulting damages. *Smith* v. *Preston*, 104 Me., 156, 161, 71 A., 653. The evidence clearly shows that The Texas Company pumped large quantities of water from the sea in making its fill and that some of this salt water seeped over upon the plaintiffs' lots. The defendant Corporation is liable for any damages which resulted from this seepage.

The record indicates, however, that the general verdicts returned were based, in part at least, on a finding that The Texas Company had damaged the plaintiffs' lands by obstructing the natural water course which ran through and from them and by which they were drained. Under instructions from the Presiding Justice, the jury returned special verdicts on this issue, reporting as findings of fact that a water course as defined by law had existed and been obstructed as alleged in the writs.

The law applicable to this issue is also well settled. There is a public or natural easement in a water course belonging to all persons whose lands are benefited by it, and it can not be stopped up or diverted to the injury of other proprietors. To constitute a water course as defined by the law, it must appear that the water in it usually flows in a particular direction, by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It must have a well-defined and substantial existence but need not flow continually or never be dry. *Morrison* v. *Bucksport and Bangor*, 87 Me., 353; *Bangor* v. *Lansil*, 51 Me., 521, 525. Applying this rule, the jury were fully warranted in finding that the plaintiffs' lands were flooded by the defendant's obstruction of a natural water course by which they were drained, and that the damage which resulted is directly traceable to this cause.

The general verdicts in these cases, which were properly returned on either or both counts of the writs, are supported by the weight of the evidence and must be sustained.

Motions overruled.
New trials denied.

BERT KIMBALL *vs.* ROBERT CLARK.

York. Opinion, January 30, 1935.

MASTER AND SERVANT. NEGLIGENCE. NEW TRIAL.

It is the duty of a master to use reasonable care to furnish for his servant a reasonably safe place in which to do his work.

In the discharge of this duty, the law requires the master to give suitable warning to his employee of any and all special risks and dangers of the employment of which the master has knowledge, or by the exercise of reasonable care should know, and which are unknown to the employee and would not be known and appreciated by him in the exercise of reasonable care on his part.

While the servant assumes the ordinary apparent risks of his employment which are obvious and incident thereto and known and appreciated by him or should have been in the exercise of reasonable care, he does not assume the risk of defects not apparent, of which he has no knowledge, existing in the place in which the master has directed him to work and is bound to use due care to make and keep reasonably safe.

The law holds parties to the exercise of due diligence in the preparation of their cases, and public welfare as well as the interest of litigants requires that suitors should prepare their cases with reference to all the probable contingencies of the trial.

Unless on all the evidence it is apparent that an injustice has been done, a new trial will not be granted on the ground of newly discovered evidence when the moving party, by proper diligence, might have discovered such evidence in season for the trial.

In the case at bar, under the rules above stated, the plaintiff's evidence, that his employer, with full knowledge of the existence of poison ivy and the dangers of contact with it, sent him, unaware of its presence and unable to recognize the

plant when he saw it, in to cut the bushes where it grew, showed negligence on the part of the defendant. The proof offered in support of this claim was not manifestly outweighed by the evidence offered in defense.

On the evidence, a finding by the jury that the plaintiff suffered from a skin eruption caused by ivy poisoning contracted as claimed was not clearly wrong.

The new evidence which the defendant offered in support of the special motion, consisting of a bank record, always available, and a letter and sundry bills and checks which had never been out of the defendant's possession, but had been carefully filed in their proper places according to his office practice and easily discoverable if a reasonably careful search had been made, was not ground for a new trial.

On general motion for new trial by defendant, and separate motion for new trial on the ground of newly discovered evidence. An action of negligence to recover damages resulting from ivy poisoning. Trial was had at the October Term, 1933, of the Superior Court for the County of York. The jury rendered a verdict for the plaintiff in the sum of $1,529.42. A general motion for new trial was thereupon filed by defendant, and later a separate motion for new trial on the ground of newly discovered evidence.

Motions overruled. The case fully appears in the opinion.

Arthur E. Sewall,

E. P. Spinney, for plaintiff.

Ralph W. Hawkes,

John J. Higgins, for defendant.

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

STURGIS, J. General motion for a new trial by defendant, together with a special motion based on newly discovered evidence. The action is in negligence for damages resulting from ivy poisoning. No exceptions were reserved.

The plaintiff offered evidence tending to prove that on June 27, 1926, while employed by the defendant as a common laborer about the grounds of his cottage at York Harbor, he was directed to mow the bushes on a small knoll and in doing so came in contact with poison ivy and was so poisoned that he was unable to work regularly, suffered great physical discomfort, and incurred large

expenses for medical treatment. He told the jury that he not only did not know that there was poison ivy where he was directed to work, but was unacquainted with the plant and would not have recognized it if he had seen it. He stated that he first knew that he had been working in poison ivy when the defendant, after the mowing was finished, told him that he was glad the ivy had been cut off, and insists that if he had known the plant was there he would not have cut the bushes. The plaintiff is corroborated by his son-in-law, who claims to have been present when the plaintiff was poisoned and confirms his account of what was said and done at the time.

The defendant told the jury a very different story. His testimony was that in September, 1925, he and his wife were closing their cottage for the season and, in the course of conversation relative to work to be done on the grounds, called the plaintiff's attention specifically to the poison ivy on the knoll and expressed a desire to have it removed. His testimony on this point is as follows:

> "I made the remark, 'I wish I could get this poison ivy removed.' And Bert said, 'Why, I will take it out.' And I said, 'No, I don't think you better take it out because, if you remember, Charlie Mains took it out and he said it wouldn't poison him and he got very badly poisoned, so I think you had better leave it alone.' And he said no, he was not afraid of it and he would take it out. I then said, 'Well, all right, go ahead and take it out.' That ended the conversation then."

The defendant went on to say that he knew nothing more about the matter until the middle of the next June when the plaintiff told him that he was poisoned when he cut the ivy. The defendant admitted that he knew that the ivy was poisonous and that the knoll in front of his house was covered with it. His wife corroborated him in all the substantial details of his testimony.

The physicians called in the case disagreed as to the cause of the plaintiff's affliction and the probability of its having resulted from contact with poison ivy. It was undisputed that he suffered from a long continued and incapacitating skin eruption. In view of the history of the case as it appears in the record, a finding that

the plaintiff's skin eruption was due to poisoning by ivy was not clearly wrong.

It is the duty of a master to use reasonable care to furnish for his servant a reasonably safe place in which to do his work. *Charpentier* v. *Tea Company*, 130 Me., 423, 157 A., 237; *Loring* v. *Maine Central Railroad Co.*, 129 Me., 369, 152 A., 527; *Sheaf* v. *Huff*, 119 Me., 469, 111 A., 755; *Elliott* v. *Sawyer*, 107 Me., 195, 201, 77 A., 782. In the discharge of this duty, the law requires the master to give suitable warning to his employee of any and all special risks and dangers of the employment of which the master has knowledge, or by the exercise of reasonable care should know, and which are unknown to the employee and would not be known and appreciated by him in the exercise of reasonable care on his part. *Loring* v. *Railroad Company*, supra; *Dirken* v. *Great Northern Paper Co.*, 110 Me., 374, 86 A., 320; *Welch* v. *Bath Iron Works*, 98 Me., 361, 369, 57 A., 88; *Wormell* v. *Maine Central Railroad Co.*, 79 Me., 397, 10 A., 49; see also 4 *Thompson on Negligence*, 332; *Williams* v. *Walton*, etc. Co., 9 Houst. (Del.) 322; 32 Atlantic Reporter 726. And it is settled law that, while a servant assumes the ordinary apparent risks of his employment which are obvious and incident thereto and known and appreciated by him or should have been in the exercise of reasonable care, he does not assume the risk of defects not apparent, of which he has no knowledge, existing in the place in which the master has directed him to work and is bound to use due care to make and keep reasonably safe. *McCafferty* v. *Maine Central Railroad Co.*, 106 Me., 284, 76 A., 865; *Dirken* v. *Great Northern Paper Co.*, supra.

An application of the foregoing rules to the evidence in this case does not as a matter of law entitle the defendant to a verdict. In weighing the flatly contradictory statements of the parties and their supporting witnesses, the credence to be given the one or the other was necessarily the determining factor. According to the plaintiff's version, his employer, with full knowledge of the existence of poison ivy and the dangers of contact with it, sent him, unaware of its presence and unable to recognize the plant when he saw it, in to cut the bushes where it grew. We can not assume a common knowledge of the plant which would compel its recognition. The plaintiff's case, if believed, establishes negligence on the

part of the defendant. It is not manifestly outweighed by the evidence offered in defense. On the general motion, the verdict can not be set aside.

After verdict and before judgment in the case at bar, the defendant filed a special motion for a new trial on the ground of newly discovered evidence. A Commissioner was appointed to take out testimony in support of the motion, and a transcript is certified forward.

We are of opinion that by the exercise of ordinary diligence the defendant could have discovered and produced at the trial the evidence he now offers. It consists of a bank record, always available, and a letter and sundry bills and checks which have never been out of the defendant's possession, but have been carefully filed in their proper places according to his office practice and easily discoverable if a reasonably careful search had been made. The law holds parties to the exercise of due diligence in the preparation of their cases, and public welfare as well as the interest of litigants requires that suitors should prepare their cases with reference to all the probable contingencies of the trial. A new trial will not be granted on the ground of newly discovered evidence when the moving party, by proper diligence, might have discovered such evidence in season for the trial. *Atkinson* v. *Conner*, 56 Me., 546; *Blake* v. *Madigan*, 65 Me., 522; *Smith* v. *Booth Brothers*, 112 Me., 297, 92 A., 103; *Ryan* v. *Carter & Mileson*, 125 Me., 522, 134 A., 566. No exception lies to the application of this rule unless, on all the evidence, it is apparent that an injustice has been done. *Cobb* v. *Cogswell*, 111 Me., 336, 89 A., 137; *Rodman Company* v. *Kostis*, 121 Me., 80, 115 A., 557. It is not made to appear that in the case at bar the general rule should not apply.

Motions overruled.

LETHA BEDELL

vs.

ANDROSCOGGIN & KENNEBEC RAILWAY COMPANY.

Androscoggin. Opinion, February 1, 1935.

BAILMENTS. MOTOR VEHICLES. NEGLIGENCE. STREET RAILWAYS.

The principle of law with relation to bailments as enunciated in Robinson *v.* Warren, 129 *Me.*, 172, *to wit; that in bailments other than for carriage the contributory negligence of the bailee is not imputable to the bailor when the subject of bailment is damaged by a third party, and the bailor under the ordinary contract of bailment may recover, despite the occurrence of contributory negligence on the part of the bailee, is reaffirmed.*

While it is true that the operator of an electric car is not always bound to stop when he sees an approaching car, yet if he sees or should see an automobile approaching so closely to his car that it is or would be reasonable to believe that there will be a collision unless he stops, then an observance of due care requires him to stop.

In crossing a street from right to left, the motorman must have his car under such control that it may be stopped to avoid collision with the operator of an automobile who himself is in observance of due care.

At nisi prius, *the Justice, having already given the substance of a request, is not bound to repeat it in the language of the attorney.*

In the case at bar, the request for an instruction, to wit: "The operator of the electric car was not bound to stop when he saw an approaching car," was properly denied as too broad and indefinite.

The defendant likewise suffered no prejudice from the failure to give another requested instruction to the effect that the jury was entitled to consider whether or not the automobile owned by the plaintiff was being operated improperly, carelessly or negligently, in order that they might determine whether or not the conduct of the driver of the automobile was such that the operator of the electric car was not bound to anticipate it or guard against it, which though an accurate and correct statement of law, was substantially followed in the language of the charge.

On exceptions and general motion for new trial by defendant. An action of tort brought by an owner of an automobile to recover for damages to her automobile resulting from a collision with a street railway car of the defendant. Trial was had at the April Term, 1934, of the Superior Court for the County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $195.00. To the refusal by the presiding Justice to give certain requested instructions, defendant seasonably excepted, and after the jury verdict filed a general motion for new trial. Motion overruled. Exceptions dismissed. The case fully appears in the opinion.

Benjamin L. Berman,
David V. Berman,
Donald C. Webber, for plaintiff.
Skelton & Mahon, for defendant.

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

HUDSON, J. On motion and exceptions by defendant. Action of negligence resulting from a collision between an automobile and an electric car in the evening of December 18, 1933, at the junction of Sabattus Street and Campus Avenue in the City of Lewiston.

Sabattus Street, running easterly, is crossed by Campus Avenue, running northwesterly. Defendant's railway is located on the south side of Sabattus Street and runs easterly across Campus Avenue but shortly before it reaches the avenue there are a switch and curved section of railway connecting the Sabattus Street line with one running on the easterly side of Campus Avenue. Approaching the switch, Sabattus Street has a twenty-five foot width of macadam, and a descending grade of two and a half to three per cent.

On this night (about 9:30), the defendant's one-man-operated electric car came easterly on Sabattus Street and stopped at the switch, where it was accustomed to stop and let off and take on passengers. Some passengers alighted. Then the motorman shut the door, entered the interior of the car, turned the register, started to go to the controls, looked back through the left windows

of the car and saw an automobile (not the plaintiff's but one immediately ahead of it) about two hundred feet distant coming towards him. He continued on to the controls, started the car forward into the switch and commenced to take the curve and cross Sabattus Street. When it had gotten partly across (just how far was in dispute), the plaintiff's automobile, then being driven by one Bunker, ran into the left rear end of the electric car and was injured, on account of which the owner, not then present, seeks recovery of damages in this action. That evening the plaintiff had loaned her automobile to her brother, who, in turn, had let Bunker take it for his use. The estimated maximum rate of speed of the car on the curve was three miles per hour and of the automobile as it proceeded down Sabattus Street, slippery from ice, was fifteen miles per hour.

The plaintiff charges two distinct acts of negligence, viz: (1) Carelessly and negligently operating "its said electric car as to cause same to be propelled suddenly and without warning around the said curve into Campus Avenue, so that said electric car proceeded directly in front of the automobile, . . . so that the plaintiff's said automobile collided with the electric car, . . ." and, (2) negligently and carelessly causing "its said electric car in its progress across said Sabattus Street to be brought to a stop directly in the course of the plaintiff's automobile, causing the said plaintiff's automobile . . . to collide with said electric car. . . ." Proof of the defendant's alleged negligence as the proximate cause of the collision as set forth in either count is sufficient to justify the jury's verdict for the plaintiff.

It is conceded that following *Robinson v. Warren*, 129 Me., 172, 151 A., 10, it was not incumbent upon the plaintiff herein to prove lack of contributory negligence and that were Bunker, the driver of the automobile, negligent, his negligence is not imputable to this plaintiff, a bailor, the bailment not being for carriage.

So now we must determine whether or not the verdict for the plaintiff is manifestly wrong. It is not necessary to discuss at length the duty that rests upon a motorman, as he starts his car from the right side of a street to make a left turn across it, for this Court already has stated:

"Having his car so under control the motorman is required at all times to exercise due care and vigilance to avoid collisions, especially at crossings, and he must before making a crossing stop if necessary to avoid a collision with an approaching automobile or other vehicle, which is itself lawfully controlled. His duty is analagous to that of the driver of a motor car who crosses a street from right to left to enter a connecting road or driveway." *Dill* v. *Railway Co.*, 126 Me., 1, 3, 135 A., 248; *Denis* v. *St. Ry. Co.*, 104 Me., 39, 70 A., 1047.

Even more recently, with reference to the duty of the driver of a motor car who crosses a street from right to left, our Court has declared:

"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 the 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." *Verrill* v. *Harrington*, 131 Me., 390, 395, 163 A., 266, 268; *Reid et al.* v. *Walton et als.*, 132 Me., 212, 168 A., 876.

The record discloses the following credible evidence on which the jury, without being manifestly wrong, could have found actionable negligence upon the part of this defendant: That Sabattus was a city street of considerable traffic, with an appreciable down grade, and its macadam surface then, to the knowledge of the motorman, in a very slippery condition, extremely hazardous for automobile use; that this curve of the railway effected not simply a crossing of Sabattus Street but as well the intersection of the two streets; that its car in leaving the switch would, before making the turn to the left, for a short distance proceed straight ahead

as though to keep along on the railway on Sabattus Street and thus tend to mislead the driver of an automobile following it; that, although before starting the car from the switch, its motorman had looked back and had seen the headlights of an approaching car, yet, afterwards he did not look again to ascertain if any automobile were coming with which there might be a collision, but proceeded blindly across the street, when the jury, no doubt, must have found that the plaintiff's automobile was so close at hand that the collision was imminent and that it resulted because the motorman did not exercise the required due care to ascertain the presence of the approaching car and "to watch and time its movements."

It is true that the operator of an electric car is not always bound to stop when he sees an approaching car, but if he sees or should see an automobile approaching so closely to his car that it is or would be reasonable to believe that there will be a collision unless he stops, then an observance of due care requires him to stop. In crossing a street the motorman must have his car under such control that it may be stopped to avoid collision with the operator of an automobile who himself is in the observance of due care. In this case, although contributory negligence *as such* played no part in the determination of the case, the jury may have found that the driver of the automobile was not negligent; that he was proceeding carefully and slowly at a rate not exceeding fifteen miles per hour; that he saw and watched the movements of the electric car; that as it left the switch it appeared to be going straight ahead when suddenly and without warning it turned to the left and proceeded directly across in front of the automobile when it was impossible for its driver in the exercise of due care to avoid colliding with the electric car.

Counsel for the defendant in their brief claim to have demonstrated mathematically (building on the premise that the automobile was proceeding five times as fast as the electric car) that the statement by the plaintiff's witnesses that the automobile was only four or five lengths behind the electric car when it started to make the turn could not have been true, but that, on the contrary, it must have been some three hundred feet back, at which distance, they say, the motorman, without giving warning or looking back,

would not have been guilty of negligence. Finding no fault with the mathematical solution of the problem on the facts, assumed for its demonstrative purpose, yet unless the jury found the same facts, its application herein would avail nothing. The claimed mathematical demonstration is based only on estimates, both of rates of speed and distances covered. Change any of these estimates—bases of the problem—and the proffered mathematical solution becomes inapplicable. The speeds either of the automobile or the electric car, as finally determined by the jury, we can not know, nor have we any way of determining what the jury found the facts to be as to distances covered either by the electric car after starting or by the automobile from where it was when the car started to the place of collision. In conflict was the evidence both as to where the rear of the car was when it started and where it stopped as well as how far back was the automobile when the car started. The jury was warranted in believing that when the motorman finally caused his car to enter the switch and to proceed to cross Sabattus Street the automobile was well within his vision and close at hand else there would have been no collision. The defendant has failed to show any manifest error upon the part of the jury in finding the defendant guilty of negligence and for that reason the motion can not be sustained.

EXCEPTIONS

Both exceptions are to the denial of the presiding Justice to give the jury certain requested instructions.

Exception 1

The request: "The operator of the electric car was not bound to stop when he saw an approaching car." This request was properly denied. *Dill et al., Admr.* v. *A. & K. Railway Co.*, 126 Me., 1, 135 A., 248, is cited as authority for the correctness of the requested instruction. In that case, the Court said: "The motorman is not bound to stop *whenever* he sees an approaching car," which is a very different statement of the law from that requested. The use of the word "whenever" clearly indicates that there are times when the operator must stop to be in the observance of due care

and other times when he need not, depending upon the particular facts and circumstances attending the situation. This request was altogether too broad. Had it been given, the jury erroneously would have received a statement of law that the operator need not stop when he saw an approaching car, regardless of the imminence of a collision and the ability of the motorman by stopping to avoid it. The following language taken from the brief of the defendant's attorneys affords justification for the denial of this request, viz.: "The motorman was not bound to stop his electric car and wait for the automobile to pass unless while under proper control it was so close that to enter across its course might in natural consequence bring about a collision." As a general rule, for application to unstated facts, this request was altogether too indefinite to be given to the jury as a proper instruction.

EXCEPTION 2

Request: "The jury is entitled to consider whether or not the automobile was being operated improperly, carelessly or negligently in order that they may determine whether or not the conduct of the driver of the automobile was such that the operator of the electric car was not bound to anticipate it or guard against it." We believe the requested instruction contains a correct statement of law. Had it been given and had the plaintiff excepted to the giving of it, he would take nothing by his exception.

While in this case, as above stated, negligence of the plaintiff, if there were such, would not have been a defense, yet, so far as it affected and bore upon the negligence of the defendant, the facts tending to show such negligence were not only admissible evidence but should have been considered by the jury. Insofar as such negligence affects and qualifies the duty of the defendant, even though in a case where lack of contributory negligence need not be proven to establish liability, such negligence is a matter for the jury's consideration. *Dill* v. *Railway Co.*, 126 Me., 1, 4, 135 A., 248.

The defendant, however, takes nothing by this exception, even though the request might well have been granted, because of other language in the charge, which has received our careful study, and

in which the substance of the request was correctly given to the jury. The defendant has not been prejudiced by the failure to give this requested instruction.

The Court stated in the charge as follows:

"Having his car so under control, the motorman is required at all times to exercise due care and diligence to avoid collisions, especially at crossings, and he must, before making a crossing, stop if necessary to avoid a collision with an approaching automobile or other vehicle *which is itself lawfully controlled.*"

Again, this language:

"The trolley car or electric car is engaged in a public service and the motorman has duties to his own passengers, who are entitled to receive speedy transportation, and he the motorman *may assume, at all events until the contrary appears, that approaching automobiles will be driven carefully.*"

Likewise:

"It is also true, as I said to you before, that the motorman had the right all the time to assume that the driver of an approaching automobile, this one, if this one was the one that he saw the lights of, *would not commit a negligent act.*"

The above quotations from the charge clearly show that the jury must have understood that, in determining negligence upon the part of the defendant, it had the right and it was its duty to consider whether or not the automobile was being operated improperly, carelessly or negligently.

The presiding Justice, having already given the substance of the request, was not bound to repeat it in the language of the attorney. The defendant takes nothing by either exception.

Motion overruled.
Exceptions dismissed.

IN RE: EARL G. HOLBROOK, PETITIONER.

Kennebec. Opinion, February 4, 1935.

PLEADING AND PRACTICE. EXCEPTIONS. CONTEMPT OF COURT. PERJURY.

Exceptions lie to the refusal of a discharge in habeas corpus proceedings.

Refusal on the part of a witness to answer legitimate questions constitutes contempt.

Evasion equivalent to refusal may be punished as contempt.

Perjury may not be so punished. Perjury is an infamous crime, of which no man may be deemed guilty until indicted, tried by a jury and found guilty.

Our statutes provide that when a party or witness, in a court of record, so testifies as to raise a reasonable presumption that he is guilty of perjury, the presiding justice may order him committed to await the action of the Grand Jury. The Court holds this procedure as sufficient to satisfy the needs of such a situation.

On exceptions by petitioner to the overruling by a Justice of the Supreme Judicial Court of petitioner's contentions in his petition for writ of habeas corpus and adjudging that his imprisonment was lawful. Exceptions sustained. Writ of habeas corpus to issue. The case fully appears in the opinion.

William H. Niehoff, for petitioner.

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

PATTANGALL, C. J. On exceptions. Petitioner, having been adjudged guilty of contempt by a Justice of the Superior Court, was committed to jail for the term of four months. While so imprisoned, he unsuccessfully sought liberation through habeas corpus proceedings and now comes to this Court for the relief denied him below.

"An application for writ of habeas corpus is addressed to the

sound discretion of the court and the writ will not be granted unless the real and substantial justice of the case demands it." *O'Malia* v. *Wentworth*, 65 Me., 129; *Sweetland, Petitioner*, 124 Me., 58, 126 A., 42. And in *Knowlton* v. *Baker*, 72 Me., 202; *Stuart* v. *Smith*, 101 Me., 397, 64 A., 663, and *Wyeth* v. *Richardson*, 76 Mass., 240, it was decided that exceptions will not lie to the discharge of a prisoner upon habeas corpus.

Whether or not exceptions lie to the refusal to discharge has never been ruled upon, or even discussed, in any opinion of this Court. Our Law Court is a statutory court. Its jurisdiction is limited and defined in Sec. 9, Chap. 91, R. S. 1930, the provisions of which have not been materially changed since 1857. Prior to that time, no specific mention of habeas corpus appeared. As the law then stood, it was in substance similar to the Vermont statute under which it was held that exceptions would lie to refusal to discharge. In re *Jesse Cooper*, 32 Vt., 252. In the 1857 revision, there was added the following clause, "questions arising on writs of habeas corpus, mandamus or certiorari where the facts are agreed or ascertained and reported by a judge." Sec. 17, Chap. 77, R. S. 1857. This provision is identical in substance with that appearing in the Massachusetts statute. We find no reported case in that state in which the court refused to consider a case coming before it on exceptions to the refusal of a discharge.

But in *Bishop, Petitioner*, 172 Mass., 35, 51 N. E., 191, the Court said, "It is doubtful if exceptions will lie in a hearing upon petition for habeas corpus or after the writ has issued in a hearing upon the question of remanding or discharging the party. In recent cases, questions of law arising on habeas corpus have been reserved, reported or adjourned into the full court by a single justice."

And in *Chambers' Case*, 221 Mass., 178, 108 N. E., 1070, "Habeas Corpus is a proceeding at law. No appeal lies from a decision or order of a justice of this court made at common law. *Channel* v. *Judge of District Court*, 213 Mass., 78, 99 N. E., 769, and cases cited. It is doubtful whether exceptions lie to rulings made at a hearing on a petition for a writ of habeas corpus. *Wyeth* v. *Richardson*, 10 Gray, 240; *King's Case*, 161 Mass., 46; *Bishop, Petitioner*, 172 Mass., 35. The usual course has been for the presid-

ing justice to reserve, report or adjourn cases into the full court where its determination ought to be had."

Fish v. *Baker*, 74 Me., 106, came to the Law Court on exceptions which were not considered because not seasonably filed, and the opinion notes that the case is not "reported by the presiding justice within R. S., Chap. 77, Sec. 13," a method of procedure provided for by the amendment referred to above.

But in *O'Malia* v. *Wentworth*, supra; *Tuttle* v. *Long*, 100 Me., 123, 60 A., 892; *Sweetland, Pet'r.*, supra; *Cote* v. *Cummings*, 126 Me., 330, 138 A., 547; and *Rafferty* v. *Hassett*, 130 Me., 241, 154 A., 646; our Court considered and decided cases on exceptions to refusal to discharge, expressing no doubt as to the procedure being correct. In view of this sustained and uniform practice, notwithstanding the amendment to the statute, we may safely assume jurisdiction and regard as established the practice of bringing forward, on exceptions, cases such as that which we have before us.

The mittimus on which petitioner was committed and held read as follows:

"WHEREAS on this 16th day of October, 1934, being the twelfth day of this October Term of said Court, in open Court and in the presence of Herbert T. Powers, the Presiding Justice thereof, and while said court was engaged in hearing and determining a cause then and there pending before it, in which said cause the said Earl G. Holbrook was then and there one of the defendants.

"and WHEREAS the said Earl G. Holbrook offered himself as a witness in said action and gave testimony therein,

"and WHEREAS the said Earl G. Holbrook by clear evidence was shown to be guilty of the crime of perjury committed while giving his testimony as aforesaid,

"NOW THEREFORE, it is ORDERED and ADJUDGED by this Court, that the said Earl G. Holbrook, by reason of said act, was and is guilty of contempt of the authority of this Court, committed in its presence on this 16th day of October, 1934.

"And it is further ORDERED that the said Earl G. Holbrook be punished for said contempt by imprisonment in the county jail in said County of Kennebec for the term of four months.

"And it is further ORDERED that a certified copy of this Order, under the seal of this Court, be process and warrant for executing this Order. . . . "

Petitioner claims that his imprisonment was unlawful for these reasons:

"FIRST: The Court was without authority to adjudge the Petitioner in contempt for the reason that he was shown to be guilty of the crime of perjury.

"SECOND: The Court was without authority to adjudge the Petitioner guilty of the crime of perjury.

"THIRD: The constitutional rights of the Petitioner were violated when the Court adjudged him guilty of the crime of perjury.

"FOURTH: The mittimus does not state what particular statements were false or upon what facts the Court adjudged the Petitioner guilty of the crime of perjury.

"FIFTH: The mittimus does not state that the Petitioner had been duly sworn or affirmed or that he gave testimony under oath.

"SIXTH: That Section 3 of Chapter 133 of the Revised Statutes of Maine abrogated any right or authority the Court may have had in punishing for contempt based upon perjury committed in the presence of the Court.

"SEVENTH: The mittimus ordered that a certified copy of the order under the seal of the Court be process and warrant for executing the order while the process upon which the Petitioner is being held in jail is but a true copy of the order attested by the Clerk."

No serious consideration need be given the fourth, fifth and seventh reasons.

The clear issue presented is whether or not a justice presiding at a *nisi prius* trial has authority to commit for contempt a party testifying in his own behalf when "by clear evidence" the witness "was shown to be guilty of perjury" while so testifying. The question is one of first impression in this jurisdiction.

"The power to commit for contempt is incident to all courts

of record." *Morrison* v. *McDonald*, 21 Me., 550. It has been by our statutes especially extended to Boards of Registration, State Assessors, Disclosure Commissioners and Department of Public Welfare.

Contempt has been generally defined as "any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice or to lessen its authority or dignity." *People* v. *Cochrane*, 307 Ill., 126, 138 N. E., 291. "Conduct which tends to bring the authority of the court and the administration of the law into disrespect or to defeat, impair or prejudice the rights of witnesses or parties to pending litigation." *Snow* v. *Hawkes*, 183 N. C., 365, 111 S. E., 621. "To obstruct the administration of justice." *U. S.* v. *Craig*, 266 Fed., 230. "Refusal of a witness to answer any question which he may lawfully be required to answer is contempt." *Rudd* v. *Darling*, 64 Vt., 456, 25 A., 479; *Dixon* v. *People*, 168 Ill., 179, 48 N. E., 108, 110. "An evasive answer constitutes contempt when it is in effect a refusal to answer." *Becker* v. *Gerlich*, 129 N. Y. S., 545.

It has been frequently held both in this country and in England that perjury may, under certain circumstances, be punished as contempt. Some authorities have assumed that it may be so punished in every case.

"Where defendant, without regard for the oath he had taken and without consideration or regard for authority, justice or the dignity of the court, gave testimony which he knew was false, he purposely demeaned himself so as to retard court proceedings and was guilty of direct contempt." *Young* v. *State* (Ind.), 154 N. E., 478.

"Wilfully false evidence in the presence of the court regarding a material fact is obstructive of justice and constitutes a criminal contempt of court." *Murray Transportation Company* v. *Dunnigan et al*, 53 Fed., (2d) 502.

"Preparing, verifying and securing the presentation of a false affidavit intended to influence the action of a court constitutes an obstruction to the administration of justice, punishable as a criminal contempt." In re *Steiner et al*, 195 Fed., Rep. 299.

"Where the perjury of petitioner is clearly demonstrated and

admitted, the court would be remiss in its duty if it failed to punish such perjury as contempt." *Backer* v. *Realty Co.*, (N. J. Eq.), 152 A., 241.

In many jurisdictions the authority of the court has been qualified and an attempt made to distinguish the cases in which perjury may properly be punished as contempt and those in which such action would be inappropriate.

"Courts will not ordinarily, when the facts are in dispute, punish perjury as contempt, not because of lack of power but because sound public policy requires that the offender should be left to the criminal law. But where the facts are admitted or demonstrated, the court would be shirking a clear duty if it did not act, and circumstances may arise which would make it the duty of the court to act even if it were obliged to weigh evidence." *Edwards* v. *Edwards*, (N. J. Eq.), 100 A., 608.

"While perjury may not of itself be punishable as contempt, it is so punishable where attended with other circumstances of obstructive tendencies inherently affecting and impeding the administration of justice." *U. S.* v. *Karns*, 27 Fed., (2d) 453.

"When the answers of a witness amount to the crime of perjury, the offender may be guilty of contempt provided there is also some obstruction of justice in addition to the necessary elements of that crime. . . . Where the court is justified in believing and does believe that a witness has obstructed the administration of justice, the witness may be adjudged in contempt, whether he has sworn falsely or not, but where the court is not justifiably convinced that the performance of its duties has been obstructed, it cannot act under the contempt power even though perjury has been committed." *Weeks* v. *McGovern*, 60 Fed., (2d) 880.

"An obstruction to the performance of judicial duty, resulting from an act done in the presence of the court is the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted, a principle which applied to the subject in hand exacts that in order to punish perjury in the presence of the court as a contempt, there must be added to the essential elements of perjury

under the general law the further element of obstruction to the court in the performance of its duty." *Blankenburg* v. *Commonwealth*, 272 Mass., 25, 172 N. E., 209.

"It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose a punishment for contempt, with the object or purpose of exacting from the witness a character of testimony which the court would deem truthful; and thus it would come to pass that a potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court, would be gravely imperiled." *Ex Parte Hudgings*, 249 U. S., 378.

In *United States* v. *Appel*, 211 Fed., 495, the Court used the following language: "If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to evade inquiry. Nevertheless, this power must not be used to punish perjury and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all."

In *State* v. *Meese* (Wis.), 229 N. W., 31, the Court stated that "While there are decided cases treating perjury without any other elements as contempt, such holding is mistaken. . . . The rule

which we consider the right one is that to constitute contempt as an act done in presence of the court, there must not only be perjury but the further element of obstruction to the court in the performance of its duty."

"A court has the right to punish as contempt manifest perjury committed in its presence where the court knows judicially and beyond doubt that the testimony is false." *Eykelboom* v. *People*, (Colo.), 206 Pac., 388.

"Merely because the court chose to believe the one side in preference to the other as to an issue of fact upon grounds of greater probability would not justify the court holding the witness who supported the losing side guilty of contempt of court. To justify such action by the court, the falsity of the witness' testimony given in open court must be a matter of judicial knowledge, not merely of opinion. In other words, it must be a patent falsehood upon which there can be no difference of opinion. If the alleged false statement is merely a matter of the court's opinion as distinguished from its knowledge, contempt proceedings will not lie." *Hegelaw* v. *State*, (Ohio App.), 155 N. E., 620.

In *People* v. *Stone*, 181 (Ill. App.), 475, the court, after stating that it was essential to a summary proceeding for direct contempt that the court act upon matters of which it had judicial cognizance, added "In the instant case the Court practically converted itself into a tribunal to try a charge of perjury in utter disregard of the constitutional guarantees afforded one charged with that crime."

Other courts have taken the view that in no event may perjury be regarded as contempt and so punished. In *State* v. *Lazarus*, 37 La., 314, the Court said, "Courts have inherent power to punish for contempt and our code of practice has expressly conferred it, but a judge cannot assume or decide that a witness has sworn untruthfully and punish him for the perjury as a contempt.

"Refusing to answer a question that a witness is bound to answer is contumacy and is punishable as a contempt. Answering such question untruthfully is perjury, the punishment of which is remitted to the regular action of the criminal law through the established forms of criminal proceedings, i. e., by indictment or information followed by a trial.

"An act may be at once a contempt of court and a violation of the criminal law, for example, an assault and battery committed in open court would be punishable as a contempt and also by prosecution. The overt physical, visible act distinguishes it from perjury.

"The law gives to every judge the power to punish for contempt. It is necessary for the orderly police of the court, but to decide that the testimony of a witness is false and to inflict summary punishment upon him without trial is repugnant to the orderly administration of justice and subversive of our idea of right."

A like view is expressed in *Lerch's Contested Election*, 21 Penna., District 1112, in which the Court said: "The proposition that a witness can be punished for contempt because the party calling him believes that the witness was guilty of perjury, and is able to prove other related facts which might lead to a fair conclusion that perjury had been committed, is a novel one. It is in effect, that if the judge believes that a witness is guilty of perjury, he can, if the perjury is committed in open court, fine and imprison him. . . . Perjury is a substantive criminal offence, and has always been triable by indictment by the grand jury and by a petit jury. Any proposition that involves a denial of trial by jury, a sacred constitutional right, should have most serious consideration. . . .

"Witnesses are expected to tell 'the truth, the whole truth, and nothing but the truth.' When they fail to fulfill this obligation, they can be indicted for perjury, and if twelve of their peers decide that they have sworn falsely, they are sentenced by the court. This is the well established and well understood course of procedure.

"In both civil and criminal cases, it frequently happens that one witness will be contradicted at all points by half a dozen witnesses, and yet a jury must decide which side is telling the truth. In civil cases, a plaintiff may be contradicted in most material points by one or more or his own witnesses, and yet the court can not non-suit him. A jury must decide who is telling the truth. . . ."

Innumerable citations might be added, but these suffice to illustrate the various positions taken by the courts concerning the

question under discussion. They may be divided into four groups, the first holding that perjury always constitutes contempt and may be punished as such; the second, that certain other definite factors must accompany perjury in order to make it a basis for contempt charges; the third, that it is only when the presiding justice has judicial notice of the falsity of the testimony that he may regard it as contempt and inflict summary punishment; and the fourth, that a single justice is entirely without authority to make a finding that perjury has been committed in any case under any circumstances and, on the basis of such a finding, punish for contempt.

The view taken by the first group is not generally accepted. Opinions sustaining that of the third are not impressive and appear to confuse judicial knowledge with personal knowledge on the part of the presiding justice. That of the second is unquestionably the majority view; but we believe that the result reached by the fourth group better accords with sound reasoning, good public policy and the orderly administration of law.

We agree that refusal on the part of a witness to answer legitimate questions or to indulge in evasion equivalent to such refusal constitutes contempt and may be punished as such. It is within the power of the witness to promptly purge himself of such contempt. We also recognize that one who disturbs the peace of the courtroom may be guilty of conduct for which he might be held criminally and also be guilty of contempt and be punished therefor. We do not, however, consider that these suggestions affect the situation presented by the instant case.

It is argued that the punishment awarded here is not for committing the crime but for obstructing justice in that particular manner. But no ingenuity of reasoning can disguise the fact that the proceeding rests upon a finding that the party punished has committed perjury.

As has been stated, authority to punish for contempt rests inherently in every court of record and by statute has been conferred upon other agencies of government. To further extend that authority to a point where its exercise includes the right to brand as an infamous criminal a witness who fails to impress a presiding justice, commissioner, or administrative board with the truth of

his testimony is carrying the exercise of judicial power beyond the bounds of safety and wisdom.

Perjury is an abhorrent crime. We are acutely aware that it is too often committed and too seldom punished. It constitutes a constant, ever-present menace to justice and threatens the safety and security of the person and property of citizens compelled to defend or assert their rights in legal proceedings. But no man should be adjudged guilty of perjury arbitrarily or by any means other than the regular method provided for the determination of that offence.

The Constitution of Maine, Section 6, Article 1, guarantees to every citizen accused of crime "a speedy, public and impartial trial by a jury of the vicinity"; and by Section 7 of the same Article provides that "no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury," reiterating like provisions in the Federal Constitution.

Those safeguards of personal liberty are neither to be disregarded nor evaded. They are not designed as a shield to crime but as a protection to innocence. The experience of generations has demonstrated their necessity and value. They are an integral part of the law of the land and must be respected. In our anxiety to sustain the dignity of courts, we should not ignore the restraints of law. Our Legislature has indicated a method by which the desired purpose may be accomplished without infringing upon constitutional rights.

Sec. 3, Chap. 133, R. S. 1930, provides that "when a witness or a party legally sworn and examined or making affidavit in a court of record testifies in such a manner as to raise a reasonable presumption that he is guilty of perjury, the Court may immediately order him committed to prison or take his recognizance with sureties for his appearance to answer to a charge of perjury and may bind over any witnesses present to appear at the proper court to prove such charge, order the detention so long as necessary of any papers or documents produced and deemed necessary in the presentation of such charge, and cause notice of such proceedings to be given to the State's attorney for the same county."

This statute outlines a course of procedure which the Legislature apparently regarded, and which we regard, as sufficient protection against the evil results likely to flow from unrebuked perjury, while still reserving to the suspected perjurer the legal protection to which he is entitled. Its wise provisions might, with good effect, be more frequently invoked.

To go farther and determine the fact of perjury without indictment or trial by jury and impose the penalty or imprisonment, theoretically for contempt but in reality for perjury, is, we believe, nothwithstanding the contrary judgment of many courts of high standing, an unsafe and unwarranted practice. One suffering confinement under such a sentence is illegally restrained of his liberty.

Exceptions sustained.
Writ of habeas corpus
to issue.

JOHN W. CHAPLIN, ADMINISTRATOR,

APPELLANT FROM DECREE OF JUDGE OF PROBATE.

Androscoggin. Opinion, February 7, 1935.

PROBATE COURTS. TRUSTEES. PLEADING AND PRACTICE. EXCEPTIONS.

Findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. When the law invests him with the power to exercise discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his findings may be challenged by exceptions.

In the case at bar, the court finds no evidence which would support the decree.

The Court further finds that the judgment of the trustee Andrew M. Chaplin was blinded by a sense of personal grievance and that he failed to realize how ill-advised his action was in refusing the sale of the securities requested by his co-trustee, and that by it he was jeopardizing the rights of the beneficiaries of the trust which he was appointed to assist in administering. Therefore it would be unjust to charge the expense of the litigation to the estate, and the Probate

Court was justified in denying the charge of commissions other than as allowed by it. The parties must be restored to the position in which they were placed by the decree of the Probate Court.

On exceptions by appellee. To the decree of the Supreme Court of Probate allowing the account of Andrew M. Chaplin trustee under the will of Mary E. Bradford, the appellee seasonably excepted. Exceptions sustained. Case remanded for further action. The case fully appears in the opinion.

Ralph W. Crockett, for John W. Chaplin.

S. Merritt Farnum, for Trustees and estate of Beneficiaries.

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

PATTANGALL, C. J. Case comes forward on exceptions to a decree of the Supreme Court of Probate, allowing an account of plaintiff's intestate, Andrew M. Chaplin, as a trustee under the will of Mary E. Bradford, in which he and Grace L. Jordan were named co-trustees for Grace L. Jordan, Margaret B. Jordan, Ada F. Jordan and Elizabeth Jordan.

The account was first presented to the Probate Court for Androscoggin County and the following items were disallowed.

Ralph W. Crockett, Legal Services and Disbursements	$529.19
Andrew M. Chaplin, Disbursements:—	
Witness Fee, Charles L. Conant	2.12
Service for subpoena	1.87
Register of Probate, Appeal papers	15.00
Clerk of Courts, Rule of Reference	.50
Witness Fee, Charles L. Conant	1.62
Service of subpoena	1.95
W. H. Cornforth, Copies for Law Court	161.00
W. H. Cornforth, Copies for Law Court	19.00
Clerk of Courts, Attesting copies	1.90

A further charge of $327.05, commission at five per cent on $7,441.07, as compensation for services as trustee was reduced to $5.25.

From the disallowance of the items stated and the reduction of the charge for compensation, appeal was taken to the Superior Court, sitting as the Supreme Court of Probate, resulting in a reversal of the decree below and the allowance of the claim in full, to which finding exceptions were seasonably taken and duly allowed.

The principal issue raised by the exceptions involved the question of good faith on the part of Andrew M. Chaplin in connection with certain litigation which arose because of a difference of opinion between him and his co-trustee concerning the sale of eighty one-fourth shares of stock in Bradford, Conant & Company, held by them under the trust. Mrs. Jordan filed a petition in the Probate Court, asking that she be authorized to sell the stock and re-invest the proceeds; and Mr. Chaplin opposed the granting of the petition. After hearing, the Judge of Probate ordered the sale of the stock. Appeal was taken to the Supreme Court of Probate and there dismissed, the decree below being affirmed with costs. Exceptions brought the case to the Law Court, which finally disposed of it by sustaining the findings below. The entire amount in dispute, excepting the charge for commissions, was incurred in this litigation, the record of which was before the Court in the instant proceedings.

The decree presented here contains a specific finding of Mr. Chaplin's good faith in pursuing the course outlined above, concluding as follows: "I decide as a matter of law that the accountant is aggrieved by the decree of the Judge of Probate made February 26, 1934 as set forth in his Appeal and Reasons of Appeal. This decision in law is based on my finding of fact that Andrew M. Chaplin acted in good faith and that his trusteeship did not cause loss to the estate, but on the contrary a financial gain."

It is settled law in this state that the findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. When the law invests him with the power to exercise discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his findings may be challenged by exceptions. *Eacott, Executor,* Appellant, 95 Me., 522,

50 A., 708; *Palmer's Appeal,* 110 Me., 441, 86 A., 919; *Gower,* Appellant, 113 Me., 156, 93 A., 64; *Cotting,* Appellant v. *Tilton,* 118 Me., 91, 106 A., 113.

The only ground, therefore, on which these exceptions may properly be sustained is that the case is devoid of evidence supporting the decree. While we hesitate to reach that conclusion, we have searched the record in vain to find any such evidence. It appears that all through the litigation upon which the claim is based, the good faith of appellant's intestate was in opinion. As is related in the decree before us, that issue was raised twice in the Probate Court, once in the Supreme Court of Probate prior to the hearing in the instant case, and was argued in the Law Court.

In the findings of fact before us, these previous hearings are referred to and the following conclusion drawn from them.

> "On the question of good faith of Andrew M. Chaplin the record shows that Probate Judge Berman said:
>
> " 'Subsequent to this annual meeting Mr. Chaplin, having no active and direct interest with the management of the business of the corporation, sought entirely in good faith to dispose of the control of the corporation.'
>
> "Judge Manser, deciding the case on appeal, said:
>
> " 'I find that Andrew M. Chaplin has not honestly and faithfully exercised his discretion and that he has abused his trust in refusing to assent to the proposed sale.'
>
> "The opinion of the Law Court was: (131 Me., 452)
>
> " '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.'
>
> "Thus we are faced by the interesting situation that, from the same evidence, Judge Berman believed that Mr. Chaplin acted in good faith; Justice Manser believed that he acted in bad faith; the Law Court believed he acted in good faith; and Judge Lancaster believed he acted in bad faith.
>
> "Where such eminent authorities disagree, I feel constrained to accept the more charitable view, especially as it is the view of no less a body than the Justices of the Law Court."

To no other evidence is specific reference made. Apparently the decree presented here was based on the understanding that Judge Berman and the Law Court had affirmatively determined that Mr. Chaplin acted in good faith in opposing the sale of the stock as proposed by his co-trustee. The quotation from Judge Berman's decree seems to bear out this theory so far as he is concerned. But an examination of the record discloses that his final conclusion was to the contrary, as indicated by the following:

> "While it is true that the Will grants the trustees complete discretion in handling of the trust property, and while it is further true that an equity court will not as a rule substitute its own judgment for the discretion of the trustees, yet I can not conclude that the equity powers of this Court must stand idly by and permit the rights of beneficiaries in trust estates to be jeopardized, where, as here, because of personal grievances entirely disassociated from the management of the trust estate, trustees can not agree upon a certain course of conduct. . . ."

So far as the Law Court is concerned, it gave no consideration to the issue of good faith, as the opinion in Chaplin, Appellant, supra, distinctly states.

The correct conclusion from the record of the former hearings is that Judge Berman found that Mr. Chaplin's conduct jeopardized the rights of the beneficiaries and was motivated by personal grievances; that Mr. Justice Manser and Judge Lancaster agreed with him; and that the Law Court approved the result reached by Mr. Justice Manser without discussion of that phase of the case.

We are forced to the conclusion that the court below misapprehended the meaning, force and effect of the evidence upon which it relied.

A study of the record discloses certain simple facts about which there can be no dispute, which absolutely negative the finding that the litigation, in which the expense now sought to be recovering was incurred, resulted in financial gain to the estate. In 1931, Grace L. Jordan received an offer of $13,500 for the Conant stock owned by the trust estate, which she accepted, so far as she

had authority to do so. Mr. Chaplin refused to join in making the sale. On her petition to Probate Court, which Mr. Chaplin opposed, permission was granted to make it. Appeal was entered and the vexatious, expensive and unnecessary litigation to which reference has been made followed. As a result, after long delay, the stock was sold for exactly the amount agreed to by Grace L. Jordan, some $5,475 above the appraisal value. It cannot be said that the litigation benefited the estate.

We do not think it necessary to determine here that Mr. Chaplin acted in bad faith in pursuing the course which he followed. We are rather inclined to the view that his judgment was blinded by a sense of personal grievance and that he failed to realize how ill-advised his action was, and that by it he was jeopardizing the rights of the beneficiaries of the trust which he was appointed to assist in administering. But in that view of the case, it would be unjust to charge the expense of the litigation to the estate and, under all of the circumstances of the case, the Probate Court was justified in denying the charge of commissions other than as allowed by it.

Notwithstanding the respect with which this Court has always regarded decrees emanating from the Supreme Court of Probate and the reluctance to disturb them, which has so frequently and emphatically been stated in our opinions, the case admits no action on our part other than to restore the parties to the position in which they were placed by the decree of the Probate Court.

Exceptions sustained.
Case remanded for
further action.

STATE OF MAINE *vs.* MAX COHEN.

Cumberland. Opinion, February 11, 1935.

ITINERANT VENDORS. R. S., CHAPTER 46. CONSTITUTIONAL LAW.

WORDS AND PHRASES.

The State may require a license, and the payment of a fee therefor from peddlers selling goods which are within the State, and of the mass of property therein, although brought from another state.

"Wholesale" and "retail" are relative terms; neither finds definition in the Maine statute.

As a general rule, wholesalers deal only with persons who buy to sell again, while retailers deal with consumers. The character, not of buying, but of selling, is determinative. The primary and usual meaning of the word "wholesale" is the sale of goods in gross to retailers, who sell to consumers.

The State may, undoubtedly, impose taxes in the form of licenses, upon different occupations within its limits, but such power must be validly exercised.

The "privileges and immunities" provided by the Fourteenth Amendment to the Constitution of the United States are those that belong to citizens of the United States, as distinguished from citizens of the State—those that arise from the constitution and laws of the United States and not those that spring from other sources.

The language of the Fourteenth Amendment contains a necessary implication of a positive right—the right to an equality before every law, the right of the citizen to be free in any state, from unjust discrimination between him and other persons, as to legal rights or duties. The phraseology does not prevent reasonable classification so long as all within a class are treated alike. It does prohibit arbitrary discrimination between persons, or fixed classes of persons, such as that based on state citizenship.

A statute imposing a license fee on peddlers of commodities shipped from or produced at a place outside the jurisdiction imposing the fee, and requiring no license for the peddling of like goods originating within that jurisdiction, is discriminating and invalid.

Sales by hawkers and peddlers to barbers and beauticians in larger quantities than ordinarily purchased by individual users are not at "wholesale" under Chapter 46, R. S.

The provisions of Revised Statutes, Chapter 46, entitled "Itinerant Vendors," but relating both to such and peddlers, is not a valid exercise of police power, but a positive discrimination in favor of Maine residents, intended also to apply, in reciprocal indulgence, to residents of other states.

The statute does not rest on actual differences. It does not define a new class on sound reasons for reclassification, but makes a distinction between members of a class. It is incompatible with the occupation under equal regulation clause of the Constitution of the State of Maine. It is at variance with the privileges and immunities clause of the Constitution of the United States. It is opposed to the equal protection clause.

Nullity pervades the entire enactment, exception being integral of, and affecting the whole.

On report on an agreed statement of facts. Respondent charged with the violation of the Itinerant Vendors Law so-called, was found guilty in the Portland Municipal Court. On appeal to the Superior Court the case was reported on an agreed statement of facts to the Law Court for its determination. In accordance with the stipulation of the report, the mandate directs the entry of *nolle prosequi.* The case fully appears in the opinion.

Walter M. Tapley, Jr., County Attorney.

Albert Knudsen, Assistant County Attorney for the State.

Harry S. Judelshon, for respondent.

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

DUNN, J. The respondent was prosecuted in the Municipal Court for Portland, and tried and convicted, on a complaint charging a violation of provisions of Revised Statutes, Chapter 46, entitled "Itinerant Vendors," but relating both to such and peddlers. The statute, in its relation to one of the questions the record presents, makes it unlawful for any person to engage in peddling merchandise, without depositing with the Secretary of State five hundred dollars, liable to attachment by creditors, as well as in security for fines and penalties, and taking out and paying for

State and local licenses, but, in Section 26, exempts, with certain others, "...peddlers from vehicles, any of whom are bona fide residents of this state or of any other state or country whose laws impose no burden upon citizens of this state engaged in like business within their borders". The quoted words were enacted by way of amendment. 1919 Laws, Chap. 129. Other terms of the statute will be stated when important for purpose.

From the judgment and sentence of the Municipal Court, respondent entered an appeal to the Superior Court. In that court, the attorneys for the prosecution and defense agreed on a statement of facts. The judge thereupon reported the case for the Law Court to determine: (1) Whether the agreed facts are sufficient to show the commission of the offense charged in the complaint; (2) whether the statute on which the proceeding is based is constitutional. Such procedure is supported by precedent. *State* v. *Montgomery*, 92 Me., 433, 43 A., 13.

The complaint lays in particular the violation of the eleventh section of the statute chapter, which provides, in substance:

Any itinerant vendor who, not having first procured licenses to do so, exposes for sale, or sells, publicly or privately, any goods, wares or merchandise, without State and local licenses, is guilty of a misdemeanor, punishable by fine or imprisonment or both.

Section fourteen exacts the deposit of mention a short space back. Additionally, this section commands the payment of one hundred dollars, as a fee for a State license, good for one year.

Sections sixteen and seventeen relate to local licenses, fees therefor to equal taxation on property of like value.

Whether the respondent had made a deposit of the prescribed amount of money, the record does not state.

The salient facts are quickly related. The respondent lives in Boston, Massachusetts, where he has a store and salesrooms. He buys and sells lotions and salves, such as barbers apply to the skin, on shaving and trimming the beard, and cutting and dressing the hair, of their patrons. Beauticians, as it is said, use the same preparations and ointments in their occupation. Besides keeping his store, respondent goes from town to town in his home state, as a solicitant vendor of the commodities of his traffic, his equipment consisting of an automobile, from which he sells and

delivers to barbers and beauty shops the identical goods he carries with him. In doing this, he is, by statutory definition in Massachusetts, practicing the trade, or plying the vocation of a peddler. Mass. Gen. Laws, Chap. 101, Sec. 13.

Massachusetts statutes distinguish "transient vendors" from "hawkers and peddlers". The distinction is determined by the manner in which the selling of goods is conducted. Transient business means any exhibition and sale of goods in any tent, booth, building, or other structure not kept open a defined minimum period in each year. The transient merchant is thus contrasted with the permanent merchant. Hawkers and peddlers are persons carrying any goods, wares or merchandise about the country, either on foot or from any vehicle, seeking customers. Mass. Gen. Laws, supra.

The Maine statute, in the latest revision, (R. S., supra), groups as "itinerant vendors," those doing a temporary or transient business in a building or structure, or at retail from a car, wagon, or other conveyance, steamer or vessel. As originally passed into a law, the statute comprised only transient business in a building or structure. 1893 Laws, Chap. 259. Selling goods, wares or merchandise from a car, steamer or vessel was added in 1897, Chapter 210. The fact that, in 1919, (1919 Laws, supra), the Legislature interpolated after the word "car," "wagon, or other conveyance," as other types of vehicles, doubtless explains the somewhat awkward and inconsistent inclusion of peddlers in the inhibition of what at first was purely regulatory of itinerant vending.

However, the statute, in its ultimate phrase, correctly designates peddlers. "The leading primary idea of a . . . pedler," says Chief Justice Shaw, in *Com.* v. *Ober*, 12 Cush., 493, "is that of an itinerant or traveling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business."

That the State may require a license, and the payment of a fee therefor, from peddlers selling goods which are within the State, and of the mass of property therein, although brought from another State, is settled law. 12 C. J., 105; *State* v. *Montgomery*, 94

Me., 192, 47 A., 165; *Howe Machine Co.* v. *Gage*, 100 U. S., 676, 25 Law ed., 754; *Emert* v. *Missouri*, 156 U. S., 296, 39 Law ed., 430; *Kehrer* v. *Stewart*, 197 U. S., 60, 49 Law ed., 663; *Banker Bros. Co.* v. *Pennsylvania*, 222 U. S., 210, 56 Law ed., 168; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S., 304, 58 Law ed., 974.

Defense here is, before anything else, that even though the respondent peddled in Maine, yet he transgressed no statute, but was indeed protected by reciprocal provision in the very statute, since Maine citizens might peddle in Massachusetts without being licensed.

The prescription of the Massachusetts statute is not, as we read it, comprehensive, in exemption, of peddling the species of merchandise which the respondent peddled in Maine.

It is next urged that as the packages or containers of the salves and lotions were of a size such as not ordinarily purchased by private individuals, any sale the respondent made from his "conveyance" was at wholesale, and not at retail.

"Wholesale" and "retail" are relative terms; neither finds definition in the Maine statute.

As a general rule, wholesalers deal only with persons who buy to sell again, while retailers deal with consumers. *State* v. *Scampini*, 77 Vt., 92, 59 A., 201. Selling by wholesale implies the selling of goods in unbroken pieces or parcels, as by the barrel, pipe, cask, etc., or in a number of such pieces or parcels. *Gorsuth* v. *Butterfield*, 2 Wis., 237, 243. The character, not of buying, but of selling, is determinative. *Great Atlantic, etc., Co.* v. *Cream of Wheat Co.*, 227 Fed., 46, 47. The primary and usual meaning of the word "wholesale" is the sale of goods in gross to retailers, who sell to consumers. 30 *Am. & Eng. Encyc. L.* (2nd ed.), 518; Re *Metz Bros. Brewing Co.*, (Nebr.) 129 N. W., 443, 32 L. R. A. (N. S.), 622; *State* v. *Spence*, (La.) 53 So., 596. The Massachusetts court apparently turns decision on the point of dealing with goods in large quantities, by the package or piece. *Com.* v. *Greenwood*, 205 Mass., 124, 91 N. E., 141. Florida holds the wholesale dealer one who sells in large quantities in difference from one who sells in small lots at retail. *Florida Packing etc., Co.* v. *Carney*, 41 So., 190, citing *Goodwin* v. *Clark*, 65 Me., 280.

There would be no useful purpose to be served by pursuing judicial definitions further. Each necessarily has reference to a just use of language concerning the circumstances of the case before the court.

It is easy to conceive of a purchaser who is neither a "dealer" nor a "consumer". For instance, a barber is, in general acceptation, not engaged in a mercantile pursuit. *Cleve* v. *Mazzoni*, (Ky.) 45 S. W., 88. A barber labors manually; he is a mechanic. *Terry* v. *McDaniel*, (Tenn.) 53 S. W., 732, 733, 46 L. R. A., 559. Barbers buy economic goods for use in their business. They may, at odd times, make package sales, but they buy, as a usual thing, not to sell again, but to utilize. Selling, with them, is incidental, as an accommodation. We take judicial notice of that.

As previously noted, the respondent sold wares to barbers and beauticians, in quantities larger than ordinarily purchased by individual users. That he sold in the same package, or by the gross, or dozen, or otherwise, as he himself had bought, is not shown. On the contrary, inference is warranted, fairly, that respondent went in quest of buyers to whom he vended on their peculiar emergencies. The need of one might have been small, that of another relatively larger. But, all said and done, he was going from shop to shop, carrying for sale, and exposing to sale, and selling and delivering, the goods, wares and merchandise he carried. He was a sort of traveling jobber or middleman, selling, from opened packages, still smaller ones, adapted to temporary wants of his customers.

Such sales cannot be found to be at wholesale, within the meaning of the statute.

If, occasionally, in some particular transaction, the term "wholesale" loses somewhat of its primal significance, it manifestly does not in the present case.

To come now to still another question. The statute is assailed as violative of constitutional limitations and restraints, in abridging fundamental personal rights and privileges.

The State may, undoubtedly, impose taxes in the form of licenses, upon different occupations within its limits, but such power must be validly exercised. *State* v. *Bornstein*, 107 Me., 260, 78 A., 281.

Under our dual systems of government, federal and state, each in its own sphere, there are two citizens, and two loyalties. The United States is composed of the States; the States are constituted of the citizens of the United States, who also are citizens of the States.

The Constitution of the State of Maine, in Article 1, Section 1, affirmatively guarantees to all persons an equality of right to pursue any lawful occupation under equal legal regulation and protection. That resident and nonresident, citizen and alien, stand, respecting unreasonable discrimination, on a parity of footing, a decision of our own court declares. *State* v. *Montgomery*, supra, 94 Me., 192, 147 A., 165.

The Constitution of the United States is the supreme organic law. A State statute repugnant to the Federal Constitution is void.

Article 4, Section 2, of the Federal Constitution, provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". That is, a citizen of one State doing business in another State cannot be denied the privileges and immunities enjoyed by its citizens. The State cannot legislate against him, except constitutionally. The intent was that the citizen of one State should not be an alien in another. No State may deprive the citizen of any other State of any privilege or immunity generally possessed by its own citizens.

The Fourteenth Amendment to the Constitution was proposed by Congress June 16, 1866; it was proclaimed adopted July 21, 1868. This amendment has been styled "the great anchorage for the rights which essentially belong to a citizenship in a free government". A provision is: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

This was held to signify, as the language imports, the privileges and immunities of national citizenship, and not to include those belonging to the citizen of the State. The "privileges and immunities" protected are only those that belong to citizens of the United States, as distinguished from citizens of the State—those that arise from the constitution and laws of the United States and not those that spring from other sources. *Slaughter-House Cases*, 16 Wall., 36, 21 Law ed., 394; McPherson v. Blacker, 146 U. S., 1,

36 Law ed., 869; *Duncan* v. *Missouri*, 152 U. S., 377, 38 Law ed., 485; *Twining* v. *New Jersey*, 211 U. S., 78, 53 Law ed., 97; *Maxwell* v. *Bugbee*, 250 U. S., 525, 63 Law ed., 1124; *Prudential Ins. Co.* v. *Cheek*, 259 U. S., 530, 66 Law ed., 1044; *Hamilton* v. *University of California*, 293 U. S., —, 79 Law ed., —. (Adv. p. 159). The opinion upon the matters actually involved and maintained by the judgment in the *Slaughter-House Cases*, supra, has never been doubted or overruled. *Maxwell* v. *Dow*, 176 U. S., 581, 44 Law ed., 597.

Putting the first clause of Section 2 of Article 4, and the quoted clause from the Fourteenth Amendment, together, the State is forbidden to abridge the privileges and immunities of (1) citizens of all other States, and (2) citizens of the United States. No governmental department of the State has the right to ignore any rights which the Federal Constitution thus assures citizens.

The Fourteenth Amendment also prohibits a State denying "to any person within its jurisdiction the equal protection of the laws". The words seem so plain as to exclude the need of refinements in interpretation. Though prohibitory, they contain a necessary implication of a positive right—the right to an equality before every law, the right of the citizen to be free in any State, from unjust discrimination between him and other persons, as to legal rights or duties. Such is the plain meaning of the amendment. *Strauder* v. *West Virginia*, 100 U. S., 303, 25 Law ed., 664.

This phraseology does not prevent reasonable classification so long as all within a class are treated alike. *State* v. *Bohemier*, 96 Me., 257, 52 A., 643. It does prohibit arbitrary discrimination between persons, or fixed classes of persons, such as that based on State citizenship. *Pearson* v. *City of Portland*, 69 Me., 278. See, too, as announcing the same principle, *State* v. *Furbush*, 72 Me., 493.

A statute which forbade peddling except under a license, and which provided that citizens might be thus licensed, and that aliens should not be, was held an unconstitutional discrimination. *State* v. *Montgomery*, supra, (94 Me., 192, 47 A., 165).

In 1901, the Maine Legislature enacted: "An Act relating to Hawkers and Peddlers," 1901 Laws, Chap. 277. The act provided for licenses and fees, and contained this clause: "but any resident

of a town having a place of business therein, owning and paying taxes to the amount of twenty-five dollars on his stock in trade, can peddle said goods in his own town without paying any license fee whatever."

That statute was held to offend the provision of the Fourteenth Amendment, in denying the equal protection of the laws, and to clash with the equal rights to acquire property and pursue happiness guaranteed by the State Constitution, since the differentiation of persons who were, from those who were not, to pay license fees, was not a discrimination based upon the inherent differences in the nature of the business carried on, or the kind of property dealt in. *State* v. *Mitchell*, 97 Me., 66, 53 A., 887.

A statute of Maryland which required all traders residing within the State to procure licenses at certain rates, and subjecting to indictment and penalty persons not residents of the State, who, without having been licensed at a higher rate, should sell, or offer for sale, by card, sample, or trade list, in the City of Baltimore, any goods, wares or merchandise whatever, save agricultural products and articles manufactured in the State, was held to be unconstitutional because it imposed a discriminatory tax upon the residents of other States. *Ward* v. *Maryland*, 79 U. S., 418, 20 Law ed., 449.

In *Webber* v. *Virginia*, 103 U. S., 344, 26 Law ed., 565, the statute called in question was held unconstitutional for the reason that it made "a clear discrimination in favor of home manufacturers, and against the manufacturers of other States."

A statute imposing a license fee on peddlers of commodities shipped from or produced at a place outside the jurisdiction imposing the fee and requiring no license for the peddling of like goods originating within that jurisdiction, is discriminating and invalid. *Welton* v. *Missouri*, 91 U. S., 275, 23 Law ed., 347. Such is the hinge of decision in our own case of *State* v. *Bornstein*, supra.

"The right of the state to impose a license tax upon peddlers, where it operates uniformly upon all citizens, and does not discriminate in favor of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police powers, . . . has been uniformly maintained; but where any injurious discrimination is discovered in favor of the resident as

against the nonresident, . . . the state laws are declared to be void, as repugnant to the Constitution of the United States." *Com.* v. *Myer*, (Va.) 23 S. E., 915, 31 L. R. A., 379.

So much for statutes which have been declared void for transgression of constitutional assurances and guarantees. The decided cases clearly determine that fundamental rights of citizenship are not mere abstractions.

It seems desirable to remark that there are exceptions to the general rule that a statute discriminatory against nonresidents is unconstitutional and void. Licenses to sell intoxicating liquors are justified under the police power for the protection of the public morals. *Crowley* v. *Christensen*, 137 U. S., 86, 34 Law ed., 620. Hunting and fishing licenses, on the ground that game, fish, and fur-bearing animals, not reduced to possession, are the common property of the citizens of the State. *Lacoste* v. *Department of Conservation*, 263 U. S., 545, 68 Law ed., 437. The manifest purpose of reciprocity provision in the inheritance tax statute respecting the transfer of intangible personal property owned by a nonresident is to avoid the hardship of double taxation on the same inheritance by different States. The devolution of property from the dead to the living is the creature of the law. *State* v. *Hamlin*, 86 Me., 495, 30 A., 76. Ownership of the highway permits, in most cases, control and regulation of road facilities.

None of these exceptions are, however, of relevancy here.

It evidently was the intent of the Legislature that, in any event, residents of Maine should not pay license fees; nor should residents of any other States "whose laws impose no burden" on Maine residents peddling there. The statute is specific as to Maine residents; it is general and restricted as to residents of other States.

The respondent is a citizen of Massachusetts. The statutes of his State require that peddlers, wheresoever resident, there peddling commodities or wares, such as those respondent peddled in Maine, shall pay fees and obtain licenses. He is a person within the jurisdiction of the State of Maine, where, in constitutional right, he may pursue a business occupation, and acquire and enjoy property, on legal equality with Maine citizens. The statute under examination affects his rights. He, therefore, having an

interest in defeating the statute, may contest the constitutionality thereof. *Cooley, Const. Lim.* (7th ed.), 232; *State* v. *Scampini,* supra; *Clark* v. *Kansas City,* 176 U. S., 114, 44 Law ed., 392.

Sufficient authorities have been cited to show that the statute under consideration is not a valid exercise of police power, but a positive discrimination in favor of Maine residents, intended also to apply, in reciprocal indulgence, to residents of other States. The statute does not rest on actual differences. It does not define a new class on sound reasons for reclassification, but makes a distinction between members of a class. It is incompatible with the occupation under equal regulation clause of the Constitution of the State of Maine. *State* v. *Mitchell,* supra. It is at variance with the privileges and immunities clause of the Constitution of the United States. *State* v. *Montgomery,* supra, (94 Me., 192, 47 A., 165). It is opposed to the equal protection clause. *State* v. *Mitchell,* supra.

Nullity pervades the entire enactment, exception being integral of, and affecting the whole. To hold that only the provision as to exemption is void, and the rest of the statute valid, so that, notwithstanding unmistakable legislative expression otherwise, peddlers must secure licenses and pay fees, would be to stipulate the doing of that which the Legislature has said should not be done. To say this is not so much to say it out of the thought of this writer, as out of that which has made that thought possible. *State* v. *Mitchell,* supra.

In accordance with the stipulation of the report, mandate will direct the entry of *nolle prosequi.*

So ordered.

CORA M. HANSCOM *vs.* HAROLD H. BOURNE ET AL.

York. Opinion, February 13, 1935.

EQUITY. PLEADING AND PRACTICE. BILLS AND NOTES.

BONA FIDE PURCHASER.

One claiming equitable title only, and alleging that by fraud another is in possession of real estate so claimed, may be heard in equity on her bill.

While it is settled in this State that the acceptance of a negotiable promissory note, in the absence of any testimony or circumstance to the contrary, is presumed to be payment of the indebtedness for which it is given, it is equally well settled that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties; and, as a general rule, this presumption will be overcome by the facts that the acceptance of a note in payment would deprive the creditor taking the note of the substantial benefit of some security.

The presumption is overcome when the court is asked to find that officials of a bank, trustees of the funds they have invested on security, would knowingly bar the bank from looking to security under evidence such as furnished in the case at bar.

To constitute one a bona fide purchaser for value without notice, within the meaning of the rule that such a purchaser takes the property free of the trust, he must pay some consideration and be without actual or constructive notice of the violation of the trust.

In the case at bar, the evidence disclosed that the bank officials did not intend by the acceptance of the new note to release the security they held in the prior notes.

Mrs. Winn, the purchaser of the property, had no notice of any violation of trust or of any irregularity in the proceedings, and was, therefore, a bona fide purchaser for value without notice taking the property free from any trust.

On appeal. A bill in equity brought by one claiming an equitable title only, to certain land. The sitting Justice sustained the bill. Defendants appealed. Appeal sustained. Decree below reversed.

Case remanded for decree in accordance with opinion. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

John P. Deering, for defendants.

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

BARNES, J. On appeal from decree of justice below. This action, brought by bill in equity was tried, and argued before this Court, as an action to remove a cloud upon title to a village lot.

It is claimed and conceded that on September 27, 1924, plaintiff was the owner of the lot in fee simple.

She was then, and is, the wife of defendant Hanscom, and, in order to aid her husband and defendant Williams in business ventures, on that date gave a mortgage, with power of sale to defendant Bourne, in trust, to guarantee payment to the Ocean National Bank, defendant, in language as follows: "Whereas one Lucius R. Williams and Ray P. Hanscom, my husband, have engaged in the operation and management of a summer hotel known as the Passaconaway Inn, at York Cliffs, Maine, in the Town of York, and to finance the said corporation of said hotel, will borrow from the Ocean National Bank of Kennebunk, Maine, the sum of Six Thousand Dollars, between the date of this instrument and the fifteenth day of October, nineteen hundred and twenty-five, now then this conveyance is made in trust to said Bourne to hold for the benefit of said Ocean National Bank to secure the payment of all the various notes given by said Ray P. Hanscom and Lucius R. Williams, or the Ogunquit Hotel Company, Incorporated, for said purpose, between now and the fifteenth day of October, 1925. If said notes are all fully paid with interest due thereon by the 15th day of October, 1925, then this deed shall be utterly void and of no force and effect whatever; but if said notes with interest, or any of them or a part of any of them, remain due on the 15th day of October, 1925, then, in that event only, said Bourne is hereby empowered to sell said land herein conveyed in public or private sale, and to devote the proceeds thereof, first to discharge said indebtedness remaining unpaid and incurred by

said Ray P. Hanscom and Lucius R. Williams, or said Ogunquit Hotel Company, for the aforesaid purpose of said bank. . . ."

Notes of Hanscom and Williams, to face total of $5,099 were given for loans to that amount, made between April 30 and July 2 of 1924, and were overdue and unpaid on October 15, 1925, and sometime after the last date, the plaintiff fixes it as in the fall of 1925, "around October", Hanscom and Williams gave the Ocean National Bank a note for the amount of the indebtedness due and unpaid, on October 15, 1925, and the overdue notes were returned to Mrs. Hanscom, stamped "Canceled."

At times, attempts were made to sell the property, and on April 1, 1932, it was sold, by Bourne, Trustee, to Florence B. Winn, one of the defendants, for $1,500.

In October, 1932, this bill was brought, to gain title to and possession of the property.

In due course the bill was taken, *pro confesso* against Hanscom, the husband, and Williams, and after hearing decree was filed, sustaining the bill.

Defendants Bourne and Ocean National Bank appealed. Defense appears to be on three issues: That one out of possession of land must proceed at law and not in equity; that substitution of a new note for notes secured by a mortgage is not, in this case, payment of the indebtedness the notes of prior date express; and that a bona fide purchaser at a sale under power of sale, without notice of any irregularity in the proceedings, obtains good title to the property sold.

The property conveyed, Bourne to Winn, was a vacant lot, as Mrs. Hanscom located it, directly across the street from her house.

It is claimed by her that Bourne, the trustee, never took, and hence did not retain possession of the lot, but that she retained possession. Her testimony on acts which she interpreted as proving possession was that the ashes from her residence were piled on the lot as they accumulated each winter, hauled away in the spring; that she always had someone cut the grass on the lot, and that at one time, after she had deeded the property in trust, she had three or four loads of sand removed from the vacant lot to that of her residence.

Mr. Hanscom, who had maintained a large sign on the lot advertising his hotel venture, repainted the sign to the effect that the lot was for sale.

Mr. Bourne testified that he had the deed recorded and delivered to the defendant Bank, and that the lot was taxed to him, annually, from date of the trust deed until sale to Mrs. Winn, and the latter that it was taxed to her in 1932, and that she paid that tax.

In the summer of that year Mrs. Winn, through the agency of her husband, performed acts that evidence possession, in that he and employees under his supervision improved the lot, and excavated for the cellar of a house she or they propose to build thereon.

It is not necessary to determine whether or not the plaintiff was out of possession in this action in equity.

She does not claim by legal title; it is her contention that she has an equitable title only.

It is established as law in many jurisdictions that possession is not a prerequisite to maintaining a bill in equity to remove cloud on title.

Granted that when the estate or interest to be protected is legal in its nature, and full and complete justice can be done by recourse to legal remedies, a party is left to them; yet when the estate or interest is equitable only, jurisdiction in equity should be exercised whether the plaintiff is in or out of possesson, for, the estate or interest being equitable only, legal remedies are not applicable, adequate or sufficient.

Kennedy v. *Northup*, 15 Ill., 148; *Redmond* v. *Packenham*, 66 Ill., 434; *Booth* v. *Wiley*, 102 Ill., 84, 113; *Ormsby* v. *Barr*, 22 Mich., 80; *King* v. *Carpenter*, 37 Mich., 363; *Pier* v. *Fond du Lac*, 38 Wis., 470. So where remedy of complainant out of possession was not conisdered as adequate and perfect at law, when the court "perceives that the party complaining had equitable rights and that the remedy at law might have proved to be insufficient." *Chapman* v. *Butler*, 22 Me., 191, 197.

In such a case, "The remedy at law does not exist, and no recovery can there be had, however meritorious the complainants'

title may be in contemplation of a court of equity. Upon this consideration the principle has become well established, that chancery may be resorted to for relief by the holder of the equitable title, though out of possession, as against the legal title and possession in the defendant; even where possession in the complainant is a requisite to the maintenance of the action, it is said that the rule applies to quiet title or to remove a cloud only when the object of the bill is purely for that purpose, and not when the primary relief sought is upon other and well established grounds of equitable relief, such as fraud, and where the removal of the cloud is only an incident of that relief." 5 R. C. L., P. 647, Sec. 16. See also 51 C. J., P. 185, Sec. 102; Pomeroy's Equity Jurisprudence, Fourth Edition, Vol. 4, Sections 1398, 1399; ibid Vol. 5, Section 731, and cases cited.

In many states, Maine not included, statutes have been enacted giving the right to proceed in equity in cases like the present. In such, and in states where legislation has not been invoked to express what was inherently a power in equity, the authorities seem to agree on a majority rule that, "Where removal of a cloud from title is not the sole ground for equitable jurisdiction, but, in addition thereto, the relief asked for is based on fraud as creating the cloud, a plaintiff, though not in possession, is nevertheless entitled to pursue his remedy in a court of equity for the removal of the cloud so created, such relief being afforded on the theory that fraud is a distinct ground of equitable jurisdiction, and that the remedy at law is inadequate." *Robinson* v. *Marino*, 145 Md., 301, 125 A., 701, 36 A. L. R., 692, and note, 698.

Maine is classed with Alabama, Connecticut and Massachusetts as maintaining the minority rule.

It is agreed among annotators that the decisions in Alabama are inextricably mixed.

In the leading case in Connecticut, *Munson* v. *Munson*, 28 Conn., 582, 73 Am. Dec. 693, appears this significant paragraph, "That there is such a branch of equity jurisdiction which may afford a preventive remedy in certain cases will not be denied; but the power is not exercised as a matter of course, nor under any universal rule or principle of law requiring its exercise. It is preventive, as we have said, and very much must depend upon

the extent and imminence of the danger threatened, and the view which will be taken of the case by a discreet judge."

No Massachusetts case has come to our attention that is outside the majority rule. *Boardman* v. *Jackson*, 119 Mass., 161, is offered as justifying such classification, but there plaintiff alleged that defendant had forged the deed upon which he relied, and the court necessarily ruled it no deed and the remedy at law complete.

We do not agree that the decisions of this Court require possession in plaintiff in every case.

Chapman v. *Butler*, supra, distinctly sets out the opposite.

Of those cited as placing Maine under the minority rule, in *Spofford* v. *Railway Company*, 66 Me., 51, an attempt to stay trespass by defendant in possession, the court ruled: "The plaintiff has a plain, adequate and complete remedy at law by writ of entry, and injunction to stay waste, *pendente lite*. Under that remedy all rights of the parties can be determined.

He can not substitute a bill in equity for a writ of entry and dispossess the defendants by injunction.

Where a party has a plain, adequate and complete remedy at law, equity will not lie."

It quoted Chancellor Kent as stating the true rule: "In ordinary cases this latter remedy (by action at law) has been found amply sufficient for the protection of property, and I do not think it advisable upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong or aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless."

Robinson v. *Robinson*, 73 Me., 170, would have attained no special significance, except for the fact that it contains a statement, true as far as it goes, but seized upon as stating a bar to equity jurisdiction in all cases where the plaintiff is out of possession and desires reinstatement.

There the court say, "as to the other defendant there is no allegation that the complainant is in possession of the premises.

If therefore the allegation of fraud is relied upon, the law affords a complete and adequate remedy. It is not the purpose of equity to try titles to real estate and put one party out of possession and another in.

This must be done under the forms and principles of law which are sufficient for that purpose."

Admitting that the law affords a complete and adequate remedy in many cases; in the case at bar it affords none. The unqualified and sweeping statement in the case cited does not apply to the case at bar.

Gamage v. *Harris*, 79 Me., 531, 11 A., 422, 423, was on a bill to remove cloud upon title to land of which plaintiff was not in possession, and set up fraud as the element necessary to give jurisdiction. He failed to prove fraud, and the opinion holds that he could not further maintain the bill "for a cause giving a plain and adequate remedy at law. The rule is, that when an action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out can not, for defect of proof or other reason, be granted the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice." This case certainly is no precedent for sustaining plaintiff's contention.

Frost v. *Walls*, 93 Me., 405, 45 A., 287, 290, was tried on four issues. Three were dismissed for laches. The fourth issue arose from alleged illegality in the appointment of a guardian, and the court say: "So far as the validity of the defendant's title may be affected by a question of that kind, the issue must be tried in an action at law, where the remedy is full and complete."

Then follows the statement in *Robinson* v. *Robinson*, supra, "It is not the business of equity to try titles, and put one party out and another in," as though applicable in all cases where the purpose is to remove a cloud upon title.

The same all-inclusive statement appears in *Annis* v. *Butterfield*, 99 Me., 191, 58 A., 898, where plaintiff's contention was that he had obtained the legal title by purchase; but, proof being to the contrary, decision issued against him. Finally we have the proposition "settled" in *Clark* v. *Clark*, 107 Me., 505, 78 A., 977, without more than allusion to late decisions.

Without overruling the decisions above cited further than to deny that under no state of facts can a plaintiff, out of possession, be heard in equity to set up a title, we hold that where the plaintiff's alleged title is equitable only, and the allegation is that by

fraud another is placed in possession of real estate, plaintiff may have his day in a court of equity.

On the second contention of defendant, that substitution of a new note for the notes specified in the deed of trust is not payment, the facts are that on the date named nothing had been paid by anyone on the original notes.

According to the language of the contract entered into by plaintiff, "if said notes with interest, or any of them or a part of any of them, remain due on the 15th day of October, 1925, then, in that event only, said Bourne is hereby empowered to sell, etc."

On the date named, or shortly thereafter, Messrs. Hanscom and Williams gave to the bank new notes, and the originals, as we have said, were surrendered.

There is no evidence of understanding and agreement of parties that the new notes were given and received as payment, and every reason to conclude that accepting the new notes, unsecured, in lieu of the original notes would impair the security of the creditor. If it be argued that there is a presumption of payment of notes at maturity when new are given for the old, this Court has considered the force of the presumption, and has invariably held; "while it is settled in this State that the acceptance of a negotiable promissory note, in the absence of any testimony or circumstance to the contrary, is presumed to be a payment of the indebtedness for which it is given, it is equally well settled that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties; and, as a general rule, this presumption will be overcome by the fact that the acceptance of a note in payment would deprive the creditor taking the note of the substantial benefit of some security."

Bryant v. *Grady*, 98 Me., 389, 57 A., 92; *Clark* v. *Downes*, 119 Me., 252, 110 A., 364; *Delano Mill Co.* v. *Warren*, 123 Me., 408, 123 A., 417; *Leavitt* v. *Youngstown Co.*, 132 Me., 76, 166 A., 505. See also 35 L. R. A. (N. S.) 8 and 99.

The presumption is overcome when the court is asked to find that officials of a bank, trustees of the funds they have invested on security, would knowingly bar the bank from looking to security under evidence such as this case furnishes.

Lastly, did defendant Winn obtain good title when she took the deed?

Was she an innocent purchaser, without notice of plaintiff's claim?

It is in the evidence, and uncontradicted that the bank held the lot for sale, and up to the time of sale to the defendant, Mrs. Winn, had received no attractive offer for it; that in the winter of 1932, when her husband approached Mr. Bourne with the suggestion that Mrs. Winn would buy the lot, as Bourne recalls the negotiations, he told all the facts relative to ownership, and on April 1, of that year the deed was delivered and purchase price paid.

Six years had elapsed since the title might have become good in the trustee, and nothing had been made public by record to show that the grantor of the deed of trust had met the terms of the trust agreement.

Plaintiff's counsel do not seriously argue that Mrs. Winn was not an innocent purchaser. If she had procured an abstract of title from the recorded deeds she would have found nothing in addition to the information she received from the trustee.

It is elementary that no fraud is shown where complainant alleges purchase at a low price, and we find no fraud on the part of Mrs. Winn.

The authorities are in agreement that to constitute one a bona fide purchaser for value without notice, within the meaning of the rule that such a purchaser takes the property free of the trust, he must pay some consideration and be without actual or constructive notice of the violation of the trust.

Pertinent to this discussion is the following from *Jones on Mortgages*, (2nd Ed.) Vol. 1, 693: "One who purchases at a sale under a power without notice actual or constructive of any irregularity in the proceedings, acquires a valid title, although the mortgagor might redeem as against the person making the sale. Fraud on the part of the mortgagee or holder of the mortgage will not defeat the title of such purchaser."

The decree appealed from is not in accordance with the law and is reversed.

The case is remanded to the court below for a decree in harmony with this opinion.

Decree below reversed.
Appeal sustained.
Case remanded for decree in accordance with this opinion.

MAINE SAND & GRAVEL COMPANY *vs.* GREEN & WILSON, INC.

Cumberland. Opinion, February 19, 1935.

CONTRACTS. PLEADING AND PRACTICE.

When a party has entered into a special contract to perform work for another, and the work is done, but not in the manner stipulated for in the contract, the party performing it may recover on a quantum meruit, *especially if the other party has accepted the labor or is in the enjoyment of its fruits.*

As a general rule where an earth enbankment is to be paid for at a certain rate per cubic yard, the contractor furnishing the material must stand for the natural waste and shrinkage.

In the case at bar, the contest was over material furnished for masonry, and the Referees found that payment should be for the amount delivered, as used, without deduction for waste and shrinkage.

On exceptions by defendant. An action of assumpsit brought by plaintiff to recover a balance claimed to be due it under its contract with the defendant for furnishing sand and gravel. The case was heard by Referees, right of exceptions in matter of law reserved. The Referees made findings of fact, but were unable to agree upon the interpretation of a certain clause in the contract. To the ruling by the presiding Justice in favor of the plaintiff's contention, defendant seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Frederic J. Laughlin,
Frank P. Preti, for plaintiff.
Harvey D. Eaton, for defendant.

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

BARNES, J. This case comes up on defendant's exceptions to a ruling below. Defendant constructed a highway bridge.

Plaintiff furnished sand and gravel for both bridge and approaches. Contract for the construction is not in the bill of exceptions.

The action is in assumpsit, presumably for two items, sand and gravel for concrete work, and bank gravel furnished outside the contract.

The case was referred to Referees, the bill making "the report of the Referees and the decision of the Sitting Justice parts of this Bill of Exceptions."

Plaintiff sued for a balance for sand and gravel which it claims was furnished for and used in the construction.

The Referees held a hearing, made findings of fact, and, reporting themselves "unable to agree, upon the facts found, whether in law the plaintiff must be bound as to quantities by the contract provision or whether it is entitled to be paid for the quantities actually shown to have been furnished," returned their findings of fact and the undetermined question of law to the Court for his decision, as provided in Rules of the Courts, XLII.

The contract provision for the Court's interpretation and application is as follows:

> "The quantities used are to be determined by the engineers' estimates of the finished concrete in place. In case the state engineers direct the use of 5¼ bags of cement to the yard of concrete then it is to be assumed that each yard of concrete contains 1155 lbs. of sand of the value of 40c and 2152 lbs. of gravel of the value of $1.29. In case the state engineers direct the use of 5½ bags of cement to the cubic yard of concrete then it is to be assumed that each yard contains 1155 lbs. of sand of the value of 40c and 2129 lbs. of gravel of the value of $1.27."

The inference is unquestionable that defendant was building under a specific and detailed contract with the State Highway authorities, and that plaintiff at the time of contracting with de-

fendant knew or should have known of the provisions of the contract of construction applicable to materials and mixtures thereof.

Compliance with fair and just requirements of the "State engineers" governing construction must be had; their directions as to constituents of concrete to go into the mixer and the proportions thereof must be complied with.

Sand and gravel may be measured and sold by cubic content, or by weight.

The parties to the contract before the court set up for themselves a modified weight method of determining the amount to be paid for such material.

The engineer of construction might vary the proportion of cement to other constituents and for reasons satisfactory to the parties, they agreed that settlement, while by weight, was not to be determined by the actual weight.

They stipulated, in the provision before us for interpretation that in each cubic yard of the finished concrete it was "to be assumed" the defendant had used 1155 pounds of sand and 2152 pounds of gravel when the product of a mixture carrying 5¼ bags of cement; and sand as before, with 2129 pounds of gravel, when 5½ bags of cement to the cubic yard was the requirement.

The Referees found that the quantity of cement prescribed for a cubic yard of concrete was increased to meet the requirements of the engineers, in all "but an exceedingly small fractional part of the work," a material departure from the terms of the contract of these parties.

The Referees also found that in addition to gravel furnished under the contract, plaintiff agreed to furnish that of another type, known as bank gravel to be used in connection with the bridge construction but not for the making of concrete, and that the sum paid for bank gravel was $505.63, to the satisfaction of both parties.

As construction proceeded a difference of opinion arose as to whether sand and gravel furnished and used in making the concrete needful for building the approaches was covered by the provision as to material for the "bridge." The Referees found that the provision applied to material in the concrete for the approaches, and that the finished concrete in bridge and approaches measured 2772.6 cubic yards.

But, to lose no time in construction, the parties had agreed, until the difference of opinion should be settled, "without prejudice to the rights or claims of either party hereto under the terms" of their original contract, the defendant was to pay for the sand and gravel necessary to complete the approaches at a greater price for each than specified in the provision, and that $205.05 in excess was paid, for sand and gravel, from the time of the supplementary agreement to completion of the concrete in the approaches.

This sum the findings show is to be awarded defendant by way of recoupment.

Finally, from the findings we learn that plaintiff delivered sand and gravel, which, by actual weight, charged to defendant at the prices specified, would call for credit for $5,580.01. The Justice below ruled that the plaintiff is entitled to be paid for the quantities of material actually shown to have been furnished, and at the price specified for mixture containing 5½ bags of cement to a cubic yard of concrete, and computed the balance unpaid as $490.06, giving judgment for that sum, relying on the pronouncement of this Court in *Jewett* v. *Weston*, 11 Me., 346, that, "When a party has entered into a special contract to perform work for another, and the work is done, but not in the manner stipulated for in the contract, the party performing it may recover on a *quantum meruit*, especially if the other party has accepted the labor, or is in the enjoyment of its fruits." He also ruled that the price stipulated for the lower content of cement is the measure of recovery.

While it is true that where an earth embankment is to be paid for at a certain rate per cubic yard, the contractor furnishing the material must stand for the natural waste and shrinkage, *Clark* v. *U. S.*, 6 Wall., 543, the contest here is over material furnished for masonry, and the Referees present to the court that payment, under the accepted view of the case should be for the amount delivered, as used.

On the record we approve the decision of the Court below, and the mandate is

Exceptions overruled.

ARLENA A. PUSHARD *vs.* GEORGE A. COWAN.

Cumberland. Opinion, February 28, 1935.

ASSAULT AND BATTERY. EVIDENCE. NEW TRIALS.

In an action for assault before the Law Court on a general motion for new trial after a verdict for the plaintiff:

HELD

The story of the plaintiff that she was assaulted and kicked by the defendant in his own home is in itself highly improbable in view of admitted facts. It is refuted by the testimony of other witnesses. Furthermore there was an attempt to bolster it by an offer of money to a witness to testify to a fictitious story with respect to the circumstances alleged to have taken place. The case seems to be without merit and to permit the verdict to stand would be to acknowledge the impotence of this court to redress an apparent wrong.

On general motion for new trial by defendant. An action to recover damages for an alleged assault upon the plaintiff by the defendant. Trial was had at the June Term of the Superior Court for the County of Cumberland. The jury rendered a verdict for the plaintiff in the sum of $5,650.32. A general motion for new trial was thereupon filed by the defendant. Motion sustained. New trial granted. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Weston M. Hilton, for defendant.

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

THAXTER, J. This is an action for assault brought by the plaintiff against the defendant, an attorney residing in Damariscotta. After a similar action had been nonsuited in the Superior Court in Lincoln County, the plaintiff moves to Portland, and by reason of the change of her residence was able to bring the present suit in Cumberland County. After a verdict for the plaintiff

assessing damages in the sum of $5,650.32, the case is before us on the defendant's general motion for a new trial.

Except for two doctors, one who saw the plaintiff after the alleged assault took place, and another who testified as to her condition at the time of the trial, she was the only witness in her own behalf. She is not thereby left without a remedy, if her testimony bears the mark of truth. Her story is that in the evening of January 19, 1933 she left her home and walked to Mr. Cowan's house where she arrived about half past eight. It was damp and foggy, and the streets were filled with slush. Her reason for going was to talk with him about a disclosure hearing held during the afternoon, on a judgment against her mother, at the conclusion of which her stepfather had paid Mr. Cowan ten dollars. It is apparent that she was resentful about the collection of this money, which, though paid by her stepfather, she claimed belonged to her. She says that the defendant answered her knock on the door, invited her in politely, that they sat down in the living room and began their conversation in the presence of two of his small children. The following is her story of these preliminaries:

"Q. Then just what did you say to Mr. Cowan after you spoke about the children? A. We were seated and I said 'Why did Mr. —— when I was seated I said to Mr. Cowan 'May I ask you a few questions in regard to the cases over to Wiscasset today,' and he said 'Certainly.' I says 'Why did Mr. Littlejohn pay you ten dollars over to Wiscasset today?' He said 'He gave me the money.' I said 'He gave you the money? What for?' He said 'To settle a claim.' I said 'I understood that a real estate disclosure was served on my mother's property, but I didn't understand that there was any papers served on my step-father.' He replied 'No.'

Q. Then what happened? A. Then he jumped out of his chair and rushed over to the door and I supposed somebody had rapped.

Q. Everything had been perfectly pleasant up to that point? A. Everything was pleasant. I wasn't angry. I didn't know but there might have been extra charges that I didn't understand.

Q. Everything was perfectly quiet and peaceable up to that time? There had been no angry words? A. No.

Q. No voices had been raised or anything said up to that time? A. No, we were sitting there talking."

Then, as she relates, he told her with an oath to get out, and as she rose to do so he seized her by the arm and shook her violently, struck her head against the casement of the door, dragged her through the door to the porch, where he shook her again, and then before she could escape from him, kicked her violently in the back throwing her to her hands and knees. With difficulty she picked herself up and went home.

This much of her story taxes credulity to the limit. She was met courteously, the conversation was temperate, when without the slightest warning and for no apparent reason, he made a brutal attack on her in the presence of his children. If her theory of this assault is correct, she has unquestionably failed to relate some of the talk and the circumstances which led up to this sudden change of demeanor on his part.

But what happened immediately thereafter is significant. When she arrived home, her mother called Dr. Neil L. Parsons. He states that the plaintiff is a very neurotic woman, that she was in a highly nervous state, but that he found no marks on her body or physical injury of any kind. He could not account for her condition, called in a consultant, and finally diagnosed the trouble as hysteria caused by some sort of nervous excitement. Dr. Swift, who saw her shortly before the trial, states that she is suffering from hysteria and that she is apparently unable to walk.

The defendant testifies that at the time of the occurrence his wife, who had been ill for some months, was in a serious condition and under the care of a trained nurse. His story is in accord with the plaintiff's, that she came to his house about half past eight in the evening and that he invited her in. He then says that, as the conversation opened, she immediately charged him with exacting money from her feeble-minded stepfather, that she commenced to talk louder and accused him of stealing her money, that he requested her to stop, and called her attention to the fact that his wife was sick and that his children were present, that he got up,

opened the door and requested her to leave, and that she walked out of the house calling him a thief and again accusing him of stealing her money, that as she was on the threshold he put his hand on her shoulder, moved her through the door and closed it, and that after she was on the sidewalk she walked up the street shouting loudly that it was her money that he had stolen.

Such are the stories of the parties themselves. His is that of a man unexpectedly faced in his own home by the fury of a neurotic and highly excitable woman. That he was himself irritated and wrought up by the attack, and tried for the sake of his family to get her out is undoubtedly true. Certain facts in connection with her own recital stand out. Anyone who reads the record will conclude that she did not go to the defendant's house just to make a social call, but obviously, having nursed her wrath, planned to open an argument about the happenings of the afternoon. In spite of being courteously invited in by the defendant, and almost before the discussion of the matter in controversy opened, she contends that this assault took place. Such a claim is inconsistent with what are the normal reactions of men and women under such circumstances. She displayed to the jury clothes ripped and torn as she claims by the defendant. Yet her mother, who was present when she arrived home, who could have told of her condition, did not take the stand to testify. The testimony of the doctor who saw her that evening as to the absence of bruises or marks on her body is inconsistent with her claim that she was assaulted, as she relates. That her symptoms of paralysis are not inconsistent with an assault both doctors admit, but it is a far deduction from such conclusion that an assault caused the symptoms. Dr. Parsons concedes that no physical injury accounted for her trouble, and both men admit that it could have been caused by mental excitement alone. Quite possibly the reactions of an introspective and neurasthenic woman to the experiences of the afternoon resulted in the explosion, which seems to have taken place at the defendant's house in the evening. In any event her story in comparison with that of the defendant does not ring true, is refuted by established facts, and raises grave doubts in the mind of an impartial arbiter whether the incident as told by her ever took place.

But there is much more to the case than this. Mrs. Hall, the

nurse, saw what happened. She heard the plaintiff's voice raised in the sitting room in anger, and because of Mrs. Cowan's very critical condition, came to the head of the stairs to request quiet. She saw Mr. Cowan and the plaintiff as they approached the front door and states that no assault was committed of any kind. She heard the plaintiff accuse the defendant of stealing her money, and heard her loud talk and screams as she went up the street to return home. She corroborates the defendant's version in every particular.

Mrs. Cowan testifies that, as she lay very ill in bed upstairs, she heard the plaintiff in a loud voice accuse Mr. Cowan of stealing her money, that the windows of her bedroom were open, and that she heard Mrs. Pushard, after she left the house fling back this same charge in a loud and angry voice from the street.

There is a further aspect to this case much more sinister even than all this. Defendant's Exhibit 2 is in evidence. It is in the handwriting of the plaintiff. She admits that she wrote it. It purports to be a statement of some third party who was an eye-witness of this supposed assault. According to this, the narrator took the plaintiff home, after he had seen her brutally attacked. In explanation of this document, William Chickering, a relative of the plaintiff, testifies that it was written by the plaintiff in his presence and in the presence of her mother, and was a recital which they wished him to give in court as a witness for the plaintiff; and he further states that they offered him for such testimony "a hundred dollars, win or lose, and more if they won." He testifies that he was home on the night in question, and saw nothing of the occurrence. As that part of this statement which relates how Mr. Chickering took the plaintiff home contradicts the plaintiff's own testimony that she went home alone, she was forced to acknowledge the falsity of that part of it. Her explanation of why she wrote it at all is too absurd to be believed by anyone. It appears to have been a patent attempt to purchase false testimony to bolster a cause which was known to be utterly without merit.

Just why the jury should have rendered in this case the verdict which they did is not easy to explain. Their judgment was undoubtedly clouded by the apparently serious condition of the plaintiff due to a mental disturbance of some kind. To permit

such a verdict to stand would be to acknowledge the impotence of this Court to redress an apparent wrong.

Motion sustained.
New trial granted.

WALTER R. FOGG *vs.* IVORY A. HALL ET AL.

Cumberland. Opinion, March 2, 1935.

PLEADING AND PRACTICE. ACCORD AND SATISFACTION. PAYMENT.

In order to avail himself of recoupment, namely, show that the plaintiff had not performed the same contract on his part, and abate or reduce the damages for such breach in one action, the defendant must plead it. This may be done by brief statement under the general issue.

The rule of law respecting accord and satisfaction, which applies to demands undisputed as well as to demands disputed, has been stated by our court as follows: "It must be shown that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such."

A payment not by way of compromise or settlement of a claim is no bar to a recovery of any balance actually due the creditor.

A check is, for the most, a receipt in full, open to qualification and explanation.

In the case at bar, there was not a single figure upon which to reckon what quantity of milk had been sold at retail by the defendants, at a price in excess of that which was ruling when the parties to the action contracted; there was no scope for inference; the damages recoverable, on the theory of the division of increase of retail price, were not so shown as to be ascertainable with reasonable certainty; the evidence was too uncertain to rest a verdict on, even partially.

On general motion for new trial. An action of assumpsit on an account annexed, to recover a balance which the plaintiff alleged was due to him from the defendants for the production of milk. Trial was had at the November Term, 1934, of the Superior Court for the County of Cumberland. The jury rendered a verdict for the

plaintiff in the sum of $720.78. A general motion for a new trial was thereupon filed by the defendants. Remittitur of the amount of verdict over $232.06 to be filed not later than twenty days from the mandate; otherwise, motion sustained, verdict set aside, new trial granted. The case fully appears in the opinion.

E. A. Turner, for plaintiff.

Frank I. Cowan, for defendants.

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

DUNN, J. In this action of assumpsit on account annexed to the writ, plaintiff seeks to recover a balance of $743.10, for "the production," between September 1, 1933, and July 1, 1934, of 66,670 quarts of milk, at 4¾ cents a quart; the general issue having been pleaded, there was joinder in issue. The jury decided for plaintiff, awarding $720.78.

Whether the verdict is against law and evidence, and whether the damages assessed are excessive, is raised for review by motion for new trial. Exceptions were not preserved.

There is, on the record, no question as to the total amount of milk produced and delivered, nor claim of any payment to be added to that as of June 8, 1934, indicated by defendants' check dated July 23, 1934, to plaintiff's order, for $31.41, except small cash and other items.

A contested question of fact was if, at the making of the oral agreement, in pursuance of which plaintiff entered into possession of defendants' farm in Scarboro, and had the use of their cows to produce the milk, he was promised by them, in addition to an initial rate of 4 cents for each and every quart of milk of future delivery to defendants, an equal division of any increase over the then prevailing price, which they as dealers might receive for the product at retail.

Contention of the defense was that there had been no promise of more than 4 cents a quart for milk; that there had been sundry payments, inclusive of the check of previous mention; there was, besides, claim to recoup for "thinness of cattle and young stock, and depreciation of equipment and machinery."

In order to avail himself of recoupment, namely, show that the plaintiff had not performed the same contract on his part, and abate or reduce damages for such breach in the one action, the defendant must plead it. *Lamson, etc. Mfg. Co.* v. *Russell*, 112 Mass., 387. This may be done by brief statement under the general issue. *Peterson Oven Company* v. *Fickett*, 121 Me., 413, 117 A., 575. In the instant case, as has been said, there was no such plea. Notwithstanding, the testimony offered by the defendants was not objected to on that ground. The negligible impression the testimony made on the jury is not disturbable.

On the face of the $31.41 check was written, to the acceptance of the payee: "In full to June 8 inc."

Little more than rehearsal of pertinent facts is necessary to manifest that the matter of the check was not, to the concurrence of both parties, the settlement of the whole demand by a receipt of any sum less than the amount due thereon. R. S., Chap. 96, Sec. 65. As to this, the testimony is such that only one inference or finding can be made. *Bell* v. *Doyle*, 119 Me., 383, 111 A., 513. The rule of law respecting accord and satisfaction, which applies to demands undisputed as well as to demands disputed, (*Knowlton* v. *Black*, 102 Me., 503, 67 A., 563), has been often stated by this court. Briefly "it must be shown however that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such." *Fuller* v. *Smith*, 107 Me., 161, 77 A., 706. See, too, *Anderson* v. *Standard Granite Co.*, 92 Me., 429, 43 A., 21; *Richardson* v. *Taylor*, 100 Me., 175, 60 A., 796; *Chapin* v. *Little Blue School*, 110 Me., 415, 86 A., 838; *Horigan* v. *Chalmers Motor Co.*, 111 Me., 111, 88 A., 357; *Price* v. *McEachern*, 111 Me., 573, 90 A., 486; *Viles* v. *American Realty Company*, 124 Me., 149, 126 A., 818; *Crockett, Appellant*, 130 Me., 135, 154 A., 180. A payment not by way of compromise or settlement of a claim is no bar to a recovery of any balance actually due the creditor. *Ryan* v. *Ward*, 48 N. Y., 204.

The defendants insist, throughout, that their sole undertaking was to pay 4 cents a quart for milk delivered by the plaintiff. The plaintiff testifies that the check was proffered and received in compensation at 4 cents a quart, leaving the "split" unsettled and unpaid. The check is, for the most, a receipt in full, open to qualifica-

tion and explanation. *Duncan* v. *Grant*, 87 Me., 429, 32 A., 1000. Whether explained or not, it constitutes no bar to what is due plaintiff for performance of the contract since that time.

On the whole case, the jury appears to have accepted the plaintiff's version, supplementing the credit originally stated, by $22.32.

It is plain that the jury have drawn certain conclusions unauthorized by proof.

The plaintiff produced and delivered 66,670 quarts of milk. This entitled him, at 4 cents a quart, to $2,666.80. He credits, taking in the check for $31.41, $2,423.74, and agrees, on the stand, that there should be added, for money had by him of defendants, and for a "transfer and registration fee" of some animal, "about $11.00." This seems the extent to enlarge credit. There is due and unpaid the plaintiff, on the 4-cent basis, $232.06.

At this point, the jury lost its footing on reality and sought support from conjecture.

The trial judge, when plaintiff's case had been rested, addressed counsel:

> "I think you will see, Mr. Turner, that there is nothing for the jury to compute here. He (plaintiff) has simply said that he was informed that they (defendants) were getting more than the original price for milk, which he didn't receive compensation for. How much you have not given us any evidence of, whatsoever."

Permitted to produce further evidence, plaintiff was recalled, yet neither from his testimony then, cross-examination of defendants' witnesses, nor the testimony of plaintiff and another witness in rebuttal, was the showing materially changed.

There is not a single figure upon which to reckon what quantity of milk had been sold at retail by the defendants, at a price in excess of that which was ruling when the parties to the action contracted; there was no scope for inference; the damages recoverable, on the theory of division of increase of retail prices, were not so shown as to be ascertainable with reasonable certainty; the evidence was too uncertain to rest a verdict on, even partially.

Option is given plaintiff to reduce the amount of the verdict to $232.06, and to agree that it shall stand for the residue. Election

must be exercised within twenty days from the filing of rescript. Sustaining the motion, setting aside the verdict, and granting a new trial, is conditioned accordingly.

Remittitur of amount of verdict over $232.06 *to be filed not later than twenty days from mandate; otherwise, motion sustained, verdict set aside, new trial granted.*

EDITH A. MERRIMAN *vs.* ALVAH R. THOMAS.

Cumberland. Opinion, March 2, 1935.

COMPROMISE. CONSIDERATION.

Regardless of the ruling in other jurisdictions, it is well settled in this state that a compromise of a claim which is honestly made and settled in good faith, and believed at the time by the parties to be doubtful, is a sufficient and valid consideration for a promise to pay money or its equivalent, even though it turns out that no valid claim ever existed.

The surrender of a groundless claim which is known by both parties to be unenforceable will not constitute a sufficient consideration to uphold a promise to pay money or its equivalent, in settlement of the claim.

In the case at bar, it appears that the parties effected a compromise of what they believed to be a valid claim, and neither at the time knew that it was unenforceable. They did this in good faith. Under the rule above stated, the invalidity of the claim as established in the trial court can not nullify their settlement.

On exceptions by plaintiff. An action on a promissory note. The defendant pleaded payment. Trial was had at the November Term, 1934, of the Superior Court for the County of Cumberland, before a sitting Justice, with right of exceptions to matters of law reserved. The court found the defendant entitled to a credit of $600.00 upon the note and ordered judgment in favor of the plaintiff in the sum of $12.50, the amount of interest due on the note at

the time of settlement. To this ruling and finding plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Sherman I. Gould,
Charles H. Shackley, for plaintiff.
Joseph A. Aldred,
Ellis L. Aldrich, for defendant.

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

STURGIS, J. Action on a promissory note. Plea of the general issue with a brief statement setting up payment. The case was heard at *nisi prius* by the Court without a jury and with the right of exceptions to matters of law duly reserved. The presiding Justice, finding that a partial payment had been made, gave credit therefor and ordered judgment for the plaintiff for the balance due on the note. The plaintiff filed exceptions.

The note in suit was given on account of the purchase price of certain real estate which the plaintiff conveyed to the defendant by warranty deed. By mutual mistake, a parcel of land known as "The Middle Field," which the plaintiff did not own, was included in the description in this deed. Later, the defendant, using the same description, conveyed the property by warranty deed to one Edith G. Rush and, after her death, her devisee, discovering that he had no title to "The Middle Field," made demand on the defendant for damages for the breach of his covenant of warranty and the claim was paid. The defendant thereupon demanded damages from the plaintiff for the breach of her covenant of warranty and, in settlement of this claim, she credited the defendant with $600 on his note and gave him a receipt therefor. In this action, in disregard of that settlement, the plaintiff seeks to recover the full amount of the note.

The Court found that, although the defendant did not have a legal claim against the plaintiff for a breach of warranty, they both, acting in good faith, believed that he did have such a claim and a credit of $600 upon the note in suit was given in settlement thereof. The credit was accordingly allowed the defendant under his plea of payment in this suit, and judgment was ordered for the

plaintiff for $12.50, the amount of the interest accrued at the time the credit was given.

As the case comes forward, the findings of fact by the presiding Justice are conclusive. This is conceded. The ruling that the defendant did not have a legal claim against the plaintiff for the breach of her covenant of warranty, for the purpose of this case, is accepted as correct. The exception reserved goes only to the allowance of the credit upon the note growing out of the compromise of the claim for a breach of warranty and the order of judgment based thereon.

Regardless of the rule in other jurisdictions, it is well settled in this State that a compromise of a claim which is honestly made and settled in good faith, and believed at the time by the parties to be doubtful, is a sufficient and valid consideration for a promise to pay money or its equivalent, even though it turns out that no valid claim ever existed. The compromise will not constitute a sufficient consideration for the promise, however, if the claim made is groundless and known by both parties to be so and unenforceable, or if it is in its nature an illegal claim. *Read* v. *Hitchings*, 71 Me., 590, 594; *Melcher* v. *Insurance Company*, 97 Me., 512, 517, 55 A., 411.

We can not travel outside the Bill of Exceptions. It there appears that the parties to the instant action effected a compromise of what they believed to be a valid claim, and neither at the time knew that it was unenforceable. They did this in good faith. Under the rule stated, the invalidity of the claim as established in the trial court can not nullify their settlement. The defendant is entitled to credit upon his note in accordance with the compromise. We find no error in the order of judgment below.

Exceptions overruled.

MARTHA C. WOODBURY *vs.* WALTER F. WILSON.

Cumberland. Opinion, March 4, 1935.

BASTARDY. BONDS.

In construing Section 7 of Chapter 111, *R. S.* 1930, *relating to "Bastard Children and Their Maintenance," held:*

1. *Having been adjudged guilty on a bastard complaint and having been ordered by the Court to stand charged with the maintenance of the child, with the assistance of the mother; to pay the complainant her costs of suit, her expenses of delivery and medical attendance and her expense for support of the child to the date of the child's adoption, (which date was prior to the date of judgment) the respondent, in order to prevent his commitment to or remaining in jail, must give to the complainant a bond securing the performance of the Court's order in toto, namely, for the maintenance of the child as ordered, her costs of suit, the expense of her delivery, and of her nursing, medicine and medical attendance during the period of her sickness and convalescence and of the support of the child to the date of rendition of judgment.*

2. *That the provision in the last sentence of said Section for the issue of execution as in actions of tort is a cumulative remedy for the benefit of the complainant and does not, in case the bond thereinbefore referred to is given, relieve the respondent from the necessity of providing coverage therein for payment of expenses and costs of suit.*

3. *That in the event the bond be given and execution issue as in tort, there can be only one satisfaction, for the respondent is not to be subjected to double penalty.*

Complaint in bastardy. At the October Term, 1934, of the Superior Court for the County of Cumberland, a verdict of guilty was rendered by the jury against the appellee. The presiding Justice entered an order of affiliation and ordered the appellee to pay the appellant costs of suit, taxed at $21.23, and costs of delivery and medical attendance, amounting to $174.48, executions for the above sums to issue as in actions of tort. It was further ordered that appellee pay for the support of the child the sum of $120.00, and that the appellee give a bond in the penal sum of $240.00, conditioned for the faithful performance of that part of the order re-

lating to support of the child. The appellant sought to have the bond secure performance of other portions of the order. To the refusal of this request by the sitting Justice, appellant seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Jacob H. Berman,
Edward J. Berman, for complainant.
Henry Cleaves Sullivan,
Philip G. Willard, for respondent.

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

HUDSON, J. Law on exceptions. The respondent, having been found guilty on a complaint brought under the Bastardy Statute and having been ordered by the Court to stand charged with the maintenance of the child with the assistance of the mother, to pay the complainant her costs of suit, her expenses of delivery and medical attendance and her expenses for support of the child to the date of the child's adoption, (which date was prior to the date of judgment) the question now presented is, did he, to prevent his commitment to or remaining in jail, have the right to give a bond to the complainant, securing the performance of the Court's order only so far as it related to the payment for the support of the child before the adoption. The presiding Justice ruled that he had that right and consequently that the bond need not include coverage for the costs of suit and the complainant's expenses for her delivery and for her nursing, medicine and medical attendance. To this ruling the complainant excepted.

The statute involved is Section 7 of Chapter 111, R. S. 1930. By it the Court is commanded to order: (1) That the respondent, being found guilty, shall assist the mother in maintaining the child "as the Court orders"; (2) that he shall pay the complainant her costs of suit; and (3) shall pay the complainant for certain named expenses, to wit: (a) "The expense of her delivery," (b) the expense "of her nursing, medicine, and medical attendance, during the period of her sickness and convalescence," and (c) the expense "of the support of such child to the date of rendition of judgment." As

the statute uses the word "orders" with relation to the maintenance of the child and later the word "ordered" as to the payment of the costs of suit and the expenses of the complainant, it might be thought that the statute contemplates two separate orders, yet we think that the fair and reasonable construction of it is that the Court is commanded to make only one order for the benefit of the complainant to include its several elements. Therefore, when the statute says that the respondent "shall give a bond . . . to the Complainant to perform said order," it means to secure the performance of all that the Court is compelled to order. Unless so construed, we have this, we believe, unintended and amazing result—that the bond need not help to accomplish the very purpose for which the Bastard Statute was enacted, namely, to assist the mother in the future maintenance of the child.

> "The object of the statute relating to bastard children and their maintenance was to compel the putative father to aid in supporting his illicit offspring." *Smith* v. *Lint*, 37 Me., 546, 547; *McKenzie* v. *Lombard*, 85 Me., 224, 27 A., 110.

Support of the child to date of judgment, it is admitted, must be secured by the bond, and it is hardly conceivable that the intention of the Legislature was that the bond should secure the aid for the first few months of the child's existence and not for the remainder of its minority.

The purpose of the amendment of 1909 (see P. L. 1909, Chapter 111) was to enlarge the order for the benefit of the mother and thus compel the father to render additional help in paying her for the expense of her delivery and of her nursing, medicine and medical attendance. Before the amendment, she could recover the expense of maintenance from the time of birth to judgment, *Smith* v. *Lint*, 37 Me., 546, and no doubt the costs, as assumed in *Dennett* v. *Nevers*, 7 Me., 399. The very fact that the amendment includes in the commanded order the costs of suit and support before judgment, as well as the mother's expenses, tends to show that it was intended that the bond should secure performance of the whole order. Counsel does not claim that the bond need not protect her on account of the support of the child to the date of judgment or for its future support, but contends only that the bond need not provide cover-

age for the costs of suit and the expenses of her delivery and of her nursing, medicine and medical attendance.

By his brief, he indicates that he would not make this contention "were it not for the last sentence of the section" of the statute, which reads: "If the Respondent does not comply with that part of the order relative to payment of expenses and costs of suit, execution may issue thereafter as in actions of tort." His argument is that the fact that "execution as in actions of tort" may issue for the payment of expenses and the costs of suit, indicates an intention to relieve the respondent from the necessity of coverage of these items in his bond. Admitting that without this sentence in the statute the mother has the right of a bond protecting her for the full order, yet it is insisted the addition of this sentence deprives her of the right of security for payment of the costs and her expenses; that the issue of the execution therefor is in the place of their inclusion in the bond. Still it is not claimed that the bond should not include support to time of judgment. Such a position is inconsistent and no valid reason appears for such a distinction. It is just as essential to the mother that she have bond protection for the costs and expense of her delivery, nursing, medicine and medical attendance as for her expense for the support of the child before judgment. The purpose of the issue of the execution is to give her assistance additional to her coverage by the bond and is not inconsistent with it. It is cumulative, not restrictive. Besides, the issue of the execution gives her a forthright remedy. If he has property, it may be levied on without delay. She need not await the determination of a suit on the bond. While she has the right to proceed both by execution and on the bond, there can be only one satisfaction. The respondent is not subjected to double penalty. We consider that this last sentence subtracts nothing from the effect of the previous language but simply gives to her a possible auxiliary remedy altogether consistent with the purpose and scope of the bastardy statute.

In the early case of *Taylor* v. *Hughes*, 3 Me., 433, a respondent in a bastardy process, who did not surrender himself before judgment but who appeared in Court, defended, was found guilty and adjudged the father of the child, urged that the sureties on his original bond for his appearance and for the abiding the order of

the Court were discharged because of the fact that the Court, after judgment, ordered him to give a bond to perform the order of the Court. The Court did not so hold but, on the contrary, held that the statutory provision for the new bond was for "new security which the Court may require, is only a super-added one." *Taylor* v. *Hughes*, supra, was confirmed in *Corson* v. *Tuttle*, 19 Me., 409, in which it was held that the failure to give the new bond (now provided for in Section 7) and consequent commitment to jail did not release the sureties on the original bond because the new bond was ancillary. The Court said, on page 411:

> "But it appears to us to have been, not a substitution for the first order, but as ancillary to it, and made expressly for its enforcement."

Both *Taylor* v. *Hughes*, supra, and *Corson* v. *Tuttle*, supra, were approved in *Doyen* v. *Leavitt*, 76 Me., 247, 250.

So here by analogy we hold that the possible issue of execution as in tort does not relieve the respondent from the necessity, would he keep out of jail, of giving a bond which shall secure the performance of the whole order, including the costs of suit and her expenses.

The respondent relies on the law enunciated in *Howard* v. *Railroad Co.*, 86 Me., 387, at page 389, 29 A., 1101, 1102, in which the Court said: "But the rule of interpretation which governs in cases generally, where any doubt or uncertainty exists, is that the last words control all preceding words for the purpose of correcting any inconsistency of construction," and from this argues that this last sentence controls the preceding language. Also see *Millett* v. *Hayes*, 132 Me., 12, 15, 164 A., 741. No doubt these cases state a correct rule of construction. In both of them there was a clear-cut repugnancy between the language constituting amendatory words and the amendment as finally stated. The latter was held to control. In *Howard* v. *Railroad Company*, supra, on pages 389 and 390, Chief Justice Peters quoted Section 183 from Endlich on the Interpretation of Statutes, and by it, it appears, that for the rule to apply there must be an irreconcilable conflict between the earlier and the later provision in the statute.

In this Section there is no such irreconcilable conflict, no necessary repugnancy; it harmonizes.

It is suggested that the provision in Section 10 of said Chapter 111 (whereby the mother after the liberation of the father from jail following six months' incarceration, he not having been able to give the bond as ordered) that she may recover of him in an action of debt any sum of money which ought to have been paid pursuant to the order, indicates that the issue of the execution, as provided for in Section 7, is not a cumulative remedy. It is urged that "if the last sentence of Section 7 simply provided a cumulative remedy, an action of debt would be wholly unnecessary." This argument might have force if Section 10 had been enacted subsequently to the amendment of 1909, which provided for the issue of the execution. Section 10 as law long preceded the amendment in time and the Legislature simply allowed this provision of Section 10 to remain in the statute. Thus the deduction drawn by respondent's counsel is not justified.

To permit recovery by the mother in an action of debt, based on the order of Court, this provision was not necessary anyway, for, without the aid of the statute, the statutory order having been made, remedy at common law would lie for its enforcement. It was simply a statutory declaration of a common law right. As we view it, the original reason for this provision, as well as the reason for allowing it to remain in the statute after the amendment of 1909, was to dispel any doubt, if such should arise, as to whether or not the respondent's incarceration and discharge from jail should constitute satisfaction of the order previously made so as to prevent the mother later from enforcement of it in an ordinary action of debt.

Having carefully studied the whole of the Bastardy Act, and considered its purpose and its scope, the construction we place upon it leads us to the conclusion that the complainant was entitled to receive, if a bond were given, one that contained full coverage of the whole order as made.

Exceptions sustained.

WILLIAM S. LORD *vs.* MASSACHUSETTS BONDING & INSURANCE CO.

PERLEY E. BERRY *vs.* MASSACHUSETTS BONDING & INSURANCE CO.

ESTATE OF FRANK B. WALKER

vs.

MASSACHUSETTS BONDING & INSURANCE CO.

Cumberland. Opinion, March 6, 1935.

EQUITY. R. S., CHAP. 60, SECS. 177-180.

In an action in equity to reach and apply insurance money by virtue of the provisions of Secs. 177-180, *Chap.* 60, *R. S., wherein the defense raised a single issue, namely, that the insurance was procured by fraud, and wherein the evidence disclosed that insurance was not sought until two days after the collision in which the plaintiffs were injured, and that the agent of the insured who procured the insurance was fully informed of that fact, and falsely misrepresented to the insurance agent and that within a reasonable time after learning the truth, defendants cancelled the policy and returned the premium.*

HELD:

A decree dismissing the bills with costs must be the necessary result, and while cases involving questions of fact alone are not ordinarily considered on report, yet under the circumstances presented in the case at bar, the Law Court feels it its duty to finally dispose of the litigation without compelling the parties to incur further expense.

On report. Bills in equity brought against the defendant corporation to reach and apply insurance money, by virtue of the provisions of Secs. 177-180, Chap. 60, R. S. Bill dismissed. Decree accordingly. The cases fully appear in the opinion.

Robinson & Richardson, for plaintiffs.

William B. Mahoney, for defendant.

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

PATTANGALL, C. J. On report. Bills in equity to reach and apply insurance money, by virtue of the provisions of Secs. 177-180, Chap. 60, R. S. 1930. Plaintiffs recovered judgments for personal injuries sustained on January 14, 1933, in a collision with a truck which defendant had insured against liability. The defense raised a single issue, namely, that the insurance was procured by fraud. The question is of fact. There is, and can be, no dispute as to the law governing the case.

A careful examination of the long, involved and somewhat confused record discloses the following facts. The policy, made effective January 1, 1933, was issued on February 7th as a result of negotiations between agents of the insured and the insurer. The evidence is clear and convincing that these negotiations began on January 16, two days after the collision in which plaintiffs were injured; that the agent of the insured, who procured the insurance, was fully informed as to that fact; that he falsely misrepresented it to insurer's agent; that, except for such misrepresentation, the policy would not have been issued; and that, within a reasonable time after learning the truth, defendants cancelled the policy and returned the premium. A decree dismissing the bills with costs is the necessary result.

A discussion of the details of the evidence upon which these conclusions are based might be of interest to the parties to the litigation but would be of no value to students of the decisions of this Court, and we deem it unnecessary to encumber our reports with such a discussion. Suffice it to say that the evidence submitted by defendant fully sustains its contentions, and that the only witness called by the plaintiffs who testified concerning material matters, was not only contradicted by every other witness who testified regarding them, by documentary evidence, and by logical inferences to be drawn from the evidence, but by his own previous sworn statement.

Cases involving questions of fact alone are not ordinarily considered on report, but under the circumstances presented here, we regard it our duty to finally dispose of this litigation without compelling the parties to incur further expense.

Decree accordingly.

RICHARD PALMER *vs.* INHABITANTS OF THE TOWN OF SUMNER.

Oxford. Opinion, March 11, 1935.

WORKMEN'S COMPENSATION ACT. TOWNS. NEGLIGENCE.

Towns, which are merely sub-divisions of the State, are not in general liable for the defaults or negligence of their agents and servants in the performance of municipal or public duties which they perform as agents of the State, unless the liability is created by statute.

Section three of the Workmen's Compensation Act (Chap. 55, R. S. 1930) only deprives the non-assenting employer of certain named defenses and besides doing this does not establish a statutory right of recovery based only on the fact that the employee sustained injuries by accident arising out of and in the course of his employment.

Said Section three neither expressly nor impliedly changes the common law, whereby a town is not liable for negligence of its agents and servants in the performance of public duties, performed as agents and servants of the State.

On report on an agreed statement of facts. An action on the case under the provisions of the Workmen's Compensation Act to recover for personal injuries sustained by the plaintiff who had been hired by the road commission for the defendant town to take charge of the construction of a road in said town. The issue involved the question of whether a non-assenting employer town would be liable for negligence of their servants or agents when performing municipal duties which they perform as agents of the State. Judgment for defendant. The case fully appears in the opinion.

Franklin Fisher, for plaintiff.

Albert Beliveau, for defendants.

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

HUDSON, J. Action on the case for personal injuries, based on the Workmen's Compensation Act (see Chapter 55, R. S. 1930,

and amendments thereto) and before this Court on the following agreed statement of facts:

"1. That at the time the plaintiff received the injuries complained of John F. Redding was the duly appointed and qualified Road Commissioner for the Town of Sumner.

"2. That the said John F. Redding in his capacity as Road Commissioner for said Town of Sumner hired the plaintiff, Richard Palmer, to take charge of the construction of the road on Potash Hill in said Town.

"3. That said plaintiff, Richard Palmer, worked on said road with five other employees of said Town and had full and complete charge of said operation.

"4. That the defendants did not vote to accept the provisions of Chapter 55 of the Revised Statutes and was not an assenting employer under said Division 3, Section 2, of Chapter 55 of said Revised Statutes.

"5. That the plaintiff seeks to maintain his action on the theory that the plaintiff was an employee of the defendant under the provisions of Chapter 55 of the Revised Statutes and that said chapter changed the law relating to master and servant so as to give the plaintiff a right of action against the defendants for their torts in an accident arising out of and in the course of the employment of the plaintiff if the defendants did not accept said statute and deprived the defendants of certain common law defenses if they did not accept the statute.

"6. The defendants contend that said action cannot be maintained because the said defendants have not voted as a town to accept the provisions of Chapter 55, and because in the construction of said road on Potash Hill the Selectmen and Road Commissioner were acting not as agents of the Town of Sumner but as public officers for whose torts the said defendants are not liable.

"7. That if the Law Court should sustain the plaintiff's contention as described in paragraph 5 above then the case is to be sent back for trial. If the Law Court on the other hand sustains the defendants' contention judgment is to be for the defendant.

"8. The plaintiff's writ and the defendants' pleadings are made a part of this case."

The plaintiff seeks recovery only by reason of said statute. His counsel frankly admits that at common law he has no right of action because at the time of the accident, as an employee of the Town, he was engaged in the performance of work not for the benefit of the Town, as a proprietor, but for the public; the Road Commissioner in employing him not having acted as a servant or agent of the Town but as a public officer for the benefit of the State.

"These two phases of character presented by the decisions, and the peculiar liabilities in reference to the different capacities of officers, whether as agents of the town, or public officers, are fully recognized and established in this and other States. As to the first, may be noted, *Anthony* v. *Adams*, 1 Met., 284; *Seele* v. *Deering*, 79 Me., 347, 10 A., 45; *Hawks* v. *Charlemont*, 107 Mass., 414; *Deane* v. *Randolph*, 132 Mass., 475; *Waldron* v. *Haverhill*, 143 Mass., 582, 10 N. E., 481; *Doherty* v. *Braintree*, 148 Mass., 495, 20 N. E., 106. As to the second, *Small* v. *Danville*, 51 Me., 359; *Mitchell* v. *Rockland*, 52 Me., 118; *Cobb* v. *Portland*, 55 Me., 381; *Woodcock* v. *Calais*, 66 Me., 234; *Farrington* v. *Anson*, 77 Me., 406; *Bulger* v. *Eden*, 82 Me., 352, 19 A., 829; *Goddard* v. *Harpswell*, 84 Me., 499, 24 A., 958, and many other cases." *Bryant* v. *Westbrook*, 86 Me., 450, 452, 29 A., 1109, 1110.

Among other later Maine cases noting the distinction in the capacities aforesaid may be cited: *Mains* v. *Inhabitants of Fort Fairfield*, 99 Me., 177, 59 A., 87; *Keeley* v. *Portland*, 100 Me., 260, 61 A., 180; *Tuell* v. *Inhabitants of Marion*, 110 Me., 460, 86 A., 980; *Dyer* v. *South Portland*, 111 Me., 119, 88 A., 398, 399; *Inhabitants of Rumford* v. *Upton*, 113 Me., 543, 95 A., 226; *Graffam* v. *Town of Poland*, 115 Me., 375, 99 A., 14; *Woodward* v. *Water District*, 116 Me., 86, 100 A., 317; *Arsenault* v. *Inhabitants of Town of Anson*, 129 Me., 447, 152 A., 627; *Anderson, Admx.* v. *City of Portland*, 130 Me., 214, 154 A., 572; *McKay Radio & Telegraph Co.* v. *Inhabitants of the Town of Cushing*, 131 Me., 333, 162 A., 783. An examination of these cases and others not

cited will show conclusively how firmly imbedded in the common law of Maine has become this principle that ". . . towns, which are merely sub-divisions of the State, are not in general liable for the defaults or negligence of their agents and servants in the performance of municipal or public duties which they perform as agencies of the State, unless the liability is created by statute. *Mitchell* v. *Rockland*, 52 Me., 118; *Frazer* v. *Lewiston*, 76 Me., 531; *Bulger* v. *Eden*, 82 Me., 352." *Dyer* v. *South Portland*, supra, on page 120.

It may be observed that several of the decisions in the above cited cases follow the enactment of the Workmen's Compensation Law in 1915.

The question, then, is: Does this statute establish in this case a right of recovery when admittedly there was none at common law?

> "It is not to be presumed that the Legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention. . . . The rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language." 25 R. C. L., Section 280, page 1054; *Ryalls* v. *Mechanics Mills*, 150 Mass., 190, 22 N. E., 766; 5 L. R. A., 667; *State* v. *Central Vermont R. Co.*, 81 Vt., 459, 71 A., 193, 21 L. R. A. (N. S.), 949.
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> "Statutes are not to be understood as effecting any change in the common law beyond that which is clearly indicated, either by express terms or by necessary implication from the language used. . . ." 59 C. J., Sec. 617, page 1040.
>
> "It is not presumed that the legislature intended to make any innovation upon the common law further than the necessity of the case required. In other words, statutes in derogation of it, and especially of a common-law right, are strictly construed, and will not be extended by construction beyond their natural meaning." Sutherland on Statutory Construction, Sec. 290, page 374.

The plaintiff's contention is not that the Act expressly but impliedly changes the common law and creates his cause of action. He urges that he is an employee within the specific terms of the Act and likewise that the defendant is an employer within its meaning, although it is not claimed (and the contrary is the fact) that the Town ever became an assenting employer. Assuming, however, that these contentions of the plaintiff as to employment are well founded, yet by no means does it necessarily follow that this Act has created for the plaintiff this right of action and thus changed the common law. Had the Town assented to the Act, the plaintiff would have had his right of compensation, because, in such an event, the Act expressly provides the remedy for compensation. Not assenting, however, he has no statutory right of action, "unless the language employed clearly indicates such an intention." The plaintiff relies particularly on Section three of the Act, which provides:

> "In an action to recover damages for personal injuries sustained by an employee by accident arising out of and in the course of his employment, or for death resulting from such injuries, it shall not be a defense to an employer, except as hereinafter specified, (a) that the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury." Sec. 3, Chap. 55, R. S. 1930.

The action mentioned in this section, we interpret the statute to mean, that which has existence at common law, so if one having a common-law right of action pursues it against a non-assenting employer, the employer can not defend on the grounds of contributory negligence, negligence of a fellow-employee, or assumption of risk of injury by the employee. Such an employee, although benefited by the taking away of the defenses enumerated, must still prove negligence upon the part of employer, and, proceeding at common law, prove his common-law right of recovery. The statute purports only to rid the non-assenting employer of certain named defenses and it was not the intention of the Legislature, as we view it, in addition to taking away those defenses, to establish a statutory right of recovery based only on the fact that the employee

sustained injuries "by accident arising out of and in the course of his employment."

It is to be noted that this defendant Town as to this particular work engaged in by this plaintiff was not really the ultimate employer. While it is true it employed the plaintiff, yet the employment was for the benefit of the public at large, the State, and in accordance with the performance of a duty, statutably imposed upon the Town as a political sub-division of the State. A town compelled by statute to contract for such employment for the benefit of the public at large and not alone for its constitutents, should not in the absence of clear and specific legislation be held liable for injuries received by such an employee nor be denied its common-law right of defense. To construe said statute so that it be held that it establishes such a right of action, would effect a radical change in the common law, not, in our judgment, contemplated by the Legislature. Said Section 3 in its effect is negative, not positive; destructive, not constructive. Its only effect is to abolish certain defenses, not to create a new right of action where there was none at common law.

> "The plaintiff's contention is in substance that the defendant's duty and obligation were enlarged by St. 1911, c. 751." (The Massachusetts Statute is practically identical with said Section 3.) "But that Act takes away some of the employer's defenses. It does not transform conduct theretofore lawful on the part of the employer into negligence. *Ashton* v. *Boston & Maine Railroad*, 222 Mass., 65, 109 N. E., 820." *Walsh* v. *Turner Centre Dairying Assn.*, 223 Mass., 386, 388, 111 N. E., 889, 890.
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> "The Workmen's Compensation Act does not enlarge the duty of an employer who is not a subscriber, nor transform into negligence conduct which apart from that statute would impose no liability upon him." *Mammott* v. *Worcester Consolidated Street Railway Co.*, 228 Mass., 282, 284, 117 N. E., 336.

While *Hare* v. *McIntire*, 82 Me., 240, 19 A., 453, dealt not with the interpretation and construction of the Workmen's Compensa-

tion Act, yet its reasoning tends strongly to support our conclusion in this case. In that case, the plaintiff, injured in a quarry, sued his fellow-employee and based his right of recovery on the statute therein quoted on page 242 and which provided that in case of inability of the fellow-employee to pay or his avoidance of payment by the poor debtors' oath after judgment and execution, that the owner of the quarry should be liable. At common law, there could be no such recovery against the owner of a quarry, for negligence of the fellow-employee was a legal defense. By that statute, a right of action was created in favor of "all persons or teams (that may be) approaching" and the question was whether the plaintiff employee was one included in the words of the statute, "all persons." The Court held that he was not, and on page 243 said:

> "Moreover, if the real intention of these provisions, derived from their language alone, left any doubt on this question, it is entirely removed by the further consideration that the other construction would make it in derogation of the common law; and to warrant such a result the intention should be clearly expressed. *Dwelly* v. *Dwelly*, 46 Me., 377; *Carle* v. *Bangor & Pisc. Canal & R. R. Co.*, 43 Me., 269. . . . But if the statute in question is intended to include workmen in quarries, then this long established salutary rule of the common law is thereby reversed; for the statute expressly makes the employers liable for an injury occasioned by the negligence of a fellow-servant if the one who causes it is unable to pay or avoids. If such a radical change of the law governing the duties and liabilities of employers to their employees has been in the mind of the legislature, we think the law-makers would have clearly and directly expressed such intention; . . ."

In *Robinson's Case*, 131 Mass., 376, the question was whether an unmarried woman was entitled to be examined for admission as an attorney to practice law by virtue of a statute that provided that "a citizen . . . may, on the recommendation of an attorney, petition the Supreme Judicial or Superior Court to be examined for admission as an attorney, . . ." The Court held she was not so

entitled, although "The word 'citizen' when used in its most common and most comprehensive sense, doubtless includes women; . . ." Chief Justice Gray said:

> "The intention of the Legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part, and in the light of the common law and of previous statutes upon the same subject. And the Legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to introduce a fundamental change in long established principles of law."

In this case, the Legislature by the Workmen's Compensation Act has not evinced an intention by language either express or implied to change this "long established" principle of common law and thus create a statutory right of action herein available for this plaintiff.

> "It is hardly necessary to add that our duty is limited to declaring the law as it is, and that whether any change in that law would be wise or expedient is a question for the legislative and not for the judicial department of the government." *Robinson's Case*, supra, page 384.

Our decision, then, sustaining the defendant's contention, "judgment" in accordance with the stipulation in the agreed statement of facts "is to be for the defendant."

Judgment for defendant.

INHABITANTS OF THE TOWN OF BAR HARBOR

vs.

INHABITANTS OF THE TOWN OF JONESPORT.

Hancock. Opinion, March 15, 1935.

PAUPERS. PAUPER SUPPLIES.

A person can not be pauperized except by applying for supplies himself or by receiving them with full knowledge of their character. A promise to pay, however, or a disavowal of intent to apply for relief as a pauper does not change the character of the relief and thereby affect the obligation of the Town of residence to furnish supplies in the first instance, or of the Town of settlement to pay for them subsequently.

In the case at bar, the letter by Groves asking for relief and promising to pay did not constitute an agreement between the parties that the supplies were not to be regarded as pauper relief.

On general motion for new trial by plaintiff. An action to recover for supplies furnished by the overseers of the poor of the plaintiff Town to one Daniel Groves and his family. Trial was had at the April Term, 1934, of the Superior Court for the County of Hancock. The jury found for the defendant. A general motion for new trial was thereupon filed by the plaintiff. Motion sustained. New trial granted. The case fully appears in the opinion.

Wood & Shaw,

Herbert L. Graham, for plaintiff.

Ryder & Simpson, for defendant.

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

THAXTER, J. This action, which is before us on the plaintiff's motion for a new trial after a verdict for the defendant, was brought to recover for alleged pauper supplies furnished by the Town of Bar Harbor to one Dan Groves, whose derivative settle-

ment was admittedly in Jonesport. It is not denied that during the time when the supplies were furnished Grove had a home in Bar Harbor. The sole question is whether his pauper settlement as defined by R. S. 1930, Chap. 33, Sec. 1, VI, was there. He had, while living in Bar Harbor, received pauper supplies during the years from 1919 to 1925 and from 1931 to 1933. The issue is whether he had received such relief during the period from 1925 to 1931. If he did, the five-year interval prescribed by the statute had not run during which he would have acquired a settlement in Bar Harbor, and the Town of Jonesport would be obliged to reimburse Bar Harbor for his support.

It is conceded that fuel and groceries valued at $26.16 were furnished by the plaintiff town to the family of Groves on four separate occasions during the year 1928. The defendant claims that these were not pauper supplies, and in support of such contention relies on a letter written by Groves to the overseers of the poor of Bar Harbor of the following tenor:

"Feb. 21, 1928

Dear Mrs:

Please give Abbie two foot of wood if she needs it and also Five Dollars worth of provisions if needed until the middle of next week and when I get my pay from my work I will send it to you. The boss don't come in very often. He lives fifteen miles from here. Answer as soon as you get this if you can or not and if you can't I will have to come home and go on the town and I don't want to. I will pay you all if you help her before you send the bill in. She can't get anything because I told George not to let her have only . . . for she would run me in the hole so far I could never get out.

Daniel Groves,
Surrey, Maine
R. F. D. No. 2
c/o Harry Snow"

The defendant maintains that, because of the offer of Groves to pay as set forth in the letter and a subsequent renewal thereof, this was not an application for pauper supplies in accordance with the terms of section 2 of the statute in question. It is true, as contended by the defendant, that a person can not be pauperized except by

applying for supplies himself, or by receiving them with a full knowledge of their character. This does not, however, mean that he can, by a promise to pay or by a disavowal of intent to apply for relief as a pauper, change the character of that relief and thereby affect the obligation of the Town of Bar Harbor to furnish support in the first instance, or of Jonesport to pay for it subsequently. The provisions of section 2 of the statute in no respect modify the rule to this effect as set forth in *Inhabitants of Veazie* v. *Inhabitants of Chester*, 53 Me., 29.

There was in this case no agreement between Groves and the Town of Bar Harbor that these supplies were not to be regarded as pauper relief. His letter can be construed in no other way than as an application to the town to relieve his family from distress, which he was then unable to alleviate himself. The rights of the parties are determined by the facts as they were at that time. *Inhabitants of Veazie* v. *Inhabitants of Chester*, supra.

Motion sustained.
New trial granted.

EDWARD J. SKILLIN AND DAVID H. SKILLIN, BOTH INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY ELEANOR Y. SKILLIN, THEIR GUARDIAN, PLAINTIFFS

vs.

HOWARD N. SKILLIN, INDIVIDUALLY AND AS TRUSTEE UNDER DEED OF TRUST FROM HARRIET D. SKILLIN, AND HARVEY T. SKILLIN, DEFENDANTS.

Cumberland. Opinion, March 15, 1935.

TRUSTS.

In an action in equity to compel defendant, as trustee, to carry out the terms of a trust as set forth in a trust instrument, and wherein by the terms of the instrument property was conveyed to the trustee in trust to pay the income or

such part of the principal as he might see fit to the donor in her lifetime, and on her decease, to pay the principal remaining, one-third to one son, one-third to another son, and the remaining one-third in equal shares to two grandchildren, with a clause which stated, "that the trust herein created shall be irrevocable;" and wherein the donor sought to revoke the instrument by obtaining from the trustee a reconveyance of the property:

HELD

The authority of the trustee to pay the principal of the trust fund to the donor was not absolute. He could do so only that she might use it for her comfort and support and for such purposes in connection therewith as might seem reasonable. The first trust indenture was irrevocable and the plaintiffs acquired a vested interest in the principal of the trust subject to the power of the trustee to pay the donor such part of it for her own use as might be reasonable. These rights of the plaintiffs could be divested only with their consent. The attempt to revoke the original indenture by a reconveyance of the trust res to the donor was unavailing.

On report. A bill in equity seeking to compel defendant as trustee, to carry out the terms of a trust as set forth in a trust instrument executed by one Harriet D. Skillin. Case remanded to the sitting Justice for an accounting, and for a decree to enforce the trust as set forth in the instrument of June 21, 1930. The case fully appears in the opinion.

Cook, Hutchinson, Pierce and Connell,
Carnahan, Slusser & Mitchell, for plaintiffs.
William B. Mahoney,
John B. Thomes, for defendants.

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

THAXTER, J. This bill in equity was brought to compel the defendant, Howard N. Skillin, as trustee, to carry out the terms of a trust as set forth in an instrument executed by Harriet D. Skillin on or about June 21, 1930. The facts are not in dispute, and by agreement of the parties the case is reported to this court.

By the terms of this indenture the settlor transferred to her son, Howard N. Skillin, in trust certain securities to which she became entitled under the will of her husband. The provision around which the present controversy centers is in the following language:

"The same to be held by said trustee or his successor IN TRUST to pay the income of said trust, of such part of the principal thereof as he may see fit, to me in my lifetime and upon my decease to pay one-third of the principal and income remaining to Harvey T. Skillin of Seattle, Washington, to pay one-third of said principal and income remaining in equal shares to Edward J. Skillin and David H. Skillin of Wilmette, Illinois, children of my son, Clarence P. Skillin and to pay the remaining one-third of said principal and income remaining to Howard N. Skillin himself individually."

There is a further clause which states that "the trust herein created shall be irrevocable."

The plaintiffs in this action are the children mentioned above of Clarence P. Skillin.

Subsequently Mrs. Skillin executed another instrument to include such of her property as she did not receive under the will of her husband. In the residue of this the present plaintiffs do not claim to share. In the autumn of 1931 Mrs. Skillin determined to change the disposition of her property which she had made in the first trust indenture. She appears to have decided that her son, Harvey, was more in need of money than her grandchildren, the plaintiffs in this action. She consulted her attorney, who advised her that the trustee had power under the terms of the trust agreement to return to her such part of the principal as he saw fit. She accordingly requested her son, Howard, as trustee to reconvey to her the trust property; and when this was done, a new trust indenture was executed by her covering the property included in the two original trust instruments. Under the terms of this new document the balance of the trust fund was on her death to be divided between her two sons in equal shares. The present plaintiffs did not share in the residue. Shortly thereafter Mrs. Skillin died.

Certain other beneficiaries enumerated in the last two instruments, to whom were given specific amounts on the death of Harriet D. Skillin, are not made parties to this bill. It is conceded, however, that their rights are in no way affected by the construction which may be placed on the clause in the first instrument purporting to dispose of the residue.

There is no evidence that this change, under which Howard and his brother benefited, was induced by any suggestion on the part of either of them. The decision was made by their mother, and was justified in her mind by reason of changes in the finances of the respective parties. The plaintiffs, however, claim that the first trust indenture was irrevocable, that their rights under it were vested, and that the reconveyance of the trust property to the settlor was beyond the power of the trustee.

In this view we are obliged to concur. The authority of the trustee to pay the principal to his mother was not absolute. He could do so only that she might use it for her comfort and support, and for such purposes in connection therewith as might seem reasonable. *Lovett* v. *Farnham*, 169 Mass., 1, 47 N. E., 246. Though not expressly so stated, this was the evident intent. The original instrument not only contained no power of revocation but was explicitly made irrevocable. This provision would be without force or effect, if the trustee, under the discretionary power given to him, could reconvey the trust res to the donor in order that she might revoke or modify the terms of the agreement. The document must be construed as an entirety and in such manner as to give life to all its parts.

Each of these plaintiffs acquired a vested interest in the principal of this trust subject to the power of the trustee to pay to the donor such part of it for her own use as might be reasonable. These rights of the plaintiffs could be divested only with their consent. 1 Perry on Trusts and Trustees (7 ed.), Sec. 104; *Lovett* v. *Farnham*, supra; *Thurston Petitioner*, 154 Mass., 596, 29 N. E., 53; *Crue* v. *Caldwell*, 52 N. J. L., 215, 19 A., 188.

The attempt to revoke the original indenture by a reconveyance of the trust res to the donor was unavailing. The plaintiffs have properly invoked the aid of equity to enforce their rights, and the trust must be executed in accordance with the terms of the original agreement.

Case remanded to the sitting Justice for an accounting, and for a decree to enforce the trust as set forth in the instrument of June 21, 1930.

STATE OF MAINE *vs.* CHARLES MULHERN AND ERNESTINE LETEURE.

Penobscot. Opinion, March 16, 1935.

CRIMINAL LAW. MARRIAGE. EVIDENCE. R. S. 1930, CHAP. 135, SEC. 5.

Positive proof of a legal marriage is required upon the trial of persons indicted for adultery or indicted under Sec. 5, Chap. 135, R. S. 1930, for lewd and lascivious cohabitation.

The rule as to proof of marriage is that there must be evidence of a marriage in fact, by a person legally authorized, between parties legally competent to contract. Proof of such a marriage may be made by an official copy of the record, accompanied by such evidence as will satisfy the jury of the identity of the parties, or by the testimony of one who was present at the ceremony. The special or official character of the person by whom the rite was solemnized need not be proved by record evidence of his ordination or appointment if it is shown that he was one who usually, or appeared usually, to perform marriage ceremonies.

Evidence of lewdness and lascivious behavior in secret will not support an indictment for open, gross lewdness and lascivious behavior.

In the case at bar, the necessary evidence was not adduced. Verdict for respondents should have been directed.

On exceptions. Respondents charged with adultery, with lewd and lascivious cohabitation, and gross lewdness and lascivious behavior, were tried at the January Term, 1934, of the Superior Court for the County of Penobscot. To the refusal of the presiding Justice to grant a directed verdict of not guilty, and to his refusals to grant certain requested instructions, respondents seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

James D. Maxwell,
John T. Quinn, attorneys for State.
A. C. Blanchard,
B. W. Blanchard, for respondents.

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

PATTANGALL, C. J. On exceptions. Respondents were tried, convicted and sentenced on an indictment containing three counts, the first charging them with adultery, the second with lewd and lascivious cohabitation, and the third with open, gross lewdness and lascivious conduct.

In order to sustain either of the first two counts, it was necessary to prove the marriage of at least one of the parties to some person other than the remaining respondent. The only evidence offered on this point was the statement of the alleged husband of Leteure, who testified that he and respondent were married in Lee, Maine, on July 4 "about 1927" by some person whom he did not know and whose name he could not give. This is not sufficient.

"Positive proof of a legal marriage is required upon the trial of persons indicted for polygamy and adultery and in actions for criminal conversation." *Pratt* v. *Pierce*, 36 Me., 448.

"It is not sufficient evidence of marriage in a criminal prosecution to prove that the ceremony was performed and that cohabitation for a long period followed, without showing that the person by whom it was so performed was clothed with the requisite authority for that purpose." *State* v. *Hodgskins*, 19 Me., 155.

The rule as to proof of marriage in cases like this, as laid down originally in *Damon's Case*, 6 Me., 148, is discussed and affirmed in *Jowett* v. *Wallace*, 112 Me., 389, 92 A., 321. "There must be evidence of a marriage in fact by a person legally authorized, between parties legally competent to contract. Proof of such a marriage may be made by an official copy of the record accompanied by such evidence as will satisfy the jury of the identity of the parties or by the testimony of one who was present at the ceremony. But it is not necessary that the special or official character of the person by whom the rite was solemnized should be proved by record evidence of his ordination or appointment. If it appears that there has been a marriage in fact, either by town or parish certificates or by a witness present that saw the parties stand up and go through the usual ceremonies of marriage, directed by one who usually or

appeared usually to marry persons, the Court will presume it is a legal marriage until the contrary is proved."

These requirements not having been met, no case was presented against the respondents on the first count.

The second count is based on Sec. 5, Chap. 135, R. S. 1930, under the provisions of which proof of marriage is necessary. This count therefore also fails.

In support of the third count, evidence was offered that on one occasion respondents were apparently occupying a single apartment for the night. "Evidence of lewdness and lascivious behavior in secret will not support an indictment for open, gross lewdness and lascivious behavior." *Commonwealth* v. *Catlin*, 1 Mass., 7.

The statute supporting this count in the indictment defines the offence as "open, gross lewdness and lascivious behavior." Under a similarly worded statute, it was held in *Commonwealth* v. *Wardwell*, 128 Mass., 52, that "the word 'open' is opposed to secret."

The evidence offered did not bring the case at bar within the scope of the statute. There is nothing in the record that negatives, beyond a reasonable doubt, the proposition that these two respondents were husband and wife. If that were true, there was nothing reprehensible in their conduct. If they were unmarried, there was no proof of open, gross lewdness and lascivious behavior on their part.

Exceptions were taken to the refusal of the presiding Justice to give certain instructions to the jury, and also to his refusal to direct a verdict for the respondents. Such a verdict should have been directed.

Exceptions sustained.

DOMINICK M. SUSI *vs.* EVERETT E. DAVIS ET AL.

Somerset. Opinion, March 19, 1935.

JUDGMENTS. BOUNDARIES. DEEDS. NEW TRIALS.

A judgment is not evidence of any matter which came incidentally or collaterally in question, or may be deduced only by way of argument or construction. Certainty is an essential element, and unless it is shown that the judgment necessarily involved a determination of the fact sought to be concluded in the second suit, there will be no bar.

Where the second action between the same parties is on the distinct cause, the earlier judgment is conclusive, by way of estoppel, only as to facts, without the existence and proof of which it could not have been rendered.

To constitute a preclusion, it must be substantiated affirmatively that, in the suit in which the judgment was entered, a right was adjudged and decided. The expression that a judgment is conclusive not only as to subject matter, but also as to every other matter that was or might have been litigated, means that a judgment is decisive upon the issues tendered by the proceeding.

Grantees in severalty of lots of land laid off on a particular plot, hold, in proportion to their respective conveyances, where actual measurements not controlled otherwise are variant in wide departure from those given in the deeds. Deficiency must be divided among the several lots proportionately to their respective content as shown by the plot. The same principle maintains where the real measurements are in excess of those specifically designated upon the plot.

On motion to grant a new trial, the reviewing court will not reverse upon a question of fact if there is sufficient evidence to support the verdict, especially if it is against the party having the burden of proof, and such proof depends appreciably upon the testimony of witnesses whom the jury saw and heard.

In the case at bar, there was no showing of the original location of the line separating the lots of the plaintiff and defendant. There were no physically existing monuments, no admitted lot boundaries. The plan, the jury could have found, could not, except as to the outermost lines, be projected onto the earth. Construction of the deeds, and their legal effect, was a question of law; but the incidental location of the west line of plaintiff's land was a question of fact. The Court holds that the verdict, not being obviously wrong, must stand.

On exception and general motion for new trial by plaintiff. An action of trespass for taking and carrying away pulp wood cut by plaintiff from a strip of land which both plaintiff and defendants respectively claimed to own. Trial was had at the September Term, 1934, of the Superior Court, for the County of Somerset. Plaintiff offered an authenticated copy of the record in an equity suit between the parties, heretofore determined, and also copy of the brief of opposing counsel. To the exclusion of this evidence, plaintiff excepted, and after the jury verdict for the defendant filed a general motion for new trial. Exception overruled. Motion overruled. The case fully appears in the opinion.

Harry R. Coolidge, for plaintiff.

Locke, Perkins & Williamson, for defendant.

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

DUNN, J. The questions presented are raised by plaintiff on a single exception going to the exclusion of evidence, and on general motion for a new trial.

He brought trespass, alleging that, of his pulpwood, defendants "at said Burnham" carried away 110 cords, of the value of $1,122.00, "and disposed of the same to their own use, against the peace of the State." Defendants pleaded the general issue. The jury returned a verdict for defendants, without special findings.

Upon the trial, evidence tended to prove that plaintiff owned two contiguous lots of woodland, one north of the other, numbered 10 and 11, respectively, as delineated and laid down on a plan, dated 1818, of a "Gore," subdivided into twelve lots. Plaintiff's lots abut, on the east, lots 3 and 2, title to the westerly third of the former being in defendant Everett E. Davis, and ownership of lot 2 being in Ermine B. Davis, his wife.

That defendants took the wood, which had been cut by plaintiff, there was no dispute; there was in debate, in the discussion and development of the evidence, the location on the face of the earth of the line running northerly and southerly, limiting plaintiff's land eastwardly, and the defendants' westwardly.

On plaintiff's contention, that line had been definitely settled, as between himself and the defendants, by a judicial decision.

Prior to this action, the now defendants, then plaintiffs, invoked as against the present plaintiff, the exercise of equitable jurisdiction to prevent a continuing trespass in cutting and removing trees growing on their lands. A temporary injunction issued, object being to preserve the property until the rights of the parties could be determined.

The defendants in the equity suit did not demur, but answered generally. Whether the continuous severing and carrying away of trees was a proper subject for injunctive relief was not therefore open. *O'Connor* v. *Slachetka*, 237 Mass., 228, 129 N. E., 598.

The cause was heard on bill, answer, replication and proof. The issues of fact were whether defendant had unlawfully entered upon plaintiffs' lands, and cut and carried off their wood, and, if so, whether the trespasses had been persistent and frequent.

No findings, no rulings, are of record. Decree was that "the plaintiffs' bill be dismissed with costs."

To establish the grounds upon which the decree proceeded, counsel for plaintiff in the instant trespass action offered in evidence a copy of the brief prepared in advance of the equity hearing, by the attorney for his adversary, and used (whether wholly or merely in part does not appear) on the trial of that suit. The brief noted, as a first point or head:

> "*The Issue*: The location on the face of the earth of the 'Gore Line,' i.e., the center line of Gardiner and Williams Gore in the Town of Burnham, which center line separates Lots 2 and 3 (owned by Davis) and Lots 10 and 11 (owned by Susi)."

In a sense, the location of the divisional line between the lots was in issue, but subordinately rather than immediately; even so, nothing goes to infer, much less manifest, that decision went upon that basis.

The record of the former proceeding, supplemented extraneously by the brief, was, on objection, excluded from the evidence. Exception was allowed.

The allegations for equitable interference were, not to determine a boundary line controversy, with regard to which a writ of entry would have afforded apt remedy, but to restrain the defendant

from a continuing trespass arising from an intrusion upon plaintiffs' realty, and the removal of growing trees therefrom; the predicate of prayer for injunction was irreparable injury to growing timber, and want of an adequate remedy at law.

The case was tried on the merits; conclusion of the equity court, as has been seen, was against the plaintiffs. The decree dismissing the bill is in full force and unreversed, but the question of the boundary line is not thereby fully adjudicated.

The decree does not, certainly or uncertainly, define any of the rights of the parties, other than that plaintiffs should no longer maintain the bill.

The fact inferably settled for the defendant was that on the proof there were no acts of trespass continuously or constantly recurring, on any part of plaintiffs' real estate, from which, unless defendant was enjoined, irremediable injury would result.

The effect of the decree was to deny permanent injunction, refuse the prayer for relief, dissolve the temporary injunction, and dismiss the bill.

A judgment is not evidence of any matter which came incidentally or collaterally in question, or may be deduced only by way of argument or construction. Certainty is an essential element, and unless it is shown that the judgment necessarily involved a determination of the fact sought to be concluded in the second suit, there will be no bar. *Freeman on Judgments*, Sec. 691; *Coke on Littleton*, 352b; *Campanella* v. *Campanella*, (Cal. App.) 265 P., 327.

True, there may be an equitable proceeding to determine confused boundaries of adjacent parcels of land.

The foundations of the jurisdiction are fraud and misconduct on the part of the defendant resulting in a confusion of the boundary, a relation between the parties making it the duty of one of them to preserve and protect the marking line, with such neglect or misconduct on the part of him on whom the duty rests as results in its confusion, or where a settlement of the boundary cannot be had at law without a multiplicity of suits. *Watkins* v. *Childs*, 80 Vt., 99, 66 A., 805.

In such instances, it is requisite that a plaintiff allege and prove that some of his land, in respect to which relief is sought, is in the possession of the defendant. 4 *Pom. Eq.*, Sec. 1385; *Watkins* v.

Childs, supra, and supporting cases cited. The plaintiffs averred successive trespasses; also that they were in possession of their land except as trespassed upon, and that the line dividing their parcels of land from defendant's was "clear and well known."

That suit and this action do not relate to the same thing; this is for something different from the first.

Where the second action between the same parties is on a distinct cause, the earlier judgment is conclusive, by way of estoppel, only as to facts, without the existence and proof of which it could not have been rendered. *Burlen* v. *Shannon*, 99 Mass., 200; *Hill* v. *Morse*, 61 Me., 541; *Young* v. *Pritchard*, 75 Me., 513; *Smith* v. *Brunswick*, 80 Me., 189, 13 A., 890; *Embden* v. *Lisherness*, 89 Me., 578, 36 A., 1101; *Kimball* v. *Hilton*, 92 Me., 214, 42 A., 394; *Harlow* v. *Pulsifer*, 122 Me., 472, 120 A., 621; *Lausier* v. *Lausier*, 123 Me., 530, 124 A., 582; *Edwards* v. *Seal*, 125 Me., 38, 130 A., 513. To constitute a preclusion, it must be substantiated affirmatively that, in the suit in which the judgment was entered, a right was adjudged and decided. The expression that a judgment is conclusive not only as to subject-matter, but also as to every other matter that was or might have been litigated, means that a judgment is decisive upon the issues tendered by the proceeding. *Campanella* v. *Campanella*, supra. What was said in *Corbett* v. *Craven*, 193 Mass., 30, 78 N. E., 748; *Edwards* v. *Seal*, supra, and other cases of citation in the brief for the plaintiff, of course must be read in the light of all the circumstances. The opinions lend no support to that which has been contended here.

The evidence was properly rejected. The exception must be overruled.

The plaintiff insisted ownership of the wood; insistence was based on the right of property arising from his own seizin of the premises on which it had been cut. The burden was upon him to make good that assertion by a reasonable preponderance of all the evidence.

He called and examined witnesses, including land surveyors. He introduced his own title deeds (the only deeds in evidence), and official copies of antecedent ones. The description in the deeds amounts to this, and nothing more: Lot 11, containing 87½ acres, and Lot 10, containing 85 acres, the two lots being part of the

"Gore" in Burnham, according to a survey and plan by Charles Hayden.

The map made by the surveyor was admissible in evidence as indicating the location of the survey. *Danforth* v. *Bangor*, 85 Me., 423, 27 A., 268. But at last the question of boundary was one of fact determinable by the force and character of the testimony.

Of the original location of the line separating the lots of plaintiff and defendants, there was no showing. There were no physically existing monuments; no admitted lot boundaries.

The exterior lines of the Gore, as an entirety, were unquestioned; the north-and-south line dividing plaintiff's lots from defendants', was, as drawn by the plan maker, part of the straight direction of the so-called center of the Gore.

The Gore is longer, northerly and southerly, than broad, easterly and westerly. Beginning at the southeast corner of the plan and extending northerly on the east side, the lots are designated, in regular sequence, 1 to 6; thence, beginning with 7, in the northwest corner, to and inclusive of 12.

Of the lots, two are designated of similar acreage; each of these, one being plaintiff's 11, is denoted 87½ acres. The other lots vary from 86½ acres to 255 acres. Plantiff's lot 10 is defined 85 acres; of defendants' lots, 2 is noted 97½ acres, and 3 (the whole lot) 86½ acres.

In the phrase of surveyors, there are overruns, with material excess of land. Plaintiff's lots, the stated areas of which, united, embrace 172½ acres, have, exactly measured, 34½ acres more, full inclusion being 207 acres. Defendants' lots 2 and 3 (all of 3) have, on the plan, together, 184 acres; the overplus is 44 acres; actual total, 228 acres.

Surplus essentially affects other lots; still others fall short.

The plan, the jury could have found, could not, except as to the outermost lines, be projected onto the earth.

Grantees in severalty of lots of land laid off on a particular plot hold, in proportion to their respective conveyances, where actual measurements not controlled otherwise are variant in wide departure from those given in the deeds. It must be presumed, in the absence of circumstances showing the contrary, that variance arose from an imperfect measurement of the whole piece of land.

Deficiency must be divided among the several lots proportionately to their respective content as shown by the plot. *Wyatt* v. *Savage*, 11 Me., 429. The same principle maintains where the real measurements are in excess of those specifically designated upon the plot. *Witham* v. *Cutts*, 4 Me., 31. A survey shall govern the plan. The plan is a picture, the survey the substance. The plan may be all wrong, but that does not matter if the actual survey can be shown. *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Me., 219; *Pike* v. *Dyke*, 2 Me., 213; *Brown* v. *Gay*, 3 Me., 126; *Esmond* v. *Tarbox*, 7 Me., 61; *Loring* v. *Norton*, 8 Me., 61; *Bussey* v. *Grant*, 20 Me., 281; *Williams* v. *Spaulding*, 29 Me., 112; *Whitten* v. *Hanson*, 35 Me., 435; *Bean* v. *Bachelder*, 78 Me., 184, 3 A., 279; *Stetson* v. *Adams*, 91 Me., 178, 39 A., 575; *Ilsley* v. *Kelley*, 113 Me., 497, 94 A., 939.

Construction of the deeds, and their legal effect, was a question of law; but the incidental location of the west line of plaintiff's land was a question of fact. *Abbott* v. *Abbott*, 51 Me., 575, 581.

It is to be assumed, no point to the contrary having been saved, that the trial judge properly instructed the jury concerning the law.

On motion to grant a new trial, the reviewing court will not reverse upon a question of fact if there is sufficient evidence to support the verdict, especially if it is against the party having the burden of proof, and such proof depends appreciably upon the testimony of witnesses whom the jury saw and heard.

The verdict, not being obviously wrong, must stand.

Exception overruled.
Motion overruled.

NELSON T. GORDON, JR., PRO AMI

vs.

H. G. LEE AND JOSEPH W. SCANNELL.

Kennebec. Opinion, April 6, 1935.

PLEADING AND PRACTICE. TORT FEASORS.

Persons who do not cooperate, the harm by each being distinct, cannot be sued jointly, even though the harms may have been precisely similar in character.

Persons who contribute to the commission of a tort are joint tort-feasors.

To be joint tort-feasors it is not essential that participants should have a common intent to work injury; it is sufficient if they have a common intent to do that which results in injury. Some sort of community in the tort, injury in some way due to joint wrongdoing, must exist; not necessarily from acting in concert, because two tort-feasors, though acting apart, may unite in causing one injury.

One, or any, or all, of several joint wrongdoers, may be sued, but no person is suable for any injury of which he is not the cause.

Independent tort-feasors may not, as a general rule, be joined by the plaintiff in one action as codefendants.

When a defect in a writ is apparent of record, advantage of it may be taken by motion to dismiss. Such a motion in the circumstances operates in effect as a demurrer.

In the case at bar, the pleading set forth not a mere misjoinder of parties, but a misjoinder of causes of action. The declaration was defective, but the writ should not have been dismissed. The case came within the statute (R. S., Chap. 96, Sec. 14,) relating to amendments.

On exception by plaintiff. An action on the case for malpractice brought against two physicians, both being joined as defendants in the one writ. At the hearing at the October Term, 1934, of the Superior Court for the County of Kennebec, each defendant filed a motion to dismiss the writ on the ground of misjoinder of the

parties, viz.: that the declaration failed to set forth a joint tort on the part of the defendants or facts constituting the defendants joint tort feasors. To the granting of these motions to dismiss, plaintiff seasonably excepted. Exception sustained. The case fully appears in the opinion.

Andrews, Nelson & Gardiner, for plaintiff.

Robinson & Richardson,

Locke, Perkins & Williamson, for defendants.

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

DUNN, J. The question of leading interest is whether plaintiff, in his single action against two defendants for malpractice as surgeons, has declared them liable jointly for damages arising from the concurrence of actionable wrongs. The judge below holding that, as laid, neither tort, negligence nor liability were the same, and that in actions in form *ex delictu* there could not be different verdicts for different sums against different defendants upon the same trial, granted motions to dismiss the suit; plaintiff excepted.

The declaration contained six counts for maltreatment of plaintiff's crushed right foot and leg, with consequent amputation below the knee.

In two counts there is allegation of negligence on the part of one defendant (Dr. Lee) only.

In the remaining four counts plaintiff, in detailing negligence of the second defendant (Dr. Scannell), makes no claim that the other doctor was negligent.

There is averment in the six counts of responsibility severally for failure of the named individual defendant to possess and employ that reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession in the same neighborhood, failure to exercise reasonable and ordinary care and diligence in the exertion of his skill and the use of his knowledge, and likewise to exert his best judgment as to the treatment of the case intrusted to him.

Improper application, by Dr. Lee alone, of a cast so tight as to impair the circulation of the patient's blood, thereby producing

"the entire loss, damage and injury," is in gist what, involving him, the counts lay.

With the necessary changes, the counts against the other defendant (Dr. Scannell) aver the result proximately attributable to no tortious act but his. Failure to discover seasonably from examination that the cast had become too tight, and was preventing the flowing of blood, is, in summary, what is charged.

As the brief for plaintiff states, and as was said in argument at the bar, there is, in all the counts, language encompassing "defendants," who fell short of proper performance of duty. But, specifically, phrasing as a whole is equivalent to denial of joint tort-feasor responsibility, and the assertion of several liability. Allegation is of independent neglect through nonconjunctive delinquency of defendants. The especial count—the first, the last, any intermediate one—fairly interpreted, alleges, both as to negligence and to damage, a separate undertaking, improperly done, unrelated to breach of duty by anyone else.

A person who commits a tort is a tort-feasor.

Persons who do not cooperate, the harm by each being distinct, cannot be sued jointly, even though the harms may have been precisely similar in character. *Allison* v. *Hobbs*, 96 Me., 26, 51 A., 245, 246.

Persons who contribute to the commission of a tort are joint tort-feasors.

To be joint tort-feasors it is not essential that participants should have a common intent to work injury; it is sufficient if they have common intent to do that which results in injury. Some sort of community in the tort, injury in some way due to joint wrongdoing, must exist; not necessarily from acting in concert, because two tort-feasors, though acting apart, may unite in causing one injury. 1 *Shearn & Redf. Neg.*, Sec. 122; *Consolidated Ice Machine Co.* v. *Keifer*, 134 Ill., 481, 25 N. E., 799. "If such persons acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort-feasors. . . ." *Allison* v. *Hobbs*, supra.

Plaintiff, to repeat, has not impleaded defendants jointly; he

has, in his own speech, made them parties "severally," i.e., each by himself, for what he only had done.

One, or any, or all, of several joint wrongdoers, may be sued, but no person is suable for any injury of which he is not the cause.

Where the tort may be joint, the joinder of more persons than were liable constitutes no objection, and one or more of them may be acquitted and a verdict taken against the others. 4 *Chit. Pl.*, 74. Independent tort-feasors may not, as a general rule, be joined by the plaintiff in one action as codefendants. 20 R. C. L., 708. This case is no exception.

The instant pleading sets forth not a mere misjoinder of parties, but a misjoinder of causes of action.

The law deals with things as they are; it is not for the court to speculate as to what results might have flowed, in law or in fact, from a dissimilar recital of facts. *Adler* v. *Pruitt*, 169 Ala., 213, 53 So., 315.

The defect being apparent of record, advantage of it may be taken by motion. *Chamberlain* v. *Lake*, 36 Me., 388. Such a motion in the circumstances operates in effect as a demurrer. *Rines* v. *Portland*, 93 Me., 227, 44 A., 925; *Hurley* v. *South Thomaston*, 101 Me., 538, 64 A., 1050.

The declaration is defective, but the writ should not have been dismissed. The case came within the statute (R. S., Chap. 96, Sec. 14,) relating to amendments. *Hudson* v. *McNear*, 99 Me., 406, 59 A., 546.

Since the writ was ordered dismissed, and plaintiff thus aggrieved, exception must be sustained.

Exception sustained.

MARIE GOUDREAU *vs.* ALFRED B. OUELETTE.

JEAN-BAPTISTE GOUDREAU *vs.* ALFRED B. OUELETTE.

York. Opinion, April 8, 1935.

NEGLIGENCE. MOTOR VEHICLES. "LAST CLEAR CHANCE."

The doctrine of the "last clear chance" has no application where the negligence of the plaintiff progressively and actively continues up to the point of the collision.

In the case at bar, the negligence of the defendant was clearly established. He was driving his truck at excessive speed when he ran down the plaintiff, Marie Goudreau, and his attention, for the time being, was diverted. This was negligence and the proximate cause of the collision.

The admission of the plaintiff, Marie Goudreau, in no way clarified or contradicted, that she attempted to cross the street without looking in either direction for approaching automobiles constituted contributory negligence and barred her recovery.

The requested instructions, although phrased substantially in the language of decided cases, were generally inapplicable to the undisputed facts and could not, if given and followed by the jury, have absolved the plaintiff, Marie Goudreau, from her own negligence.

On exceptions and general motions for new trial by plaintiffs. Two actions on the case tried together to recover damages resulting from the alleged negligence of the defendant, who, when driving his automobile, hit the plaintiff Marie Goudreau, a pedestrian; the action by the husband being for resultant damage to him. Trial was had at the May Term, 1934, of the Superior Court for the County of York. To the refusal by the presiding Justice to give certain requested instructions, plaintiffs excepted, and after the jury verdict for the defendant in each case, filed a general motion for new trial. Exceptions overruled. Motions overruled. New trials denied. The cases fully appear in the opinion.

Louis B. Lausier, for plaintiffs.

Joseph R. Paquin, for defendant.

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

STURGIS, J. In the early evening of March 18, 1933, the defendant, Alfred B. Ouelette, while driving his light Ford truck westerly along Elm Street in the City of Biddeford, ran into Marie Goudreau, who brings the action of negligence here numbered 1,472 for the personal injuries she received. Her husband, Jean-Baptiste Goudreau, in number 1,473 seeks compensation for his expenses and losses resulting from his wife's accident. The cases were tried together and the verdicts were for the defendant. Exceptions to the refusal of the presiding Justice to give requested instructions were reserved by the plaintiffs in each case and come forward with their general motions for new trials.

The evidence clearly establishes that the defendant, Alfred B. Ouelette, drove his truck at an excessive speed and out of control into the intersection formed by Elm and Center Streets in Biddeford and directly in front of St. Joseph's Church, where he knew pedestrians were regularly passing and, with diverted attention, ran down the plaintiff, Marie Goudreau, as she was passing along over the crosswalk. This was negligence. *Hill* v. *Finnemore*, 132 Me., 459, 172 A., 826; *Rouse v. Scott*, 132 Me., 22, 164 A., 872; *Sturtevant* v. *Ouelette*, 126 Me., 558, 140 A., 368.

The jury were warranted, however, in finding that the plaintiff, Marie Goudreau, was also negligent. She admits that she stepped off the sidewalk on the southerly side of Elm Street and attempted to walk across to the opposite side without looking, outside the crosswalk, in either direction for approaching automobiles. The intersection was well lighted and her view was unobstructed. Elm Street at this point is a part of the through way between Portland and Boston and motor traffic is heavy and constant. Marie Goudreau was a regular attendant at her Church and was fully acquainted with the traffic conditions in front of it. Her utter lack of care in crossing the street, by her own admissions in no way clarified or contradicted, warranted the jury in finding that she was guilty of negligence which directly contributed to her accident. The "last clear chance" rule does not apply because her negligence progressively and actively continued up to the point of collision.

Clancey v. *Power and Light Co.*, 128 Me., 274, 147 A., 157; *Hill* v. *Finnemore*, supra; *Sturtevant* v. *Ouelette*, supra.

The further defense argued on the brief that the plaintiff, Marie Goudreau, had crossed Elm Street when she was struck by the defendant's automobile, passed up the sidewalk and stepped back into the highway does not require extended discussion. The testimony offered in support of this claim is entirely inconsistent with the circumstances and probabilities of the cases as disclosed by the other evidence and is opposed by credible evidence of overwhelming weight. It can not serve as the foundation of a verdict. *Emery* v. *Fisher*, 128 Me., 453, 148 A., 677; *Page* v. *Moulton*, 127 Me., 80, 141 A., 183; *Moulton* v. *Railway Company*, 99 Me., 508, 59 A., 1023. It is not to be assumed that the jury rested their verdicts on this defense.

The exceptions reserved show no prejudicial errors. The requested instructions, although phrased substantially in the language of decided cases, were generally inapplicable to the undisputed facts and could not, if given and followed by the jury, have absolved the plaintiff, Marie Goudreau, from her own negligence.

In each case, the entry is

Exceptions overruled.
Motions overruled.
New trials denied.

MARJORIE M. PIERSON *vs.* BERDINA P. PIERSON.

Aroostook. Opinion, April 10, 1935.

ALIENATION OF AFFECTIONS. BURDEN OF PROOF. EVIDENCE.

To warrant a recovery of damages in an action by a wife against her husband's mother for alienation of affections the burden is upon the plaintiff to show that the mother's action was malicious.

Malice is not presumed but must be proved and may be by evidence of wrongdoing and unjustifiable conduct preceded by hostile, wicked or malicious intention.

A parent may use the proper and reasonable argument in counseling her child and if it later appears that the parent acted under mistake or that her advice or interference may have been unfortunate, unintentionally, if she acts in good faith for what she believes to be upon reasonable grounds for the good for her child, she is not liable.

In the case at bar, the plaintiff failed to prove malice by a preponderance of testimony and the jury erred in so finding.

On general motion for new trial by defendant. An action to recover damages for alleged alienation of affections. Trial was had at the September Term, 1934, of the Superior Court for the County of Aroostook. The jury rendered a verdict for the plaintiff in the sum of $7,591.00. General motion for new trial was thereupon filed by defendant. Motion sustained. The case fully appears in the opinion.

Donald C. O'Regan,
A. S. Crawford, for plaintiff.
Ralph M. Ingalls,
John S. S. Fessenden, for defendant.

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

PATTANGALL, C. J. On motion by defendant. Action for damages based on an alleged unlawful alienation of husband's affections by his mother. The rule governing such cases is well settled in this state. They may be maintained only when malice on the part of defendant is proved. We find no such evidence in this record.

Plaintiff and Boyd Pierson were married on July 7, 1933. At that time he was twenty-one and plaintiff twenty years of age. They first met in September, 1929, and not again until August, 1930. Three weeks later they became engaged and planned an immediate marriage but were obliged to abandon the idea because of inability to procure licenses on account of their respective ages. In December Boyd went to California where he remained until March, 1931, when the engagement was broken and their intimate relations were not resumed until November, 1932. Before Christmas, Boyd left for Portland after giving plaintiff a diamond en-

gagement ring and, as she went to Toronto before Boyd returned, they did not meet again until April, 1933. In May of that year, plaintiff became pregnant and about the time of their marriage an abortion was procured. It is to be noted that they had seen but little of each other prior to the marriage, although they had carried on an intensive correspondence during a portion of the time.

Defendant first learned of the marriage in September. Prior to that time, Boyd, having left the University of Maine on account of failure to pass examinations, had planned to attend college in Alabama, intending to pursue a course of study which would fit him to enter a medical school. Plaintiff was employed as a telephone operator and was to continue in that employment. In order to do this, the marriage was to remain secret as married women were not eligible for the work in which she was engaged.

After a conference between plaintiff, defendant, Boyd and his father, defendant and Boyd went to Alabama, remaining there about two hours, just long enough to find that he could not be admitted to the school. They then proceeded to Duke University, staying there two days, admission being again refused. In about a week they arrived at his home, and the next day Boyd returned to the University of Maine where he remained until the Christmas holidays. After a short visit at his home, he again returned to Orono, staying there until March, when, having succeeded in gaining admission to Duke University, he went there, staying until May. At that time he came north, writing plaintiff from Portland, and in June decided to apply for a divorce and so notified her.

During the Christmas vacation in 1933, Boyd informed his parents of plaintiff's pregnancy and the abortion, which so incensed plaintiff that her attitude toward Boyd entirely changed, as admitted by her and evidenced by the tone of the letters which passed between them.

Plaintiff testified that during 1934 Boyd did not write as often as formerly nor as long letters; that when he returned to Maine in June, he was apparently not as affectionate as he had been; and that on June 14th she recorded her marriage certificate and lost her employment. On the 19th, Boyd and defendant met plaintiff at her sister's, and left for Portland without any arrangements having been made for the future. They did not meet afterwards.

A great deal of evidence was submitted which had no bearing upon the issues which the jury was called upon to decide. The details of a trip which Boyd made to California prior to the marriage were gone into at great length. One hundred forty-six pages of the record, filled with letters written to plaintiff by Boyd prior to their marriage, possessed no evidence value whatever. The personal history of plaintiff from her childhood, the comparative poverty of her family during her early life, long before she became acquainted with Boyd, were dwelt upon at considerable length. This mass of inadmissible testimony may well have tended to confuse the jury and to obscure the issues. The letters may have worked prejudice against Boyd, and the feeling thus engendered may have been unconsciously related to defendant. They were not models of epistolary art. They breathed passion, teemed with vulgarity, and contained evidence of a somewhat sadistic frame of mind.

In cases of this sort, it is always difficult for triers of fact to separate the real defendant and the husband or wife appearing as a defense witness. Whatever the cause of the verdict, it has no legal basis.

The situation was not uncommon, although distressing. An immature son, not yet out of school, in fact apparently incapable of staying in any given school very long, with no means of his own and without earning capacity, married without the knowledge or consent of his parents. On the eve of his starting for a southern college, the mother learned of the situation and, realizing as would have any person with common sense, that under the circumstances the marriage was most ill-advised, suggested annulment. This idea was abandoned as impracticable, and an understanding was reached that plaintiff would continue at work for the telephone company, which necessitated keeping the marriage secret, and that Boyd at his father's expense should acquire the education which had been planned for him. Neither defendant nor her husband were under any obligation to support plaintiff. In fact, after Boyd reached his majority, neither was obligated to support him. Defendant did not seek intimacy with plaintiff; but, on the other hand, there is no evidence that any hostility was displayed by the mother-in-law toward her.

Plaintiff made an unfortunate marriage. Given the factors present in this case, its failure was predestined. Boyd Pierson was totally unfitted to assume the responsibilities of a husband and a father. His mother knew it and doubtless was greatly exercised. If she and her husband felt that it was unwise for the young couple to live in too close connection, it may have been because they preferred not to become grandparents until Boyd had, at least, finished wandering from school to school, ostensibly endeavoring to prepare himself for a professional career. They declined to assume the expense of providing a home for Boyd and his wife in either of the college towns in which he temporarily resided. In this, they were quite within their rights.

Aside from such inferences as might be drawn from admitted facts, plaintiff relies upon her own evidence to prove malice on the part of defendant. Her testimony in that respect fails to substantiate the charge.

Certain evidence was emphasized as tending to show an antagonistic attitude of defendant toward plaintiff. Among other things relied upon was a letter from Boyd to plaintiff, written in September, 1933, while on his way South with his mother. The quotation from the letter is: "Mother hasn't said much. It seems that they don't think that you are the right girl for me. Now, dear, don't repeat any of this to anyone. If you do, I'll know that you don't love me. They are willing to have it proven to them that you are the one and they are hoping that you are. It has rather broken Mother up. She says that it is going to break Aunt Bertha's heart as I am the nearest to a son that she has ever had."

Plaintiff testified that when her husband and defendant were leaving for Alabama, "Boyd wanted me to say goodbye to his mother. He also asked me to kiss her goodbye and she turned her face away. Boyd told his mother not to be foolish and then she leaned over and kissed me."

She also testified that when Boyd came home for the Christmas holidays in 1933, he had agreed to spend Christmas Day with her but instead spent it at Presque Isle. There was nothing to indicate, however, that defendant had anything to do with Boyd's action in that respect. Both plaintiff and defendant met Boyd at the railroad station Christmas evening, riding down in the same taxi, not

by appointment but by accident. Plaintiff said that they spoke when they met in the taxi but neither spoke to the other in the station while waiting for the train to come in. The three rode in the taxi from the station to defendant's house, arriving there about ten o'clock. At this time, Mrs. Pierson again suggested an annulment of the marriage, that Boyd go to school, and later on, if he still wanted to be married, she would consent to it.

Plaintiff was asked, "Was Mrs. Pierson courteous and kind to you in her home?" Plaintiff answered, "Yes." Her counsel was evidently dissatisfied with the answer and put the question, "She was?" and again plaintiff answered, "Yes."

The final result of this interview was that plaintiff would go on working for two years, keeping the marriage a secret, and at the end of that time Boyd would support her.

It was a stormy night and Mrs. Pierson invited plaintiff to remain at the house, but she declined and went to her sister's with whom she lived.

Plaintiff testified further that they (meaning Boyd's father and mother, herself and Boyd) talked for some time that night; that the parents told them that they had been very foolish children; that it was only a case of child love; and that the wiser thing to do was to have the marriage dissolved in some way, which plaintiff and Boyd refused to consider.

In answer to the question, "Did anything happen at Christmas time in 1933 that made you dislike Boyd?" she answered, "Yes"; and also admitted that after that time she ceased to write to him frequently, and told him in one letter that she had hopes of getting along splendidly with his family but that he had spoiled it all, referring to the information he had given his people concerning her pregnancy prior to their marriage; that after that time she never sent her love to Boyd, and that on one occasion it was a month and a half before she acknowledged a letter from him; that Mrs. Pierson never talked unkindly to her; and that there was nothing excepting the talk which Boyd had with his parents at Christmas time which caused trouble between her and her husband.

She testified that on April 9, 1934, she wrote him, asking him if he wanted a divorce, and that it was possible that she had written him "our marriage ought to be annulled. Your mother is right."

Later she admitted that she had an idea that the marriage ought to be annulled, and that she had written him, comparing him to another young man she used to know, who was able to support a wife. There is very little that was material in the testimony of supporting witnesses called by the plaintiff.

It is unnecessary to consider the evidence for the defense, as the plaintiff is entitled to hold the verdict if, on the most favorable presentation of her case, it can be justified in law. We do not find such justification.

The law has always recognized a broad distinction between the permitted attitude of parents toward their married children in connection with their domestic relations and the attitude which may properly be taken under like circumstances by strangers.

A parent is liable for any wrongful alienation of the affections of a married child, but only when the parent's conduct is malicious. It is incumbent upon the plaintiff to prove malice on the part of the defendant. Liability attaches only when the parent interferes with hostile, wicked or malicious intent. If she acts in good faith for the son's good on reasonable grounds of belief, she is not liable. *Oakman* v. *Belden*, 94 Me., 280, 47 A., 553; *Wilson* v. *Wilson*, 115 Me., 341, 98 A., 938; *Shalit* v. *Shalit*, 126 Me., 291, 138 A., 70; *McCollister* v. *McCollister*, 126 Me., 318, 138 A., 472; *Miller* v. *Levine*, 130 Me., 153, 154 A., 174.

A suggestion that a marriage ought to be annulled or that it would be wise for the parties to become divorced is not evidence of malice on the part of the parent. "To the parents this ill-advised marriage may well have seemed the end of their daughter's happiness and they would have been less than human if they had not given expression to their resentment at the sudden termination of the ambitious career they had probably marked out for their daughter." *Kleist* v. *Breitung et al*, 232 Fed., 555.

Plaintiff did not succeed in establishing by a preponderance of testimony malice on the part of the defendant. The burden of proof was on her to do so.

Motion sustained.

JULIUS SINGER *vs.* JOSEPH DONDIS.

Knox. Opinion, April 10, 1935.

BANKRUPTCY. FRAUD.

A secret agreement by which a creditor of a bankrupt agrees to a composition on the condition that in addition to the percentage to be paid to other creditors he receive a note "with a good endorser" for the balance of his debt is illegal and void as against public policy.

Such a note, endorsed for the accommodation of the debtor maker, and made payable to the attorney of the creditor, is not recoverable against the endorser by an endorsee who takes with notice.

The fact that the financial advantage to the creditor comes not from the bankrupt's estate but from a third party, either by payment or by agreement to pay as in the case at bar, makes it none the less illegal and void.

On exceptions by defendant. An action on the case brought by an endorsee of a note against an endorser. The defendant pleaded the general issue, and under brief statement alleged that the note was obtained by fraud. Trial was had before a sitting Justice without jury, right of exceptions to matters of law being reserved. The sitting Justice found for the plaintiff. Defendant seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Bernstein & Bernstein, for plaintiff.

Ensign Otis,

Frank A. Tirrell, for defendant.

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

HUDSON, J. Action of assumpsit by an endorsee against an accommodation endorser of a promissory note. The Justice who

by agreement heard the case, without intervention of a jury, found for the plaintiff, to which the defendant excepted.

The facts are uncontraverted. In the Summer of 1933, one Rubenstein, a clothing dealer in Rockland, became an involuntary bankrupt, the plaintiff, a wholesale merchant in Boston, being one of his creditors. A composition for twenty per cent was obtained. At first the plaintiff flatly refused to join but did finally, on the condition that he receive, in addition to the twenty per cent to be paid all other creditors, a note with "a good endorser" for the balance of his debt.

This action is on the note thus given,—dated September 1, 1933, —for $552.00, signed by Rubenstein, endorsed by the defendant for his accommodation, payable on time to the plaintiff's attorney, Rudman, who, with knowledge of all of the facts, took it for the benefit of his client, and endorsing it without recourse, delivered it to him. The giving of the note was unknown to other creditors of the bankrupt.

The defendant pleaded the general issue with brief statement, therein setting up fraud, misrepresentation, duress, and failure of consideration.

The question is whether on said facts the judgment for the plaintiff is valid in law.

> "The general principle has been long settled in England and in this country, that a secret agreement, which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is void and will be set aside by the suit of any of the parties. . . .Hence it is that a note or other security given by a debtor for the purpose of inducing a creditor to consent to a composition, or any security taken for an amount beyond the composition agreed on, or even for that sum, better than that which is common to all, if unknown to the other creditors, is void and inoperative; except, however, that such a note may not necessarily be void in the hands of subsequent and bona fide holders before maturity; and it is said that a failure to disclose a secret advantage amounts to a fraudulent

misrepresentation of the state of fact on the basis of which the contract is entered into." 5 R. C. L., Sec. 5, pages 871, 872.

A great many authorities might be cited to sustain the above declaration of the law, so well settled in both the Federal and State Courts, although until now we seem not to have had a Maine decision to this effect. See *Bean* v. *Amsinck, et al.*, 10 Blatchf., 361, Fed. Cas. Vol. 2, Case No. 1167; *Bean* v. *Brookmire, et al.*, 2 Dill., 108, Fed. Cas. Vol. 2, Case No. 1170. In the latter case, on page 1134, the Court said:

> "The rules of law respecting the good faith to be observed by all who unite in a composition agreement are well known and well settled, and rest upon the soundest policy and upon the clearest principles of equity, commercial morality, and fair dealing. The temptation to obtain undue or secret advantages is so great, that the necessity for the severe rules which have been declared by the courts to repress it, is undeniable. All must be open and fair. If a creditor, appealed to by his debtor, makes it a condition of his uniting in a composition, that he shall have any advantage not enjoyed or made known to the others, the transaction can not stand either at law or in equity. . . . It is treated as oppression or duress toward the debtor, and he may defend against any promise to pay made under such circumstances; or, if he has actually paid, he may recover back the amount, as the law does not consider the parties as being in pari delicto, nor regard the payments thus made as voluntary, and allow such recovery on grounds of public policy. *Breck* v. *Cole*, 4 Sandf. 79."

See also *In re B. Jacobson & Son Co.*, 196 Fed., 949; *In re M. & H. Gordan*, 245 Fed., 905; *Collier on Bankruptcy*, 13th Ed., Vol. 1, Par. 4, Page 453; *Nole* v. *Abate*, 44 Am. Bank. Rep. 608; *White* v. *Kuntz, et al.*, 14 N. E., 423; *Citizens National Bank* v. *Kerney* (Ind.), 108 N. E., 139; 7 C. J., Par. C, Pages 341, 342; 3 R. C. L., Sec. 130, Page 307; Footnote in 27 L. R. A. An., beginning on page 36; *Blasdel* v. *Fowle, et al.*, 120 Mass., 447; *Phelps* v. *Thomas*, 6 Gray, 327; *Case* v. *Gerrish*, 15 Pick., 49; *Coates* v. *Black*, 1 Cush., 564; *Partridge* v. *Messer*, 14 Gray, 180; *Dexter* v.

Snow, 12 Cush., 594; *Downs* v. *Lewis, et al.*, 11 Cush., 76; *Ramsdell, Exr.* v. *Edgarton, et als.*, 8 Met., 227; *Tirrell* v. *Freeman, et al.*, 139 Mass., 297, 1 N. E., 350.

An examination of the above authorities discloses that the fundamental ground on which the decisions rest is that such a contract is void because against public policy.

The fact that the financial advantage to the creditor comes not from the bankrupt's estate but from a third party, either by payment or by agreement to pay, (as herein by endorsement of a note) makes no difference. It is still illegal and void. 5 R. C. L., pages 872, 873, and cases cited in footnotes 15 and 16.

In *Blasdel* v. *Fowle, et al.*, supra, the note for the additional amount was signed by the bankrupt's wife and her separate property was given as security. The Court said:

> "Nor is it material whether the wife knew of the fraudulent agreement when she made the note and mortgage; for the agreement being illegal and void, all instruments made for the purpose of giving it effect are tainted with the illegality, and will not be enforced by a court of equity."

While we find no Maine decision that such a contract with relation to a composition is void, yet *Marble* v. *Grant*, 73 Me., 423, is analogous in principle. In that case, it appeared that the note was given in pursuance of an agreement not to oppose an application for a discharge in bankruptcy then pending. The Court held that a contract "thus procured" was "against sound public policy," "void at common law, as well as by the Bankrupt Act."

Whether a subsequent purchaser for value before maturity and without notice may recover on such a note is not herein decided, for in this case the plaintiff had notice. Moreover, he conceived the scheme and had the note made for his secret advantage over the other creditors—all of whom had the legal right to share alike in the composition. Each owed to the other the exercise of good faith. In this the plaintiff failed. Such conduct does not receive the sanction of this Court and should be condemned.

Exceptions sustained.

MERRITT G. PRIDE *vs.* CHARLES F. KING.

Cumberland. Opinion, April 20, 1935.

R. S., CHAP. 95, SEC. 95. STATUTE OF LIMITATIONS. ACCOUNT STATED.

Where an account sued is mutual, open and current, and so within Section 95, *Chapter* 95, *R. S.* 1930, *the Statute of Limitations begins to run with its last item, either of debit or credit.*

Where the debtor, in such an account, to whom credit has been given for howsoever short a time, pays for the particular item for which credit was given, such payment does not prevent the running of the statute.

Cash credits only do not rid such an account of its mutuality.

A stated account is one which has been examined by the parties and from which a balance, due from one to the other, has been ascertained and agreed upon as correct.

In the case at bar, the conference between the plaintiff and the defendant relative to the settlement of the bill did not result in an "account stated." Their minds apparently were focused on the method of settlement rather than on the amount to be paid. Nothing definite resulted from their conference. Not enough transpired to effect an "account stated," and without it the account remained as it had been, mutual and open, not closed nor stated; not settled, but still unsettled. The account as sued and proved was not outlawed.

On exceptions by defendant. An action on an account annexed. The defendant pleaded the general issue with the statute of limitations by way of a brief statement. Trial was had before the sitting Justice without jury. To his finding in favor of the plaintiff, defendant seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Skillin, Dyer & Payson, for plaintiff.

Charles F. King, pro se

Milan J. Smith, for defendant.

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

HUDSON, J. Assumpsit upon an account annexed. Defendant pleaded the general issue and by brief statement the Statute of Limitations. By agreement, the action was heard before the presiding Justice without the aid of a jury. Chap. 91, Sec. 26, R. S. 1930. Judgment for the plaintiff for the amount sued, to which decision exceptions were taken.

The account has fifty-six debit items, the first dated January 20, 1923, and the last November 30, 1929, twelve in 1923, ten in 1924, fifteen in 1925, fifteen in 1926, one in 1927, and three in 1929, all of which are for fuel. It contains nine credit items, beginning January 11, 1924, and ending December 18, 1929, all of cash, two in 1924, three in 1926, and four in 1929. The following are the only items within the period of six years before the date of the writ, to wit, March 15, 1934:

1929	DEBIT	
Feb. 9	1 ton coke and pea,	$14.50
	2 ft. p. edg. sd.	3.00
Nov. 30	1 ton coal,	12.00
1929	CREDIT	
Feb. 9	Credit by cash,	$15.00
March 19	Credit by cash,	2.50
Dec. 6	Credit by cash,	12.00
Dec. 18	Credit by cash,	3.00

The total of all of the debits as sued is $774.63 and of the credits given, $294.38, leaving a balance of $480.25, which the presiding Justice found due the plaintiff.

The plaintiff offered no oral testimony but submitted his case on affidavit under the statute. (See R. S. 1930, Chap. 96, Sec. 129.) The defendant testified.

The plaintiff contends that this account comes within the provisions of Sec. 95 of Chap. 95, R. S. 1930, which reads:

> "In actions of debt or assumpsit to recover the balance due, where there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both, the cause of action shall be deemed to accrue at the time of the last item proved in such account."

The defendant claims that prior to the transactions of 1929 that which had been a mutual open account current was converted into an "account stated." Thus, two questions arise:

1. If the account be within said Section 95, is it, or any part of it, outlawed; and,
2. Had the items of the account dated prior to March 15, 1928, or any part of the same, been converted into an "account stated" and thus had become outlawed when the action was sued, March 15, 1934?

1. The first question is easily answered by application of the principle of law determined in *Rogers* v. *Davis*, 103 Me., 405, 69 A., 618, in which it was held that where the account is mutual, open and current, the Statute of Limitations begins to run with its last item, either of debit or credit, and that the fact that the debtor, to whom credit has been given, for howsoever short a time, pays for the particular item or items for which credit was extended, does not bar recovery. The Court said, on page 409:

> "When the parties by their mutual dealings, by some item of debit or credit have extended the time of the operation of the statute upon the balance of the account, we do not think it lies in the power of the debtor then to shorten the time by making specific payment of debit items. The statute was evidently intended to preserve the right of action upon a mutual unsettled account for six years after the last item, no matter how far back the account commenced. Until there has been a period of at least six years during which there are no items, either debit or credit, the account is alive and suable." (Also see *Mansfield* v. *Gushee*, 120 Me., 333, 348, 114 A., 296, affirming *Rogers* v. *Davis*, supra.)

Cash credits only do not rid the account of its mutuality. *Benjamin* v. *Webster*, 65 Me., 170; *Davis* v. *Smith*, 4 Me., 337.

This account comes within said Section 95 as construed in *Rogers* v. *Davis*, supra. As in *Rogers* v. *Davis*, supra, the charge for tobacco on November 15th caused the statute to run anew from that date, although by specific direction of the debtor it was paid

on the following December 15th, so here, the last debit on November 30, 1929, for one ton of coal, although paid by the $12.00 credited December 6th, caused the statute to run anew on said November 30th. Then, on said last named date, which was within the six year period before the date of the writ, the whole account was alive and suable, there having been no period of at least six years from the beginning to the end of the account when there were no items, either of debit or credit.

2. The claimed "account stated."

> "Stated accounts are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct." *McLellan* v. *Crofton*, 6 Me., 307, 337; *Lancey* v. *Maine Central Railroad Co.*, 72 Me., 34, 37.

A stated account is distinguished from an open account and this distinction was early and well stated by Chief Justice Mellen in *McLellan* v. *Crofton*, supra, when he said:

> "While an account remains open, each party is depending for the recovery of the balance he may consider due to him, upon the promise which the law raises on the part of him who is indebted, to pay that balance; but when the parties have stated, liquidated and adjusted the accounts, and thus ascertained the balance, it ceases to be an account; it has lost the peculiar character and attributes of an account; what was before an implied promise to pay what should be found to be a reasonable sum, by such liquidation and stating of the account, at once becomes an express promise to pay a sum certain. . . . Such balance is a result in which previously existing accounts have become merged, and lost their character and existence." *McLellan* v. *Crofton*, supra, at page 337; *Lancey* v. *Maine Central Railroad*, supra.
>
> "A 'stated account' is an agreement between the parties entered into after an examination of the items by which a balance is struck in favor of one of them. It is a final settlement arrived at after the allowance or disallowance of their respec-

tive claims." *Words & Phrases*, Third Series, Vol. 1, page 145; *McMahon* v. *Brown*, 219 Mass., 23, 27, 106 N. E., 576, 578; *Chace* v. *Trafford*, 116 Mass., 529, 532.

"An account stated is an account balanced and rendered with an assent to the balance express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance." *Words & Phrases*, Third Series, Vol. 1, page 144; *Cudd* v. *Cowley*, 85 So., 13, 14, 203 Ala., 665.

"Thus it is apparent that the necessary elements of an 'account stated' are previous transactions, the fixing of an amount due in respect to such transactions, and a promise to pay. It is true that the promise to pay may be either express or implied, . . ." *Words & Phrases*, Third Series, Vol 1, page 146; *Shores-Muller Co.* v. *Bell*, 94 S. E., 83, 21 Ga. App., 195.

Now let us consider the defendant's testimony to ascertain if that which was done in this case ever attained unto an account stated. The defendant testified that "Mr. Pride came to me shortly after I had opened my law office in Portland one morning to see me about the account and I told him I was not in a position to make any payment on the account at that time, but that there was a Buick automobile, practically a new car standing in the yard paid for, that he could have, and there was a lot of land next to my house which was free and clear which I owned and he could have that, amounting to the price of his bill, and he said he had all the automobiles he wanted, but he wanted to talk with me about this account a bit, and wanted to keep the credit good. That was all there was to it."

The defendant claims that this constituted a conversion of all of the foregoing items of debit and credit into an account stated. The presiding Justice in finding for the plaintiff must have found to the contrary and we perceive no error in that finding, either in fact or law. The burden to prove the account stated is on the one who sets it up, (1 C. J., Sec. 398, page 727, and cases cited in footnote 75) and so here was on the defendant. The record does not disclose that the plaintiff or anyone in his behalf ever presented the defendant with an itemized statement of the account, that the de-

fendant ever saw the book entries of the plaintiff, that the defendant ever examined the account of the plaintiff, that the plaintiff ever stated orally what it consisted of or the amount of the claimed balance, or that the parties ever agreed upon any balance due the plaintiff. Without their minds meeting upon such a balance, there could be no "account stated."

The record shows that all of these dealings had been between the plaintiff and the defendant's wife, while the defendant had been for the most, if not all, of the time out of the state. As his wife, she had authority to act here as his agent and to incur this indebtedness. There is no evidence to show either that his wife knew the balance claimed or, if she did, that she communicated it to the defendant before this conference with the plaintiff. True, the defendant stated with reference to the bill that it "amounted to around four hundred dollars" but that does not prove a meeting of the minds upon any definite and specific amount. The exact amount must have been determined and agreed upon as part and parcel of the stating of the account.

> "The present rule is, that if a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, that will be evidence to support a count upon an account stated. . . . But a party can only recover under this count when a certain and precise sum is admitted to be due; and an acknowledgment of a debt, but without naming or referring to a sum certain, does not enable a plaintiff to recover on this count even nominal damages; . . . . But it may be shown by other evidence than the defendant's admission, that the sum to which he referred was of a precise and stipulated amount." *Chitty on Pleadings*, 16th Am. Ed., Vol. 1, pages 472, 473.

The evidence convinces us, as no doubt it did the presiding Justice, that the plaintiff's purpose in seeking the defendant was to see what could be done in regard to this account of considerable size, and which then had been running for years. The defendant when approached was concerned more with the fact that he could not pay in cash than with how much was the true balance to be paid; so he suggested payment not in cash, nor even by the giving

of a note, but by a delivery of the automobile and conveyance of the house lot, placing no specific value on either; still whether by both or only one the record is not clear. Their minds apparently were focused on the method of settlement rather than on the amount to be paid; but, as to this, they could not agree and so nothing definite resulted from their conference. Not enough transpired to effect an "account stated" and without it the account remained as it had been, mutual and open, not closed nor stated; not settled, but still unsettled.

After this conference, although perhaps then it was intended that their future dealings would be cash, they were not. Credit was extended and book charges were entered without objection, though prompt and full payment was later made. The future indebtedness was not only paid in full but $3.00 in addition was paid December 18, 1929, and credited generally on the account. While the defendant testified that since February 11, 1927, he had paid nothing on the account, yet there was no evidence that his wife, who was transacting this business, did not pay the $3.00. She did not testify. The plaintiff's affidavits proved this payment prima facie and in the absence of contra "competent and sufficient evidence," it was sufficiently proven. Chap. 96, Sec. 129, R. S. 1930. As this was the last item in the account, though one of credit, following *Rogers* v. *Davis*, supra, the statute began again to run anew from that date.

The account as sued and proved was not outlawed. We conclude that the decision below was justified and the entry must be,

Exceptions overruled.

HARRY J. GIVEN, ADM'R C.T.A. *vs.* MARION G. CURTIS ET ALII.

Cumberland. Opinion, April 25, 1935.

WILLS. EXECUTORS AND ADMINISTRATORS.

A widow waiving the provisions of a will made in her behalf, takes by virtue of the statutes of descents and distributions. One-third of the real estate of which her husband died seized and possessed, or to which he was entitled, descends to her, in fee, free from liability to sale, on special license, to pay debts and charges of administration.

Personal estate, except that assigned by law, or granted by allowance, to a widow, must be expended, first, in paying liabilities and administrative expenses.

An executor or an administrator must pay such demands and charges promptly and within the statute period, though to do so defeats every dispositive clause in the will. If personalty proves insufficient, so much of the real estate as may be necessary should be so applied.

In the case at bar, the court does not decide whether two-thirds of the testator's real estate was taken by the widow subservient to obligations and debts. Such question could be raised by the widow in appropriate action.

Whether the testator, survived by collateral heirs or his adoptive parents, was outlived by kindred within the meaning of the statutes, the court likewise does not determine in this action as it should properly be determined on petition to the Probate Court for distribution.

On report. A bill in equity brought for the construction of the last will of James D. Curtis. Bill sustained. Decree accordingly. The case fully appears in the opinion.

Joseph A. Aldred, for plaintiff.

J. H. Rousseau, for Marion G. Curtis.

Ellis L. Aldrich and *Sherwood Aldrich*, for Sophia B. Gatchell and Frances Jeffrey.

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

DUNN, J. This bill in equity is brought by the administrator with the will annexed, for construction of the last will of James D. Curtis, who died February 15, 1934.

The widow of the testator, on electing to take her statutory share in the property her husband left, duly filed a waiver of the provision his will made in her behalf, namely: "that portion of my estate, which the Laws of the State of Maine provides, and no more." R. S., Chap. 89, Sec. 13.

To the question, what interest passes under said will to the widow, answer is, that in consequence of formal rejection of what the instrument would have given her, she is no longer either devisee or donee. *Ladd* v. *Baptist Church*, 124 Me., 386, 130 A., 177.

She now takes in higher title, by virtue of the statutes of descents and distributions. R. S., supra, (Secs. 1, 20). One-third of the real estate of which her husband died seized and possessed, or to which he was entitled, descends to her, in fee, free from liability to sale, on special license, to pay debts and charges of administration. R. S., supra, (Sec. 1, Cl. 1).

Whether the widow takes the remaining two-thirds of the realty, subservient to obligations and debits, is, on this record, without relation to execution of plaintiff's trust. The widow herself could, in an appropriate action, raise the issue.

Personal estate, except that assigned by law, or granted by allowance, to a widow, (R. S., Chap. 78, Secs. 14, 17,) must be expended, first, in paying liabilities and administrative expenses. R. S., Chap. 88, Sec. 7; *Hamlin* v. *Mansfield*, 88 Me., 131, 33 A., 788.

An executor—or, as here, where the executor whom the will named could not or would not act, an administrator—must pay such demands and charges promptly and within the statute period, though to do so defeats every dispositive clause in the will. If personalty proves insufficient, so much of the real estate as may be necessary should be so applied. *Hamlin* v. *Mansfield*, supra.

Testator had been legally adopted in childhood, by a husband and wife jointly; from the former of them, he acquired real property, owned by him at his death. The bill alleges, in such connection, that testator was survived by collateral heirs of his adoptive parents, but, so far as known, by no relatives of his own blood; it prays instruction if, within legislative meaning, he was outlived

by "kindred." The inquiry might, as to personal property, properly arise, not in a proceeding for interpretation of the will, but on petition to the probate court for distribution.

The bequest to Mrs. B. K. Jeffrey is not payable until twenty months from final allowance of the will (R. S., Chap. 78, Sec. 26); then, only so far as possible.

Any residuum of the estate is left to Mrs. S. B. Gatchell.

Bill sustained.
Decree accordingly.

STATE OF MAINE *vs.* THEODORE R. JONES.

Cumberland. Opinion, May 2, 1935.

CARRIERS. WORDS AND PHRASES. CONSTRUCTION OF STATUTES.

P. L. 1933, CHAPTER 259, SECTION 5.

A contract carrier as defined in P. L. 1933, Chapter 259, Sec. 5, who exclusively operates his motor truck within fifteen miles of some point of the boundary line of a single incorporated town, comes within the exemption declared in Section 10 of said Chapter.

The word "limit" means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint.

When words in a statute are plain and unambiguous and contain clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction and the statute must be given its plain and obvious meaning.

On report on an agreed statement. Respondent, tried in the Portland Municipal Court on the charge of operating his motor truck as a contract carrier without first obtaining the permit provided for in Chapter 259, Section 5, of the P. L. of 1933, was found guilty. Appeal was had to the Superior Court, and from there re-

ported to the Law Court on an agreed statement of facts. Complaint dismissed. The case fully appears in the opinion.

Walter M. Tapley, Jr., County Attorney for the State.

Robinson & Richardson, for defendant.

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

HUDSON, J. Report upon agreed statement of facts. In the Municipal Court of Portland, the respondent, a contract carrier as defined in P. L. 1933, Ch. 259, Sec. 5, was found guilty of operation of his motor truck without permit as therein required. He appealed to the Superior Court, from which Court this report comes.

It appears that at the time of the alleged violation of the statute, the respondent, resident of Yarmouth, while under contract with the Pejepscot Paper Company of Topsham, had been and was then using his truck for the transportation of coal from Portland to Topsham. "His practice . . . was to drive his truck from his residence to Portland, over the public highway known as Highway Route No. 1, a distance of less than fifteen miles; load the truck at Randall & McAllister's coal pockets, and return over the same highway to Yarmouth, and thence over the public highways to the plant of the Pejepscot Paper Company at Topsham, a distance of less than fifteen miles from his residence. The plant of the Pejepscot Paper Comany is twenty-eight miles from the loading point in Portland." He had no permit from the Public Utilities Commission.

The only question before the Court is whether or not the respondent comes within the exemption as stated in Section 10 of said Chapter 259, which reads:

> "There shall be exempted from the provisions of the foregoing sections 2 to 9, inclusive, (1) motor vehicles operating exclusively within the limits of a single city or incorporated town or within fifteen miles of the limits thereof; . . ."

This section of the statute creates three exempted zones, and one who trucks exclusively in any one of them need have no such permit.

Webster's New International Dictionary, Second Edition, page

1434, defines "limit" as "a boundary or boundary line . . . as the limits of a town."

> "Limit means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint." *Casler* v. *Connecticut Mutual Life Ins. Co.*, 22 N. Y., 427, 431; *Words and Phrases*, First Ed., Vol. 5, page 4164.

As this respondent exclusively operated his truck within fifteen miles of some point in a boundary line of the Town of Yarmouth, he came within the exemption.

The words in said Section 10 are plain and unambiguous and "contain clear and definite meaning." When such is the case, "there is no occasion for resorting to the rules of statutory interpretation and construction, and the statute must be given its plain and obvious meaning." *Pease* v. *Foulkes*, 128 Me., 293, 298, 147 A., 212, 214; *Van Oss* v. *Petroleum Co.*, 113 Me., 180, 194, 93 A., 72; *Tremblay* v. *Murphy*, 111 Me., 38, 46, 88 A., 55.

The entry must be,

Complaint dismissed.

GEORGE S. FOSTER, TREASURER OF THE STATE OF MAINE

vs.

KERR AND HOUSTON, INC., AND

STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK.

Kennebec. Opinion, May 3, 1935.

CONTRACTS. SURETYSHIP. MUNICIPAL CORPORATIONS.

STATE HIGHWAY COMMISSION. DAMAGES. INTEREST.

A bonding company, agreeing for a consideration is a surety, and its guaranty is not to be interpreted under the rule strictissimi juris.

The trend of all modern decisions, federal and state, in the construction of the law appertaining to sureties is to distinguish between individual and corporate

suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business.

In the case of an individual surety, or a "voluntary surety" the contract will be strictly construed and all doubts and technicalities resolved in favor of the surety.

In the case of corporate surety, underwritten for a money consideration, the contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.

One who furnishes labor or materials may sue the surety when he can not collect of the principal contractor.

A city or town when contracting for the erection of a municipal building may, for its own protection and advantage, require the insertion in the bond of the surety a clause providing for payment to subcontractors.

The state highway commission has by statute, and from the necessities of the case the authority to require such a bond, binding principal and surety to payment of proper bills for materials and labor.

Beyond the penalty of a bond there can be no recovery against sureties so far as the principal of the claim is concerned, but interest may be allowed on the amount of the penalty from the date of the breach, when the claim upon the principal at that time exceeds or equals that amount, as the whole amount of the penalty is then a debt demandable of them.

Under this rule, when the bond is breached the penalty to the amount of the damages immediately becomes the debt of the surety and bears interest, the same as any other debt on contract, if the principal claim bears interest.

The rule, common to contracts generally, applies, that where money is due and there is a default in payment, interest is to be added as damages.

As to notice of breach, or demand of payment, none need be proved.

In the case at bar, the language of the contract and the bond was clear and unambiguous. The bond must be interpreted as intended to operate for the benefit of persons who furnished labor or materials for the erection of the bridge. Such contract and bond imposed on the surety the obligation to pay laborers and materialmen.

Interest is recoverable on each claim from the date the bills were due from the contractor; according to the agreed statement, in case of American Bridge Company from August 10, 1932; by the other claimants, from due date as found by the Court below.

On report on an agreed statement of facts. An action of debt brought by the Treasurer of the State of Maine against the Standard Surety and Casualty Company of New York, as surety in the

bond given by the contractor to secure the performance of his contract with the State for construction work. Case remanded to the trial court to be disposed of in accordance with the opinion. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives,
Clyde R. Chapman, Attorney General, for the plaintiff.
Cook, Hutchinson, Pierce & Connell,
Skillin, Dyer & Payson,
J. W. Hill, for the defendant.

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

BARNES, J. This is an action of debt brought by George S. Foster, Treasurer of the State of Maine, against the Standard Surety and Casualty Company of New York, and comes forward on report, with an agreed statement of facts.

It is founded on a surety bond on which Kerr and Houston, Inc., appears as principal, the defendant as surety, and the plaintiff as obligee, and is brought in the name of the obligee for the benefit, or to the use of the American Bridge Company, Charles R. Bailey and the Augusta Lumber Company, as to each of whom it is admitted that he furnished labor or materials, or both, to the contractor, for use in construction of a highway bridge, and for the same has not been fully paid.

Kerr and Houston, Inc., the principal contractor, was originally joined as a defendant, but the action was dismissed as to it on account of bankruptcy.

It is agreed by the parties that, if the defendant surety company is found liable, damages on the claim of the American Bridge Company shall be assessed at $17,955.68, with interest from such date as the court shall determine the same is recoverable; on the claim of Charles R. Bailey at $648.00, with interest as above; and in the claim of Augusta Lumber Company, if this court finds liability, judgment is to be assessed in the court below with interest from such date as this court shall fix, the case to be remanded to the Superior Court for the purpose of assessing damages.

On July 17, 1931, the State entered into a written contract with

Kerr & Houston, Inc., a Maine corporation, for the construction of the Wiscasset and Edgcomb highway bridge.

The bond, executed two days later, contained the following provisions: "The condition of this obligation is such that if the said Principal, Kerr & Houston, Inc., shall faithfully perform the contract entered into between said State of Maine and said Principal on the 19th day of June, A.D. 1931, for the construction and completion of the bridge structure . . . on its part and satisfy all claims and demands incurred for same and shall pay all bills for labor, material, equipment, and for all other things contracted for or used by it in connection with the work contemplated by the contract, and shall fully reimburse the obligee for all outlay and expense which the obligee may incur in making good any default of said principal, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

It must be conceded that the surety, guaranteeing that its principal would "faithfully perform the contract entered into between said State of Maine and said Principal," had fully informed itself of the provisions and conditions of the contract, faithful performance of which is guaranteed.

The contract, by certain definitions and provisions here quoted, gave definite information as to the obligations of both contractor and surety.

Most important are the following:

"SURETY. The corporate body, individual, or body of individuals bound with and for the Contractor, who is previously liable, which corporate body, individual, or body of individuals engages to be responsible for his payment of all debts pertaining to and for his acceptable performance of the work for which he has contracted."

"CONTRACT BOND. The approved form of security furnished by the Contractor and his Surety as a guarantee of good faith on the part of the Contractor to execute the work in accordance with the terms of the Contract."

"REQUIREMENTS OF CONTRACT BOND. The successful Bidder, at the time of the execution of the contract, must furnish a bond payable to the Treasurer of State of Maine, or his successors in office, in the sum of seventy-five (75) per cent of the amount of

the contract awarded. The form of bond shall be that provided by the Commission and the Surety shall be acceptable to the Commission. This bond shall guarantee due execution and faithful performance and completion of the work to be done under the contract, and the payment in full of all bills and accounts for material and labor used in the work, and for all other things contracted for or used in connection with the contract."

"RESPONSIBILITY FOR DAMAGE CLAIMS. The Contractor shall assume the defense of, and indemnify and save harmless the State and the Commission and their officers and agents from all claims, suits or actions of any character, name and description on account of injuries to any person, persons, property, firm or corporation, received or sustained by reason of any act of the Contractor or his employees or resulting from the prosecution of the works, or any of its operations, or caused by reason of the existence or location or condition of the works or of any materials, plant or machinery used thereon or therein, or which may have been produced by reason of any failure, neglect or omission on the part of the Contractor or any of his agents, servants or employees who shall be engaged in any capacity in or about the work to be performed under this contract.

"The Contractor shall promptly pay all bills for labor, materials, machinery, board of workmen, water, tools, equipment, teams, trucks, automobiles, freight, fuel, light and power and for all other things, contracted for or used by him on account of the work herein contemplated, and if at any time during the progress of the work or before final payment of any money due the Contractor under the terms of this contract, any claim for labor, materials, board of workmen, water, tools, equipment, teams, trucks, automobiles, freight, fuel, light and power, or for any other things specified as aforesaid, or for damages by reason of any acts, omissions or neglect of said Contractor in the prosecution of the work, shall be presented to said Commission, the Commission may retain such sum or sums from the moneys due the Contractor under this contract as would be necessary to discharge all such claims whether for labor or materials or for damages as aforesaid."

In the construction of highway bridges, it is, and has been continuously since enactment of Chapter 202, Public Laws of 1909,

now R. S., Chapter 27, Section 117, the public policy of this State that performance of all contracts shall be secured by bond.

By provision of statute, Chapter 28, Section 64, R. S., the state highway commission "shall have full power in all matters relating to the furnishing of bonds by the successful bidders for the completion of their work and fulfilling of their contracts. These bonds shall protect fully the state, county and town from all liability arising from damage or injury to persons or property as a result of the contractor's operations."

The bond herein is a statutory bond. But it is argued by defendant that because their claims are not specifically mentioned in the bond, materialmen and laborers are not protected under it.

And further that the inclusion in a bridge contractor's bond of a requirement to protect materialmen and laborers would not furnish protection because there is no statute authorizing such requirement.

Decision on the force and meaning of the contract and bond, in these particulars, and the date when interest, if any, begins to run is the burden on the court.

The intent of the parties to the bond must be determined from expressions therein, inevitable implications, and conclusions of law.

Unless the language of specifications of performance required of the contractor is to be disregarded as mere surplusage, contract and bond are indissolubly tied together.

Before any bond was drafted the contract of construction was drawn up, expressing what the State, through the agency of the highway commission, would require of the contractor, and hence what the surety would bind himself to secure.

The statute does not prescribe the form of construction contracts. It does make the requirement of a bond mandatory, and contains nothing to negative in its agent the power to provide such other safeguards as may be deemed proper in the protection of all parties connected with the construction.

It gives, as above quoted, full powers in all matters relating to the furnishing of bonds.

The condition of the bond that the principal shall faithfully perform the contract is very general. It does not stand alone, but incorporates the contract in the bond.

In the orderly course of business, before the bond was drafted, the contract was drawn up, expressing what the state, through the agency of the highway commission, would require of the contractor, and hence what the surety must be held to have bound himself to secure.

It is not claimed that the surety did not know the requirements of the contract, and we find in this case the same requirements in both contract and bond.

This court has never before had to construe an exactly similar contract.

But the rights and obligations of contractors on public works in most states of the union have been discussed in opinions interpreting similar agreements.

First it may be said that a bonding company, agreeing for a consideration is a surety, and that its guaranty is not to be interpreted under the rule *strictissimi juris*. We quote with approval the following: "The law of suretyship has undergone a considerable change in late years. The day of personal suretyship is fast slipping away, and in its stead comes the corporate surety for profit. Formerly, a surety was an individual, or collection of individuals, actuated by beneficent motives to carry the burden of suretyship, receiving no profit or benefit, and in consequence thereof, the law dealt tenderly with him or them. But, in this day and age of corporate sureties, the burden is lightened by the payment of adequate premiums, and their final liabilities are ofttimes secured by counter indemnity. As a result of this new condition of affairs the trend of all modern decisions, federal and state, in the construction of the law appertaining to sureties is to distinguish between individual and corporate suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case, the rule of *strictissimi juris* prevails, as it always has, that is, the contract of an individual surety, or a 'voluntary surety' as he is spoken of in some cases, will be strictly construed and all doubts and technicalities resolved in favor of the surety, such person being regarded as a favorite of the law. But in the other case, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the

contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect." 21 R. C. L., P. 1160, Sec. 200.

What the contractor has agreed to perform is what the bond assures.

The language of contract and bond before us is plain. In simple words the contractor agreed to pay all bills for labor and materials, used on the work, and the surety guaranteed complete and faithful performance by the principal, and that it would "pay all bills for labor, material, equipment, and for all other things contracted for or used by it in connection with" the bridge construction.

It is agreed that the State is protected.

Has a laborer or materialman, when collection of a just claim can not be had of the contractor, the right to sue the surety; can the State, by its treasurer, sue for the use of such laborer or materialman? That is the first issue. It is argued that there is a disagreement of authorities on this question.

The very decided weight of authority answers in the affirmative. In two jurisdictions of New England, in *Byram Lumber & Supply Co.* v. *Page et al,* 109 Conn., 256, 146 A., 293, where one condition of the bond was the promise: "and shall pay all persons who have contracts directly with the principal for labor or materials"; in *United States Fidelity & Guaranty Co.* v. *Rhode Island Covering Company* (Rhode Island, 1933), 167 A., 143, "and shall also pay for all labor performed or furnished and for all materials used in the carrying out of said contract," it is held that those who furnish labor or materials may sue the surety when they can not collect of the principal contractor.

From another New England court we read: "Though the original contract between the city and the contractor did not expressly provide that the contractor should pay for the labor employed and the materials used in the construction of the buildings, which he agreed to build for the city, he and the Fidelity and Deposit Company, as surety in the bond which he gave to the city to secure the faithful performance of his contract, agreed to 'pay for all labor performed or furnished and for all materials used in the fulfillment of said contract.' The contract and the bond together constituted

an entire agreement; and the supplemental provision in the bond in regard to the payment of the labor and the materials furnished is not to be rejected because it was not also contained in the contract. It was clearly a provision upon which the minds of the parties met and was designed to express their intention that the payment for the labor and the materials, which the contractor should use in the construction of the buildings and for which the city was to pay him, should in turn be paid by him to the parties entitled to it, or to the parties employed by him to do the necessary work and to furnish the necessary supplies. . . . The reasonable construction of the clause in question is that if the contractor failed to pay a sub-contractor like the plaintiffs for work and materials furnished by them the security afforded by the surety company would be available for his benefit. . . . The further contention that the city had no power to enter into a contract which was intended to operate for the benefit of third parties, who sustained no relation or privity to it at law, and in whose undertaking the city was not legally interested and whom it was not legally liable to pay for their services, disregards what may be termed the incidental power of the city when exercising its undoubted right (as, for instance, its right to contract for the erection of municipal buildings), and its interest in having its proper work done in a proper way. It is not true that it had no substantial interest in having the work which was done by the plaintiffs well done, or that it was a matter of indifference to it whether the plaintiffs were amply secured by a bond in their favor. To secure the best results the obligation of the surety to the sub-contractors might seem to the city to be desirable, as an incident of its contract for the construction of the buildings. The payment of the premium to the surety was equivalent to the establishment of a trust fund in the hands of the surety for the benefit of the plaintiffs, if the contractor failed to pay them for their services. *Hunt* v. *Association*, 68 N. H., 305, 308, 38 A., 145. And for this reason, if for no other, the city had authority for its own protection and advantage to require the insertion in the bond of the clause in question." *William H. Toner & Co.* v. *Long et al.*, 79 N. H., 458, 111 A., 311.

To a like conclusion are *Union Indemnity Co.* v. *State, to use of McQueen Smith Farming Co.*, 217 Ala., 35, 114 So., 415; *Leslie*

Lumber & Supply Co. v. *Lawrence et al.*, 178 Ark., 573, 11 S. W. (2nd), 458; *French* v. *Farmer et al.*, 178 Cal., 218, 172 Pac., 1102, citing decisions in Nebraska, Missouri, Iowa and Indiana; *People, to use of Colorado Fuel & Iron Co.* v. *Dodge et al.*, 11 Colo. App., 177, 52 Pac., 637; *Board of Education, to use of Chandler Lumber Co.* v. *Aetna Indemnity Co.*, 159 Ill. App., 319; *Road Supply & Metal Co.* v. *Kansas Casualty & Surety Co.*, 121 Kan., 299, 246 Pac., 503; *Blair & Franse Construction Co. et al* v. *Allen*, 251 Ky., 366, 65 S. W. (2nd), 78; *Am. Fidelity Co. of Montpelier* v. *State, to use of Short & Walls Lumber Co.*, 128 Md., 50, 97 A., 12; *Knapp* v. *Swaney*, 56 Mich., 345, 23 N. W., 162; *Lanstrum* v. *Zumwalt*, 73 Mont., 502, 237 Pac., 205; *Southwestern Portland Cement Co.* v. *Williams et als.*, 32 N. M., 251 Pac., 380, 49 A. L. R., 525; *Johnson Service Co., Inc.*, v. *E. H. Monin, Inc. et al*, 253 N. Y., 417, 171 N. E., 692, removing from a case such as this at bar the inhibition of the *Fosmire Case*, 229 N. Y., 44, 127 N. E., 472; *Royal Indemnity Co.* v. *Northern Granite Co.*, 100 Ohio St., 373, 126 N. E., 405; *Mack Mfg. Co.* v. *Mass. Bonding and Insurance Co.*, 103 S. C., 55, 87 S. E., 439; *Molony & Carter Co.* v. *Pennell & Harley, Inc.*, 169 S. C., 462, 169 S. E., 283; *Fire Brick Co.* v. *National Surety Co.*, 42 S. D., 190, 173 N. W., 448; *Mosher Mfg. Co.* v. *Equitable Surety Co.* (Texas, 1921) 229 S. W., 318; *Aetna Casualty Co.* v. *Earle-Lansdell Co.*, 142 Va., 435, 130 S. E., 235; *Forsyth* v. *N. Y. Ind. Co.*, 159 Wash., 318, 293 Pac., 284; *State ex rel. Sand & Gravel Co.* v. *Royal Indemnity Co.*, 99 W. Va., 277, 128 S. E., 439; *Conner Co.* v. *Aetna Indemnity Co.*, 136 Wis., 13, 115 N. W., 811; *U. S. Gypsum Co.* v. *Gleason*, 135 Wis., 539, 116 N. W., 238, 17 L. R. A. (N. S.), 906.

On this point, Williston, in 15 Harvard Law Review, page 783, says:

> "It is a common stipulation in a building contract that the contractor will pay all bills for labor and materials. In most cases the fulfillment of this promise by the contractor operates to discharge a liability of the owner of the building, whose building would be liable to satisfy the lien given by the law to workmen and materialmen. It can not, therefore, be inferred that the promisee requires the promise in order to benefit such

creditors of the contractor. The natural inference is that his object is to protect himself or his building. When, however, the owner of the building is a municipality, or county, or state, such an inference can not so readily be justified, for the law gives no liens against the buildings of such owners. In such cases if the stipulation can be regarded as the result of more than the accidental insertion of a provision common in building contracts without reflection as to its necessity, it must be supposed that the object was to benefit creditors of the contractor."

In the case at bar, the language of contract and bond is clear and unambiguous, and we hold, in accord with the weight of authority, as cited above, that the bond must be interpreted as intended to operate for the benefit of persons who furnished labor or materials for the erection of the bridge, and that such contract and bond impose on the surety the obligation to pay laborers and materialmen.

Do the statutes pertinent to bridge construction give the highway commission authority to require and to execute a bond such as was executed in the case at bar?

The highway commission is a state agency, exercising great and extensive powers in the construction and maintenance of a system of highways, for which purposes large funds are raised by bond issues and otherwise to be expended under the direction and supervision of the commission.

Its authority is outlined in Sec. 64 of Chap. 28, R. S., and extends to preparation of "all engineering plans and specifications for materials, construction, and workmanship which it considers necessary." It calls for and receives all bids for construction: may reject any or all bids: may contract with a town for construction of a bridge within the municipality, and may, with the approval of the governor and council, provide for the construction of a bridge by contract or on a day labor basis, without advertising for bids.

The bond not only guarantees faithful performance, but payment of all bills for labor, material, equipment, and for all other things contracted for or used in the work.

This is but repetition in the bond of requirements which the

commission incorporated in the contract, and we have no doubt that the highway commission had, by statute, and from the necessities of the case the authority to require such a bond, binding principal and surety to payment of proper bills for materials and labor.

In a similar case where a state board, without specific authority to do so, wrote a provision into the contract to secure to subcontractors their pay, the court said: "It is true the act does not contain any provision specifically directing or authorizing the board of sinking fund commissioners to incorporate either in the contract or bond a provision to the effect that the general contractor would pay the laborers and materialmen. The board of sinking fund commissioners, however, was given authority to contract for the erection of the capitol. Having been given authority to make such contract, it necessarily had the right to insert in the same any reasonable covenants which the members of the board might in their wisdom deem necessary or proper in order to secure the erection of the capitol on the best terms possible. Indeed, it was their duty to do what ordinarily prudent men would do in attending to their own business of a similar nature. If, then, the members of the board, in the exercise of the discretion conferred upon them, concluded that the work would be prosecuted with more satisfaction and would be better done by securing subcontractors, they were certainly authorized to insert in the contract or bond provisions necessary to attain the end desired. Indeed, the provision in regard to the payment of laborers and materialmen was a wise one. That subcontractors, knowing they were secure, would do better work and furnish better material than if they felt uneasy about their pay, cannot be doubted; and the credit which the contractor would thus gain by the security would enable him to prosecute the work more rapidly and with greater hope of profit." *Federal Union Surety Co.* v. *Commonwealth for use of Vandiver*, 139 Ky., 92, 129 S. W., 335.

In accord with the above, see text and authorities cited, 22 R. C. L., p. 628, Sec. 29; 29 C. J., p. 611, Sec. 350; 2 *Dillon Municipal Corporations* (5th Ed.), 1266; *Union Indemnity Co.* v. *State*, supra; *Knapp* v. *Swaney*, supra; *Lyman* v. *Lincoln*, 38 Neb., 794, 57 N. W., 531; *Town of Gastonia* v. *Engineering Co.*,

131 N. C., 363, 42 S. E., 858; *Aetna* v. *Earle-Lansdell Co.*, supra; *U. S. Gypsum Co.* v. *Gleason*, supra.

As provided in the certificate of report, the recovery of interest is inevitable, this court being required to declare the time when interest shall begin to run.

Courts have differed in determining the beginning of the interest period.

One rule, followed by many courts, is that beyond the penalty of a bond there can be no recovery against sureties so far as the principal of the claim is concerned, but interest may be allowed on the amount of the penalty from the date of the breach, when the claim upon the principal at that time exceeds or equals that amount, as the whole amount of the penalty is then a debt demandable of them.

Under this rule, when the bond is breached the penalty to the amount of the damages immediately becomes the debt of the surety and bears interest, the same as any other debt on contract, if the principal claim bears interest. *Burchfield et al.* v. *Haffey*, 34 Kan., 42, 7 Pac., 548; *Bank* v. *Smith*, 12 Allen, 243, 253; *Robbins* v. *Long*, 16 N. J. Eq., 59; *Brainard* v. *Jones*, 18 N. Y., 35; *Harris* v. *Clap*, 1 Mass., 308, 317 (1805), 2 Am. Dec., 27; *Montepelier* v. *National Surety Co.*, 97 Vt., 111, 123, 122 A., 484 (1923) and cases and texts there cited.

On this branch of the case we have precedents in decisions of this court.

"Strictly speaking, guarantors, indorsers and co-obligors or co-promisors, are all sureties for others who are the principals; but still, in common parlance, the word surety is used in a more limited sense, to mean a co-obligor or co-promisor, entering into a contract with the principal jointly, or jointly and severally, and at the same time." *Read* v. *Cutts*, 7 Me., 186.

"But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the con-

tract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach.

After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule, common to contracts generally, applies, that where money is due and there is a default in payment interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs." *Wyman* v. *Robinson*, 73 Me., 384, 387, 40 Am. Rep., 360.

"As the damages awarded exceed the penalty of the bond, the plaintiff is entitled to recover the amount of the penalty with interest thereon as damages for the detention from the date of the breach of the bond." *Pennell* v. *Card*, 96 Me., 392, 396, 52 A., 801.

As to notice of breach, or demand of payment, none need be proved. *Read* v. *Cutts*, supra; *M. C. Railroad Co.* v. *National Surety Co.*, 113 Me., 465, 470, 94 A., 929.

Interest is recoverable on each claim from the date the bills were due from the contractor; according to the agreed statement, in case of American Bridge Company from August 10, 1932; by the other claimants, from due date as found by the Court below.

The case is remanded to the lower court to be disposed of in accordance with this opinion.

So ordered.

WOODBURY I. OLIVER *vs.* CHARLES W. KALLOCK.

Lincoln. Opinion, May 11, 1935.

WRITS. SERVICE.

The capias writ under our practice is a judicial writ, the purpose of which is to compel the appearance of the defendant in court to answer a suit by actual arrest of his person.

The purpose of the writ is not fulfilled by the mere arrest of the defendant. It is his presence in court, or the custody of him by the court which gives the jurisdiction to enter a judgment.

Under our form of capias writ service is not complete without the production of the defendant in court to answer, or his release on bail in accordance with the provisions of our statutes.

In the case at bar, the service of the writ on this defendant was incomplete and gave to the court no jurisdiction to enter a judgment by default.

On exception by plaintiff. An action on the case to recover damage to plaintiff's automobile with which the defendant collided. The writ was a capias writ. The defendant was arrested by a deputy sheriff, but escaped from custody. The writ with the officer's return was entered at the November Term, 1933, of the Superior Court for the County of Lincoln. The presiding Justice dismissed the same for want of service. Plaintiff seasonably excepted. Exception overruled. The case fully appears in the opinion.

Christopher S. Roberts, for plaintiff.

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

THAXTER, J. The issue involved in this case is the validity of the service of a capias writ. The presiding Justice dismissed the action for want of service, and to such ruling the plaintiff reserved exceptions.

It appears that the action was commenced by a writ of capias or attachment, which was intended to be served as a capias. Such use of the writ is optional with the plaintiff. *Commonwealth* v. *Sumner*, 5 Pick., 360. *Spaulding's Practice*, 102. Pursuant to the command in the writ the deputy sheriff, to whom it was committed, arrested the defendant, whom he afterwards permitted to go at large to have breakfast with his family. Disregarding the consideration shown to him, the defendant made his escape. The writ was entered in court with the following return thereon by the officer who had made the arrest:

"OFFICER'S RETURN

County of Knox, SS. June 2, 1933

By virtue of the within writ I arrested the body of the within named Charles W. Kallock, and safely kept him in custody, until afterwards on the same day by ruse lying and misrepresentation, as follows said defendant after being arrested asked permission to have breakfast with his wife and young child and while, I, the officer serving this process was in the front part of the Restaurant said defendant, with force and arms, escaped out of my custody through the back window or door of said Restaurant, against the peace of and dignity of the State; and thereby rescued himself. And afterwards I made diligent search for and could not find the said Charles W. Kallock in my precinct.

Charles A. Cavanaugh, Deputy Sheriff."

The sole question before this court is whether there was a valid service on which to base a judgment by default. The presiding Justice held not, and with his ruling we concur.

Under our practice the distinction no longer exists between an original writ, which issued out of chancery, and the judicial writ, the purpose of which was to compel compliance with the original. *Pressey* v. *Snow*, 81 Me., 288, 17 A., 71. Actions at law are now ordinarily commenced by judicial writs, which are writs of process, and in our practice are regarded as original. Of these the capias is one. The aim of this writ is to compel the appearance of the defendant in court to answer the suit by actual arrest of his person. *Tidd's Practice*, 2nd Am. Ed., 122. *Stephen on Pleading*, 3rd Am.

Ed., 58. The command to the sheriff in our form of capias is to this exact effect. "We command you to take the body of the said defendant and him safely keep, so that he may be had before our Justice of the Superior Court next to be holden at ..... on the first Tuesday of ..... A.D. ...., and then and there in our said Court, to answer unto," etc. It is obvious that the purpose of this writ is not fulfilled by the mere arrest of the defendant. It is his presence in court, or the custody of him by the court which gives the jurisdiction to enter a judgment. That this is so is clearly indicated when we consider the consequences of an escape by a defendant after his arrest or of his rescue from the hands of an officer.

Escape in the narrow sense is the loss of the lawful custody of a prisoner by reason of the negligence or consent of the officer having him in charge. 21 C. J., 826. Rescue, which of course involves an escape, is the forcible freeing by third parties of the person under arrest. 54 C. J., 696. Where one is held in such cases under civil process, a right of action accrues to the plaintiff, in the first instance against the officer who permitted the escape, in the second against those who effected the rescue. The basis of this right in each case is the depriving the plaintiff of the means of recovering his debt. See the form of the writ in Chitty, *Pleading*, 13 Am. Ed., Vol. 2, 736-737. This is also clearly shown by the opinion in *Langdon* v. *Hathaway*, 1 N. H., 367.

This was a case of a voluntary escape after which the prisoner was recaptured. He brought suit for trespass against the officer who retook him. In sustaining a verdict for the defendant the court said, page 369: "The object of the mesne process, also, is to have the defendant in court at its session, that the contested rights between the parties may be settled, and the defendant be present to abide any judgment, which shall be rendered against him. If he be then present in custody, the object of the process is fulfilled and as to that object it must be of no consequence how many escapes have happened, and what may have been their character." The court then points out the different consequences of an escape after an arrest on final process, the purpose of which is not to secure the presence of the defendant in court but to deprive him of his liberty that he may be induced to pay the judgment against him.

This same distinction is pointed out in the note to the case of

Jones v. *Pope*, 1 Saunders, 34, where it is said, page 35: "But in arrest upon *mesne process*, it is sufficient if the sheriff brings in the body on the day of the return; and therefore, in actions for escape on process of execution, the form is "*ad largum ire permisit*," but on mesne process "*ad largum ire permisit, et non comparuit ad diem.*"

See also *Hawkins* v. *Plomer*, 2 B'l R., 1048, and cases there cited.

Buckminister v. *Applebee*, 8 N. H., 546, was an action on the case, wherein it was alleged that the plaintiff sued out a writ against one Tyler, which was delivered to the sheriff, who, in accordance with the command in the writ, arrested Tyler, who was subsequently rescued from the sheriff by the defendants, by reason of which the debtor went at large and the plaintiff thereby lost his debt. In sustaining a verdict for the plaintiff the opinion holds that, after such an arrest and a rescue before commitment, the only remedy of the plaintiff is an action against the rescuers.

See also *Cady* v. *Huntington*, 1 N. H., 138.

If a defendant arrested on mesne process escapes before the return day of the writ and fails to appear to answer, we have an altogether different problem from that presented by his escape subsequent to the time when the writ is returnable. In the first instance no valid judgment can be rendered against him; in the latter judgment may be entered. The different results flowing from these two situations are indicated by the procedure followed in two Massachusetts cases. The question in each was as to the measure of damages against an officer who had suffered a prisoner to escape.

In the first of these cases, *Brooks* v. *Hoyt*, 6 Pick., 468, the escape appears to have taken place after the appearance of the defendant to answer to the writ but before the actual rendition of judgment. Judgment was entered against the defendant, and the measure of damages in the suit against the officer was held to be the value of that judgment, which was determined to be merely nominal because of the insolvency of the debtor. In the second case, *Slocum* v. *Riley*, 145 Mass., 370, 14 N. E., 174, the prisoner was apparently permitted to escape before the date when the writ was returnable. No judgment was entered against him, but in the action against the officer for permitting the escape the merits of the case between the plaintiff and the prisoner were tried out, in order to

determine the amount which the plaintiff might have recovered in the original suit.

The precise point at issue in the case before us has, so far as our investigation shows, not heretofore been decided. In some instances judgment appears to have been entered in the original action in spite of the failure of the officer to produce his prisoner in court or to have him under bail as permitted by the statute. *Sheldon* v. *Upham*, 14 R. I., 493; *Gebhardt* v. *Holmes*, 149 Wis., 428, 135 N. W., 860. Whether this practice may have been due to a different statutory form of capias in these jurisdictions from that in ours, or to the fact that the exact question here presented was not raised, is difficult to determine. Suffice it to say that under our form of capias writ service is not complete without the production of the defendant in court to answer or his release on bail in accordance with the provisions of our statutes. The essence of the service is his presence in court to secure which the officer is directed and authorized to place him under arrest. The problem is entirely different from that following the failure of a defendant to answer a summons, the penalty for which is that his appearance may be presumed, and the action proceed against him by default. The language of the opinion in *Gebhardt* v. *Holmes*, supra, page 436, in citing Murfree, Sheriffs, Sec. 199, is applicable here. "If he executed the warrant in part by taking defendant into custody and then loses such custody by escape, for any cause within human control,—escape, voluntary or involuntary on his part, he is liable to the plaintiff the same as in case of a failure to execute the writ at all."

The service of the writ against the defendant in this case was incomplete, and gave to the court no jurisdiction to enter a judgment by default.

Exception overruled.

CATHERINE OLIVER *vs.* CHARLES W. KALLOCK.

THAXTER, J. The question in this case is identical with that in *Woodbury I. Oliver* v. *Charles W. Kallock* and in accordance with the opinion and the mandate handed down this day in that case the entry here will be the same.

Exception overruled.

CALEB E. ESTABROOK *vs.* HARRY M. HUGHES.

York. Opinion, May 17, 1935.

PLEADING AND PRACTICE. PARTNERSHIP. EQUITY.

By the great weight of authority a partnership inter sese may be determined from the declarations, acts, conduct and dealings of the parties, and from the circumstances which may interpret the agreement between them.

In the case at bar, there was abundant evidence that for many months there was no thought of any relation other than that of partnership.

The court holds that justice can not be done between the parties in an action at law, and that a settlement in court must be arrived at on the equity side. In conformity with the provisions of R. S., Chap. 96, Sec. 17, the pleadings at law are to be struck out, the parties to plead anew in equity, and the action is to be transferred to the equity docket for the County of York.

On general motion for new trial by defendant. An action on the case to recover a balance claimed to be due for services and wages. The defendant pleaded the general issue with a brief statement that plaintiff and defendant were co-partners, and that no final settlement had been arrived at between the parties. Trial was had at the October Term, 1934, of the Superior Court for the County of York. The jury rendered a verdict for the plaintiff in the sum of $1,045.62. A general motion for new trial was thereupon filed by the defendant. Case transferred to the Equity Docket for the County of York, there to be heard and determined. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

Clifford E. McGlauflin, for defendant.

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

BARNES, J. This is an action on account annexed, with omnibus count attached.

The plea is the general issue with brief statement, that plaintiff and defendant were co-partners, under the firm name of Hughes & Estabrook, during all the period for which the plaintiff claims compensation; that all his services were services performed for the firm, and that no final settlement has been arrived at between the partners.

After trial, before a jury, resulting in a verdict for plaintiff, defendant brings the case up on a general motion.

In the late summer of 1928 plaintiff and defendant, then residents respectively of Presque Isle and of Mapleton, in Aroostook County, the former for ten years the driver of a Standard Oil Company truck, the latter a dealer in machinery, automobiles and their accessories, and a man of experience in growing potatoes, began search for a desirable farm in central or southern Maine.

They made three or more trips, inspecting farms from Newport to Buxton, as defendant says thirty-four in all.

The records show that plaintiff understood at the outset that the farm stock and equipment were to be bought and owned in equal shares by the two; that he should live on the farm and work it, with necessary help furnished by the two, and be allowed wages out of the profits of the venture.

When the farm was purchased and stocked, in the winter and spring of 1929, the plaintiff had no money in hand, and could pay nothing.

He later received a soldier's bonus and a gift of $300 from his father, which he contributed to the venture.

Defendant took the deed of a Buxton farm, in his name, placed thereon a small dairy herd, horses, seed, fertilizer, and equipment, and the plaintiff moved in as farmer.

Until the latter part of March, 1934, plaintiff struggled on in the dairy operation; results financially disappointing.

While the evidence shows that plaintiff made a slight investment of money, he never contributed any material part of the investment, and no settlement was ever made with him as to wages.

In the account sued upon he charges himself with $1,329.47 more than he had invested. The defense is that the relation of these men was that of partners. By the great weight of authority a partnership inter sese may be determined from the declarations, acts, con-

duct and dealings of the parties, and from the circumstances which may interpret the agreement between them.

The report abounds in evidence that for many months there was no thought of any relation other than that of partnership.

Justice can not be done between the parties, on the evidence before us, and in the action at law.

It is clear however, that settlement in court must be arrived at on the equity side.

In conformity then with the provisions of R. S., Chap. 96, Sec. 17, as in *Waldo Lumber Co.* v. *Metcalf*, 132 Me., 374, 171 A., 395, the pleadings at law are to be struck out, the parties to plead anew in equity, and the action will stand transferred to the equity docket for the County of York there to be heard and determined under appropriate procedure.

In the final decree, the cost of the action at law, including cost of appeal to the Law Court, to be a charge against this plaintiff.

So ordered.

JOHN J. COLLINS AND IRENE V. COLLINS *vs.* ESTHER KELLEY.

Cumberland. Opinion, May 27, 1935.

EVIDENCE. DAMAGES.

Where there is sufficient credible evidence to justify a verdict the same will not be disturbed by the Law Court.

In cases involving damage to motor vehicles, the rule long established in this jurisdiction is, that the plaintiff is entitled to recover the difference between the value of the car before and after the accident. The cost of repairs may be an important element in determining this figure, but it is not conclusive.

In the case at bar, the defendant had the right of way, and without rebutting evidence the presumption of negligence would be against the plaintiff. The issues as to due care of the plaintiff, and as to the negligence of the defendant were for

the jury. There was sufficient evidence to justify their verdicts. Damages awarded were not excessive.

On exceptions and general motions for new trials. Two actions on the case tried together to recover damages arising out of collision between automobile of plaintiff, John J. Collins, driven by his daughter, Irene V. Collins, and automobile of the defendant. Action by the father was to recover damages to his car, and by the daughter for personal injuries. Trial was had at the March Term, 1935, of the Superior Court for the County of Cumberland. The jury rendered a verdict for the plaintiff, John J. Collins, in the sum of $319.17, and for the plaintiff, Irene V. Collins, in the sum of $507.08. To the refusal of the presiding Justice to direct verdicts for the defendant, exception was seasonably taken, and after the jury verdict, a general motion for new trial in each case was filed by the defendant. Motions overruled. Exceptions overruled. The cases fully appear in the opinion.

Richard E. Harvey, for plaintiffs.

Robinson & Richardson, for defendant.

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

THAXTER, J. An automobile owned by the plaintiff, John J. Collins, and driven by his daughter, Irene V. Collins, was in collision with another driven by the defendant, Esther Kelley. Out of this accident arise these two cases, one brought by the father to recover for the damage to his car, the other by his daughter for personal injuries. After verdicts for the plaintiffs in both cases, motions for new trials were filed. These raise the same issues as the exceptions filed to the refusal to direct verdicts for the defendants.

The collision took place at the junction of Spring and Brackett Streets in Portland. The plaintiff, Irene V. Collins, was driving south and the defendant east. The defendant had the right of way and without rebutting evidence the presumption of negligence would be against the plaintiff. *Dansky* v. *Kotimaki*, 125 Me., 72, 130 A., 871. There was testimony as to the speed of the defendant's automobile, the position of the cars at the time of the impact, and

the force of the blow, which, if believed by the jury, was sufficient to justify the verdicts. The issues as to the due care of the plaintiff, Irene V. Collins, and as to the negligence of the defendant were for the jury. That as triers of fact we might have decided the questions differently is beside the point.

The defendant claims that the damages are too high. Miss Collins received severe bruises and a cut on the wrist which required stitches to close. Though not permanently injured, she suffered from the effects of the accident for some time. The verdict for $507.08 does not, under the circumstances, seem unduly excessive. On the question as to the damage to the car owned by the plaintiff, John J. Collins, there was testimony that the car was worth $650 before the accident, and $300 afterwards, and that it could be repaired for $206. The defendant claims that the latter figure is the limit of the plaintiff's recovery. The rule long established in this jurisdiction is that the plaintiff is entitled to recover the difference between the value of the car before and after the accident. *Moore* v. *Daggett*, 129 Me., 488, 150 A., 538. The cost of repairs may be an important element in determining that figure, but it is not conclusive. The jury allowed the plaintiff $319.17. In view of all the evidence, we can not hold such award excessive.

Motions overruled.
Exceptions overruled.

THOMAS H. HOOPER *vs.* MINNIE R. BAIL.

York. Opinion, May 29, 1935.

MORTGAGES. PLEADING AND PRACTICE. EQUITY. ESTOPPEL.

By reporting a case with no stipulation to the contrary, the parties must be held to have waived technical questions of pleading, and although an action is at law, equitable principles may be applied.

By the common law as interpreted in this State, a mortagage deed conveys to the mortgagee legal title to the premises and, while payment of the mortgage debt before condition broken might ipso facto *divest the mortgagee of his title*

without reconveyance or other discharge and revest the legal estate in the mortgagor, payment after condition broken does not have that effect, but leaves the legal estate in the mortgagee to be held in trust for the mortgagor until released on demand.

In equity, however, the deed is the substance and the mortgage securing it is a mere incident, the mortgagee having only a lien which retains that character until by proper foreclosure proceedings and the continued default of the mortgagor it is converted into a title. Payment of the mortgage debt at any time before foreclosure is perfected, extinguishes the debt, the lien and all interest of the mortgagee.

It is a familiar principle freely applied in proper cases both at law and in equity that if a party knowingly, though he does it passively by looking on, suffers another to purchase land under an erroneous opinion of title without making known his claim he will not afterwards be permitted to exercise his legal right against such person who has been prejudiced thereby.

This rule of equity must be applied with care and caution, however, lest it encourage and promote fraud instead of preventing and defeating it. When a party is to be deprived of his property or his right to maintain an action by an estoppel, the equity must be strong and the proof clear. The estoppel must be certain to every intent, and not to be taken by argument or inference.

The case at bar, as presented, was governed by the rules and principles of the Law and Equity Act.

The facts stated in support of the defendant's claim of estoppel are neither clear nor convincing. It does not clearly appear that there was a valid and complete transfer of the demanded premises to his intestate. Nor does the case show that she was misled to her prejudice by the execution of the deed to her by the Bank. Essential elements of equitable estoppel are lacking.

According to the stipulations of the report, the defendant, being rightfully in possession of the demanded premises, is entitled to judgment.

On report on an agreed statement of facts. A writ of entry for the recovery of certain land situated in the City of Saco. Plea of general issue with brief statement, but with no specific plea of equitable matter therein. Judgment for the defendant. The case fully appears in the opinion.

Robert T. Smith, for plaintiff.

John G. Smith, for defendant.

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

STURGIS, J. This is a real action. The case is reported on an agreed statement of facts which shows that Jason C. Hooper, now deceased, on April 22, 1893, mortgaged the demanded premises with other lands which he then owned to the Saco & Biddeford Savings Institution, a banking corporation located at Saco, Maine. This mortgage was never foreclosed, but on December 23, 1908, was paid in full and discharged and on the same day the officers of the Bank executed a warranty deed of the demanded real estate to Ella M. Hooper, the wife of the mortgagor, and that deed was recorded five days later in the York Registry of Deeds. It does not appear who directed or requested the Bank to execute the warranty deed or caused the instrument to be recorded. Some of the officers of the Bank who acted in the matter are now deceased and the others can not remember the details of the transaction. Professions of belief that the deed would not have been executed without the mortgagor's consent have no evidential value.

It is also stated that Jason C. Hooper, who gave the mortgage to the Saco & Biddeford Savings Institution, died November 20, 1933, leaving a will thereafter duly admitted to probate, in which he devised the demanded real estate to Minnie R. Bail who is now in possession and is made the defendant in this action. Ella M. Hooper, the widow of the mortgagor, died intestate on December 6, 1933, leaving as her only heirs at law Thomas H. Hooper, the demandant, and one Roger Bail, who claim title and a right to possession of the premises under the warranty deed which their intestate received from the Bank.

The defendant pleads the general issue with a brief statement but with no specific plea of equitable matter included therein. By reporting the case, however, with no stipulation to the contrary, the parties must be held to have waived technical questions of pleading and equitable principles may be applied in defense of the action at law. *Hurd* v. *Chase*, 100 Me., 561, 564, 62 A., 660; *Savings Bank* v. *Hurley*, 117 Me., 211, 103 A., 234.

In the facts reported, the terms of the mortgage given by Jason C. Hooper to the Saco & Biddeford Savings Institution are not stated and it does not appear whether the payment of the mortgage to which reference has been made was before or after breach

of condition. If legal defenses only were to be considered, the omission of this fact would be important. By the common law as interpreted in this State, the mortgage deed under consideration conveyed to the Saco & Biddeford Savings Institution a legal estate in the premises and, while payment of the mortgage debt before condition broken might *ipso facto* divest the mortgagee of its title without reconveyance or other discharge and revest the legal estate in the mortgagor, payment after condition broken does not have that effect, but leaves the legal estate in the mortgagee to be held in trust for the mortgagor until released on demand. *Stewart* v. *Crosby*, 50 Me., 130. We are of opinion, however, that as the case is presented it should be governed by the rules and principles of equity as found in the Law and Equity Act. R. S., Chap. 96, Secs. 15-21, inclusive.

In equity, the doctrine has long prevailed that the debt is the substance and the mortgage securing it is a mere incident and, whatever the form of the mortgage, in reality the mortgagee has only a lien which retains that character until by proper foreclosure proceedings and the continued default of the mortgagor it is converted into a title so that payment of the mortgage debt at any time before foreclosure is perfected extinguishes the debt, the lien, and all interests of the mortgagee. *Hussey* v. *Fisher*, 94 Me., 301, 47 A., 525. Applying this rule in the case at bar, it is apparent that the deed of the Saco & Biddeford Savings Institution to Ella M. Hooper of December 23, 1908, conveyed no title to the mortgaged premises.

The demandant, however, sets up the claim that Jason C. Hooper, the original mortgagor of the premises in controversy, procured the execution and delivery of the deed from the Bank to his wife, Ella M. Hooper, and that the defendant as devisee under his will, as he was in his lifetime, is estopped in equity to deny the title of the grantee in that deed, which has now passed by inheritance to her heirs at law. He invokes the familiar principle that if a party knowingly, though he does it passively by looking on, suffers another to purchase land under an erroneous opinion of title without making known his claim he will not afterwards be permitted to exercise his legal right against such person who has been preju-

diced thereby. *Martin* v. *Maine Central R. R. Co.*, 83 Me., 100, 21 A., 740; *Power Company* v. *Rollins*, 126 Me., 299, 305, 138 A., 170. Aptly it has been said: "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." *Box Machine Makers* v. *Wirebounds Company*, 131 Me., 70, 159 A., 496. This rule of equity has been freely and repeatedly applied in proper cases both at law and in equity, but it has long been recognized that it must be applied with care and caution lest it encourage and promote fraud instead of preventing and defeating it. When a party is to be deprived of his property or his right to maintain an action by an estoppel, the equity ought to be strong and proof clear. *Rogers* v. *Street Railway*, 100 Me., 86, 60 A., 713; *Stubbs* v. *Pratt*, 85 Me., 429, 27 A., 341; *Martin* v. *Maine Central R. R. Co.*, supra. "Every estoppel because it concludeth a man to allege the truth must be certain to every intent, and not to be taken by argument or inference." *Coke Litt.*, 352b. See 21 *Corpus Juris* 1139 and cases cited.

In the case at bar, the attempted conveyance of the demanded premises to Ella M. Hooper by the Saco & Biddeford Savings Institution is veiled in uncertainty. Why or for what purpose that deed was given is not made clear. There is no fact stated which compels the conclusion that Jason C. Hooper, who held the title to the mortgaged premises and after payment of the mortgage alone could make a valid conveyance of them, directed the execution of the deed from the Bank. That he may have done so is only surmise. He undoubtedly knew of the existence of the deed for the record at the Registry gave him constructive notice and, as the case shows, the instrument after record was deposited in a metal box which he and his wife used in common for the safe-keeping of valuable papers and of which they had common possession. Assuming that he procured the execution of the deed to his wife, did he intend and attempt to effect a bona fide transfer of the title to her as a gift or advancement or otherwise, or for his own purposes and ends was he creating a cloud upon his title and no more? The field of conjecture is still wider. There is no direct proof that the deed was delivered. Its record in the Registry of Deeds, standing alone, has limited evidential value on this point. It does not rise to the dignity

of prima facie proof. *Egan* v. *Horrigan*, 96 Me., 46, 51 A., 246; *Hill* v. *McNichol*, 80 Me., 220, 13 A., 883. There is no stated fact tending to prove who procured the record of the deed or who received it back from the Registry. Thereafter, apparently, it was kept in a receptacle to which both Jason C. Hooper and his wife had access, a situation which furnishes an insufficient basis for inferring that either had actual possession of the instrument. A presumption of delivery can not be predicated on so doubtful a possession by the grantee named in the deed.

Nor is it made to appear that the demandant's intestate relied upon her husband's participation in the execution of her deed from the Bank and was misled thereby to her prejudice. So far as the report discloses, she never in her lifetime claimed to own the demanded premises or in her own right attempted to exercise any control or dominion over them. She made no improvements and expended no money upon them. She and her husband lived together on the land until he died. He treated the property as his own in his will and devised it to his chosen beneficiary. She attempted no testamentary disposition of it. On the facts stated in this case, essential elements of equitable estoppel are lacking.

According to the stipulations of the report, the defendant, being rightfully in possession of the demanded premises, is entitled to judgment.

Judgment for the defendant.

THOMAS A. COOPER, BANK COMMISSIONER

vs.

AUGUSTA TRUST COMPANY.

THOMAS A. COOPER, BANK COMMISSIONER

vs.

STATE TRUST COMPANY.

Kennebec. Opinion, June 4, 1935.

BANKS AND BANKING. PRIORITIES.

By the certification of a check a bank becomes a debtor to the holder thereof.

In the case at bar, the question at issue was not so much the relation between the bank and the government as between the government and the drawers of the checks.

It was essential to look beneath the surface to the substance of the transaction in question, and to interpret the statute giving the government priority in such manner as to carry out its obvious purpose. It was enacted in order that debts due the public should be paid.

Until the postmaster should claim a default on the part of the publishing houses for failure to reimburse him for sums owed, the beneficial interest in the checks was in respective drawers of them. There never was any such default, the postmaster was mere custodian of the checks, and he intended to turn over to the drawers of them what money he might receive.

To give priority in this instance would not be to secure payment in full of a debt owed to the United States, but to give the drawers of these checks a preference which they would not otherwise receive.

On appeal from the decrees confirming a report of commissioners disallowing certain claims as priorities against the Augusta Trust Company and State Trust Company, two banks in liquida-

tion. Appeals dismissed. Decrees below affirmed. The cases fully appear in the opinion.

John E. Wilson,
Charles P. Nelson, for appellant.
John E. Nelson,
James B. Perkins, for Augusta Trust Company.
Emery O. Beane, for State Trust Company.

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

THAXTER, J. These appeals concern the validity of certain claims alleged to be preferred filed by John C. Arnold, United States Postmaster at Augusta, against the Augusta Trust Company and the State Trust Company, two banks in Augusta in process of liquidation by receivers. A hearing was held before the commissioners appointed to determine such claims, who disallowed them as priorities. From decrees of the sitting Justice confirming such report these appeals were taken.

The claims involve the status of three certified checks, one on the Augusta Trust Company for $500 dated May 28, 1928, drawn by W. H. Gannett, Publisher, Incorporated, the second on the State Trust Company for $750 dated June 12, 1928, drawn by Needlecraft Publishing Co., the third on the State Trust Company for $500, dated June 12, 1928, drawn by The Vickery & Hill Publishing Company. All three checks were made payable to John C. Arnold, P.M.

All three drawers were publishing houses in Augusta which sent daily large amounts of matter through the mail. The postal regulations provide that credit for postage shall not be given, but permit postmasters to receive from publishers a deposit of money in advance sufficient to pay for more than a single mailing. It is provided that such deposit shall be charged with the proper amount of each mailing, and if the amount on hand is not sufficient at any time to cover the full postage due, the excess of mail matter shall be held until an additional deposit is made. Postal Laws and Regulations 1924 edition revised to 1928, Sec. 415 (a); Postal Laws and Regulations of 1932, Sec. 541 (4). The checks in question were given in place of the money prescribed by such regulation, and at the re-

quest of the postmaster were certified by the banks on which they were drawn. It was the practice for the publishers to pay for postage in cash on the day following the mailing, and the checks in question were held by the postmaster over a five year period to the time of the closing of the banks as security for such payments. Conservators for the banks on which the checks were drawn were appointed July 3, 1933. The postage for that day was subsequently paid in cash, and thereafter a new arrangement was made, under the terms of which the publishers, in strict compliance with the postal regulations, deposited money to cover future mailings. Immediately after the closing of the banks the postmaster, instead of resorting to his security, received from the publishers the cash to meet all amounts due him, and at the hearing he testified that he had no interest in the payment of the checks and that any money which he might receive on them would be returned to the drawers.

The petitioner bases his claim on Section 191, Title 31, U. S. Code Ann. which reads as follows:

> "SECTION 191. PRIORITY ESTABLISHED, Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The petitioner contends that the banks are insolvent, that they are "indebted to the United States" within the meaning of the statute, and that accordingly the claims are entitled to priority. He relies on the well established rule that by the certification of a check a bank becomes a debtor to the holder thereof. 5 R. C. L., 523; *National Mechanics Bank* v. *Schmelz National Bank*, 136 Va., 33, 116 S. E., 380; *Merchants National Bank of Boston* v. *The State National Bank of Boston*, 10 Wall., 604. Conceding the soundness of such contention, the result claimed by the peti-

tioner does not necessarily follow. We are concerned not so much with the relation between the bank and the United States as between the United States and the drawers of these checks.

It is the duty of the court to apply the statute giving the government priority in such manner as to carry out its obvious purpose. It was enacted for the general good, that debts due the public should be paid, and it is not to receive a narrow interpretation. *The United States* v. *The State Bank of North Carolina*, 6 Pet., 29. As was well said by the sitting Justice, we must look beneath the surface of this transaction to its real substance.

The postmaster held these checks as security. It was an arrangement assented to by the post office inspectors, not in strict accord, it is true, with the postal regulations which require that money shall be deposited in advance to pay the charge for a mailing, but to protect the postmaster from loss by reason of his failure to have on hand the requisite amount of cash. Until the postmaster should claim a default on the part of the publishing houses for failure to reimburse him for sums owed, the beneficial interest in these checks was in the respective drawers of them. There never was any such default; and on the making of the new arrangement by which the drawers of the checks in strict compliance with the regulations substituted money for them, the petitioner became a purely passive trustee or custodian, whose sole duty was to return the checks to those from whom he had received them. He will turn over to the drawers whatever money he may recover, and the effect of giving to him a priority in this instance would be not to secure payment in full of a debt owed to the United States, but to give to certain general creditors of these banks a preference which they would not otherwise receive.

This case is fundamentally different from *Bramwell* v. *United States Fidelity & Guaranty Co.*, 299 Fed., 705, affirmed 269 U. S., 483, in which the government, as trustee for the Klamath Indians, was held entitled to priority, on a deposit in an insolvent bank. The United States in that case was something more than a mere passive trustee, and by reason of a treaty owed certain obligations to the Indians.

The sitting Justice applied the statute in question to the facts before him in accordance with its manifest purpose. To have ruled

otherwise would have been to have disregarded its essence for a servile observance of its form.

Appeals dismissed.
Decrees below affirmed.

FRED D. MARTIN,

APPELLANT FROM DECREE OF JUDGE OF PROBATE.

Washington. Opinion, June 17, 1935.

WILLS. PLEADING AND PRACTICE. EVIDENCE. WORDS AND PHRASES.

In a will contest, technical rules of pleading, in reference to bringing the case to the Law Court, have never been permitted to prevent the exercise of revisory power. No rule of court changing or modifying "customary procedure" has ever been adopted.

The Law Court in this state has held "whenever a jury trial is had, there may be a motion or exceptions for the correction of errors, whether of the court or jury."

Ability to make a will depends upon mental competency. Wills are denied effect until they have been publicly proven. A fair preponderance of the evidence must establish not only that the testator signed, but that he was of sound mind at the time of doing so. Absolute soundness of mind is not essential, but "sound mind" is a condition precedent to making and executing a valid will. The expression "sound mind" does not mean a perfectly balanced mind. The question of soundness is one of degree. One is sane when he is possessed of a mind which is not that of an imbecile and which is healthy.

A person of statute age, who understands substantially the nature of the act he is performing, has a knowledge without prompting of the extent of his property, his relations to others who might or ought to be the objects of his bounty, is aware of those to whom he is giving as well as those from whom he withholds it, of the scope or bearing of what he is doing, and has sufficient memory to collect and hold in his mind the elements of the business to be transacted, long enough to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them, has that sound mind which qualifies him to make a valid will.

The want of capacity, when urged as a ground for invalidating a testamentary act, must relate to the time of the act. Incompetency may exist before or after, and still the will be valid.

On the issue of competency to make a will, the burden of proof is upon the proponent. It is for him to substantiate soundness of mind, even though the contestants offer no evidence at all.

A layman is not competent to give expert testimony; he is not at liberty to give his judgment as to the condition of the mind of the testator at the time he saw the acts of which he speaks; it is for him to describe the acts and the appearances that he saw.

An attending or family physician's opinion as to the mental health of his patient is competent; such patient's condition some time before and some time after making the will is relevant, as tending to show the condition of mind when it was executed.

The verdict of the jury upon an issue out of probate is only advisory and never conclusive upon the court; that is, the court may or may not regard it.

In the case at bar, the court finds that the burden of proof as to soundness of mind, when the will was made, is not sustained.

On motion for new trial by appellee. The question at issue involved the testamentary capacity of John T. Martin whose will was duly allowed by the Probate Court for the County of Washington. Appeal was had to the Supreme Court of Probate, trial being before a jury who found that the testator was not of sound mind within the requirement of the Statute of Wills. A general motion for new trial was thereupon filed by appellee. The decree of the Probate Court reversed; will denied; motion for new trial overruled; and the cause remanded to the Supreme Court of Probate for the entry of decree accordingly. The case fully appears in the opinion.

Harold H. Murchie, for Appellee.
Herbert J. Dudley and
Oscar H. Dunbar, for Appellant.

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

DUNN, J. This case presents a contest over a will dated November 1, 1929, which purports to have been executed by John T. Martin, late of Calais. Mr. Martin died April 23, 1932, aged 83 years. He left no widow, but was survived by two children, a son and a daughter.

"Wills do not become operative until proved and established in some court having jurisdiction for that purpose—in this state, by allowance by the court of probate, or the appellate supreme court of probate. No other tribunal can give effect to a will." Strout, J., in *Cousens* v. *Advent Church*, 93 Me., 292, 45 A., 43. This clearly expresses the law respecting the operation and validity of wills.

The court of probate allowed the document in question as and for the last will of the decedent. Upon that, the son, as an heir at law, appealed to the Supreme Court of Probate. Such jurisdiction in probate is conferred by statute on the superior court. R. S., Chap. 75, Sec. 31.

On the appeal, all the reasons thereof save want of testamentary capacity were abandoned. With respect to that, there was much controversy, the discussion of which is left until later.

The issue of fact whether, when John T. Martin signed and published the writing, he was, within the requirement of the statute of wills, of sound mind, was submitted to the jury. That body, by its verdict, answered in the negative.

The proponent thereupon filed a motion to the Law Court to set aside the verdict as against law and evidence, and to grant a new trial. (In the interest of brevity, it is usual to call such a motion merely one for a new trial). Next, proponent moved, in the appellate court, for stay of final decree pending decision on the new trial motion; motion was granted.

Apparent confusion exists as to the course of procedure to bring a probate appeal from the Supreme Court of Probate to the Law Court. Neither rule of court nor legislation regulates the method. In recent years, especially, the practice has been by bill of exceptions, but the procedure adopted in the instant case is not a novel one.

The appeal for which the statute provides, from the original probate court to the higher probate court, brings up questions of

fact as well as of law. In the appellate court, questions of law may arise in the discussion and development of the case, to which exceptions are taken. An exception is designed as a warning for the protection of the court, that it may reconsider its ruling; and for the protection of the opposing counsel, that he may consent to a reversal. An additional object of the exception is to save the point to incorporate it into a bill of exceptions, which is the vehicle or medium conveying the case in purely legal aspect, to the reviewing court. For instance, exception might be noted to the admission of testimony, the rejection of evidence, principles of law as laid down by the presiding judge, exercise of discretion without authority, or findings of fact without evidence. A bill of exceptions would bring any such matter forward, on a strictly logical basis.

The practice has not, however, been uniform. In *Small* v. *Small*, 4 Me., 220, decided more than a century ago, the cause was heard on appeal. So, also, was *Rogers et al., Appellants*, 11 Me., 303. The case of *Halley* v. *Webster*, 21 Me., 461, recognizes motion for a new trial. In *Mayall, Appellant*, 29 Me., 474, the opinion begins: "This case comes before us by an appeal from the judge of probate." Like language is in *Cilley* v. *Cilley*, 34 Me., 162. In *Withee* v. *Rowe*, 45 Me., 571, motion for new trial was addressed to the appellate probate judge, who denied it, allowing exceptions. In *Robinson* v. *Adams*, 62 Me., 369, there were exceptions from instructions given, and from the refusal of instructions; also new trial motion. In *Barnes* v. *Barnes*, 66 Me., 286, again there was motion for new trial. *Carvill* v. *Carvill*, 73 Me., 136, came before the court on new trial motion. Such course of proceeding was challenged. There, as here, there had been a jury trial and a verdict adverse to the proponent. Judge Appleton, in delivering the opinion, says: "Whenever a jury trial is had, there may be a motion or exceptions for the correction of errors, whether of the court or jury."

In *McKenney* v. *Alvord*, 73 Me., 221, Barrows, J., writes: "We have no doubt of the power of this court to consider and pass upon the motion." Motion for a new trial appears to have been regarded as affording an opportunity for the correction of errors, with a minimum of expense and delay.

The cause assumes, says Judge Haskell, in *Backus* v. *Cheney*, 80

Me., 17, 12 A., 636, when issues are framed for a jury trial, the character of an action at law. The procedure is according to the course of the common law.

The opening words of the opinion in *Hall* v. *Perry*, 87 Me., 569, 33 A., 160, are: "This is an appeal . . ."

Wells, Appellant, 96 Me., 161, 51 A., 868, proceeds on the theory that where issue framed for the jury, simple motion to have the verdict set aside and a new trial granted, is suitable.

So are the cases, without detailing them further, until *Latham, Appellant*, 116 Me., 524, 102 A., 295.

There, after jury verdict, the appellate probate court disallowed the proffered document. "That decree," the per curiam opinion states: "appears to be in force, its validity not having been questioned by exceptions or otherwise. The practice in such a case should be, we think, for the party filing the motion for a new trial to move the court not to enter any final decree pending the motion for a new trial on the issues presented to the jury, and, should a decree be made notwithstanding that motion, then to take and prosecute exceptions to the making of such decree under the circumstances." On consideration of all the evidence, the motion was overruled. The court noted that the overruling of the motion had the effect of sustaining the decree of the appellate court.

In *Thompson, Appellant*, 118 Me., 114, 106 A., 526, the jury answered submitted questions. Counsel as to whose contentions the answers were adverse, interposed a new trial motion. No decree was entered. "As a matter of strict statutory construction," says Cornish, C. J., in disposing of a motion to dismiss the new trial motion, "it may well be doubted whether this course of procedure is correct; but in view of the fact that such a practice has been of long standing, a majority of the court do not feel compelled to dismiss the motion on this ground without considering the merits of the case. If the customary procedure is to be changed or modified, it had best be done by rule of court." Affirmation of the decree of the judge of probate was ordered.

Mr. Justice Spear, concurring, in an additional note, in the result, expressed himself of the opinion that a motion for a new trial on the verdict of a jury in a probate appeal was without effect; that the remedy should be exceptions.

In *Ingraham, Appellant*, 118 Me., 67, 105 A., 812, there was, after jury findings, motion for new trial. The Law Court, on reviewing the case, remanded it for the entry of a decree of indicated tenor.

Rogers, Appellant, 123 Me., 459, 123 A., 634, came up on exceptions.

In *Look, Appellant*, 129 Me., 359, 152 A., 84, after jury verdict, final decree was settled. Appellant excepted; he also filed a motion for a new trial. Exception sufficing purpose, the motion was without office.

Hiltz, Appellant, 130 Me., 243, 154 A., 645, was on exception to decree.

Against this background, there is room for honest differences of interpretation as to what should be formal practice. The decided cases come to this: In a will contest, technical rules of pleading, in reference to bringing the case to this court, have never been permitted to prevent the exercise of revisory power. No rule of court changing or modifying "customary procedure," (to recall the words of Judge Cornish in *Thompson, Appellant*, supra,) has ever been adopted; nor has the view advanced by Judge Spear for himself alone been announced as the view of the full court.

Moreover, what was done in the case at bar is suggested in *Latham, Appellant*, supra. It is true that the statements in that opinion are dicta, but as dicta they are not without significance.

Neither precedent, policy nor justice demands that other than legal rights, in distinguishment from those rules which the court may adjust for itself, should be controlling.

Ability to make a will depends upon mental competency. Wills, as has been seen, are denied effect until they have been publicly proven. A fair preponderance of the evidence must establish not only that the testator signed, but that he was of sound mind at the time of doing so. Absolute soundness of mind is not essential, but "sound mind" is a condition precedent to making and executing a valid will. The expression "sound mind" does not mean a perfectly balanced mind. The question of soundness is one of degree. One is sane when he is possessed of a mind which is not that of an imbecile and which is healthy. *Robinson* v. *Adams*, supra.

A person of statute age, who understands substantially the na-

ture of the act he is performing, has a knowledge without prompting of the extent of his property, his relations to others who might or ought to be the objects of his bounty, is aware of those to whom he is giving as well as those from whom he withholds it, of the scope and bearing of what he is doing, and has sufficient memory to collect and hold in his mind the elements of the business to be transacted, long enough to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them, has that sound mind which qualifies him to make a valid will. A testator may forget the existence of a part of his estate, or of some one who has natural claims upon him, and yet make a will. What is required is merely that he shall have such mind as to remember the necessary facts; not that he shall remember them all. He need not have the same perfect and complete understanding and appreciation of the matter involved as a person in vigorous health of body and mind would have, nor is he required to know the precise legal effect of every provision in his will. *Hall* v. *Perry*, supra; *Wells, Appellant*, supra.

Schouler says: "The true criterion is not whether the testator is capable of a particular transaction inter vivos, but whether he is capable of making a will. The comparison is not of different standpoints, rather that of different degrees from a common standpoint." *Schouler on Wills*, Sec. 67. See, too, *Page on Wills*, Sec. 140 et seq. There can be no safer rule than that the competency of the mind should be judged by the thing to be done on a consideration of all the circumstances of the case. The point is to comprehend the testamentary act. *Hall* v. *Perry*, supra; *Wells, Appellant*, supra.

The want of capacity, when urged as a ground for invalidating a testamentary act, must relate to the time of the act. Incompetency may exist before or after, and still the will be valid.

On the issue of competency to make a will, the burden of proof is upon the proponent. It is for him to substantiate soundness of mind, even though the contestants offer no evidence at all. This is because the right to make a will is neither a common-law nor a constitutional right, but one created by statute. *Hazard* v. *Bliss*, 43 R. I., 431, 113 A., 469; *Nelson* v. *Nelson*, 235 Ky., 189, 30 S. W., (2nd) 893; *In re Garland's Will*, 160 N. C., 555, 76 S. E.,

486; *Irwin* v. *Rogers*, 91 Wash., 284, 157 P., 690; *Vestal* v. *Pickering*, 125 Ore., 553, 267 P., 821; *Gibson* v. *Van Syckle*, 47 Mich., 439, 11 N. W., 261; *In re Evans' Will*, 193 Iowa, 1240, 188 N. W., 774; *Selden* v. *Illinois Trust & Savings Bank*, 239 Ill., 67, 87 N. E., 860; *Crowninshield* v. *Crowninshield*, 2 Gray, 524; *State* v. *Hamlin*, 86 Me., 495, 505, 30 A., 76.

The ultimate question is: Is this the last will of the testator? The appeal supersedes proof of the will in the court of probate.

In this class of cases, as in the great majority where the burden of proof depends upon the weight to be given to oral testimony, it rarely can be ruled as a matter of law that the burden has been sustained. Exceptional instances, where the facts do not raise a disputed question of fact, do not affect the general rule.

John T. Martin, as previously pointed out, was, on executing the will, eighty-one years old. Extreme old age is not of itself incapacitating. *American Board of Commissioners, etc., Appellants*, 102 Me., 72, 66 A., 215. The fact, however, is not, on the one hand, to be ignored; nor, on the other hand, to be deemed as casting any additional burden of proof upon the proponent.

Mr. Martin had been part owner and captain of different coasters.

On divorcing his wife, in the 80's, he married again. No children appear to have been born of the second union. When, or in what manner, that marriage was dissolved, does not appear.

In 1917 he left the sea. Thereafter he seems to have been chiefly concerned in renting his various houses.

Between father and children, especially when the father was sailing, and the children, in their minority, were living with their mother, association had not been close, but apparently he remembered them with affection toward the end of his life.

In 1927 or 1928, there is no dispute that Mr. Martin was physically "very feeble," "awful hard of hearing," and "mind failing." He was "forgetful" in a marked degree. He had, at some previous time, had a revolver, and at intervals would try to find it, and as testimony runs, have "spells," easily get "kind of excited . . . kind of insanity like," so that he alarmed those about him. Physical infirmity and mental soundness, it is common knowledge, may coexist. Not every weakness incident to the ravages of age and disease

unfits a man for making a will, nor is it true that a lack of testamentary capacity is any less fatal to the legal power to make a will because it is the result of these things. *Byrne* v. *Fulkerson*, 254 Mo., 97, 162 S. W., 171.

At various times, from 1927 on, so is testimony, testator's son stayed with him, at his invitation, assisting him in some of his rentals and collections, driving him about in his automobile, and advising him, to some extent, regarding his affairs, but seemingly to no particular avail.

In 1930, also at his request, his daughter came to see him. He acquainted her with his property, and asked her preference with respect to either of two dwelling houses; this she made known. She testifies he told her he would give her choice effect; there the matter ended.

In July, 1929, he made a will, devising certain real estate to his son, and bequeathing personalty to his daughter. The lawyer who prepared the instrument had previously transacted minor business and collected rents for the testator. October 25, 1929, testator executed another will, mentioning neither child. On the same day, he deeded a house and lot to the son.

Two days elapsing, he expressed dissatisfaction with the terms of the will. The attorney, while on the witness stand, said that he told Mr. Martin to "go home and think it over three or four days." On November 1, 1929, he returned to the lawyer's office, on the authority of the latter as a testifying witness, bearing a safety deposit box from a bank vault, "to see if there was money enough." Besides a municipal bond, a mortgage or two, and accounts receivable, the personal estate of Mr. Martin comprised two bank accounts, aggregating nine thousand dollars. The proposed money bequests, seventeen in all, totaled fifty-nine hundred dollars. The names of his children were not on the list; of the persons whose names were listed, five—two nephews, niece, grand-niece, and sister, —were kin to him. The gifts to them amount to twenty-two hundred dollars. Nothing shows the existence of blood relationship between testator and other legatees, or between him and the residuary devisee.

The son gives testimony that he accompanied his father to the lawyer's office; that his father said: "I am not fit to make a will,"

and that on his (son's) calling the lawyer's attention to the remark, reply was: "He is all right." The son says he later left, and still later returned; in his absence a will had been made. This, the lawyer, while on the witness stand, definitely denied; he says the son was not there that day. He also denied a further statement by the son, that he (lawyer) said to testator, after the will had been attested and the witnesses had gone: "This is your last one."

The will contained specific provisions, and a general residuary clause to dispose of all the testator's estate. The lawyer's evidence is that the instrument was, in certain respects, a reproduction of the one next preceding, though the former had fewer bequests. That the testator read the will, or that its contents were read and explained to him, does not appear.

Mr. Martin signed the document, in the presence of three credible and not beneficially interested persons, who had been asked into the office; they signed as witnesses and then retired. The will, it seems desirable to notice again, contained no internal evidence of the testator's mind and motive respecting his children. As to them, it was utterly silent.

The first witness to the will, on being shown her name, testified to having been called in, signing, the other two witnesses signing, and walking out. She adds her opinion that the testator was of sound mind. The opinion of subscribing witnesses as to the condition of the testator's mind at the time of the execution of his will, may be received in evidence. *Cilley* v. *Cilley*, supra; *Robinson* v. *Adams*, supra. This witness' words are: "He (testator) seemed very bright. I didn't think there was anything wrong with him." The gist of the testimony of the next witness is: "as far as I know" he was of sound mind. She says she formed no opinion at the time. The third witness substantiates his idea that testator "seemed to be all right," by saying: "he was in my place quite often and talked and conversed . . . we lived neighbors."

"The subscribing witnesses to a will may testify to their opinion of the testator's sanity, upon its being presented for probate, because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to." *Hastings* v. *Rider*, 99 Mass., 624.

The value of the testimony of the subscribing witness is to be

determined with reference to his opportunity for observation, his skill and care in observing, his intelligence, and powers of discernment and memory. *Thornton* v. *Thornton*, 39 Vt., 122.

Assuming, in the present case, that the testimony of the attesting witness is prima facie evidence of testamentary capacity, still it is only prima facie evidence of that fact. Of course, competency to will may be established by other sufficient evidence. The contestants introduced, as a witness, a former long-time business associate of the testator, his friend and neighbor, of about his age. He gives evidence that though the testator had been a capable, prudent man, yet in 1928 and 1929 he did not think consecutively, his speech was disconnected, during conversation "he would talk about something else and then turn right on to something far from it." Evidence tends to show that testator began to take less and less care of his estate; was "changeable" in his transactions; interested in trifles; his judgment was faulty. Infirmities of body and mind became more marked with the passing of the days; faculties were dimming.

Testimony of the son is that his father was whimsical, stubborn and morbidly irritable. It goes to prove that testator had a certain amount of memory and sense; also that he was an aged man, once well able to take care of himself, but doing and saying many things in an absurd way, forgetting events, at times "worrying," and at other times having "excited spells"; acting "as though he were insane." The witness was not expressing his opinion; this was merely his way of telling what he had noticed. A layman is not competent to give expert testimony; he is not at liberty to give his judgment as to the condition of the mind of the testator at the time he saw the acts of which he speaks; it is for him to describe the acts and appearances that he saw.

A merchant who rented a house of the testator attested to disturbances of speech, to apparent lack of memory of recent happenings, garrulousness, incoherence, and failure of powers of attention.

The testator's physician described the condition of his patient, professional attendance on whom, for prostatic trouble, began in 1928. Mentality was already impaired; a condition known as senile dementia—mental imbecility from old age—existed. "We might sup-

pose old age to be that part of life farthest removed from infancy, but here we see the circle of life closing in upon itself where it began." *Hiett* v. *Shull*, 36 W. Va., 563, 15 S. E., 146. This type of mental disorder "begins gradually, is progressive in character, and in its advanced stages, 'the brain is well-nigh stripped of its functions.'" *Byrne* v. *Fulkerson*, supra.

An attending or family physician's opinion as to the mental health of his patient is competent; such patient's condition some time before, and some time after, making the will is relevant, as tending to show the condition of mind when it was executed.

The doctor stated, on the stand, that late one afternoon in the summer of 1929, (that is, before the making of the will on November 1st,) testator, "in his shirt sleeves and an old battered straw hat," came to him, requesting the loan of two dollars, "as he was going to take a trip . . . was going to take the evening train" and go to Denver, Colorado. The medical witness expressed his opinion, founded upon personal observation, on the question of the testator's soundness of mind.

The study of the mind is difficult and complex. Its problem never has been, by man, and never will be, completely solved. A man may be medically insane and yet be capable of making a valid will. In the light of medical science, a man is either sane or insane. The law recognizes that between the full light of sanity and the eclipse of total insanity, there is a penumbra in which, although the mind of a person may be to some extent impaired by age or disease, still, if in reference to his ordinary business, he can exercise not only the intellectual faculty, but the volitive, his acts for all secular purposes will be of validity and force. The distinction was made clear to the witness. He answered, in effect, that the testator was not, at the time of making the will, of rationality to transact common and simple business, continuously and understandingly, compatibly with the intelligence belonging to the weakest class of efficient minds. He was not, in everyday phrase, in his "right mind."

There was no direct evidence that on the day and at the hour the will was signed, testator was not sane, but as has been said by another court, it does not follow that the proof of incapacity at the very moment must be made by eyewitnesses on that occasion. *Byrne* v. *Fulkerson*, supra. Proof, as here, of insanity prior thereto,

permanent in kind, and progressive, raises a presumption of continuity. *Halley* v. *Webster*, supra; *Weston* v. *Higgins*, 40 Me., 102. The presumption is of fact rather than of law.

The daughter testifies that when, in 1930, she visited her father, she remained two days. This was the occasion of her indicating, at his request, her preference as to houses. She witnesses as to facts indicative of the physical and mental weaknesses of her father. He had become, from her description, childish and forgetful; he was apathetic and indifferent to current events.

No person living in or near the home of the decedent, except one of the will-subscribing witnesses, contradicts the narrations of the witnesses for the contestants; or tells any other incident or act that forbids the impression legitimately drawn therefrom.

A jury does not figure, ordinarily, in a will contest. In a court of probate there is no jury. In the appellate court of probate, an issue of fact may be framed for the jury, but hearing is usually by the judge alone. The verdict of the jury upon an issue out of probate is only advisory and never conclusive upon the court; that is, the court may or may not regard it.

The conclusion of the reviewing court is that if the jury, on the whole case, chose to believe the evidence, as they apparently did, for the contestants, it would support the verdict.

Had John T. Martin sense and memory and will enough to do the thing done? is only one form of putting the implied question the case presents. The witnesses detail his age, appearance, conversation, ways, conduct,—as compared with an earlier period in his life, when the soundness of his mind was beyond question. Too much stress should not be laid on a comparison between the present and the past. The test is capacity for the object attempted.

The difficulty in deciding where testamentary ability ends is frequently great; yet each case must depend upon and be determined by its own evidentiary showing. There is, in this case, substantial evidence of the presence of senile dementia in a state so advanced as to justify saying, as a finding of fact, that the burden of proof as to soundness of mind, when the will was made, is not sustained. On that proposition, the preponderance of the evidence is not with the proponent; indeed, it is against him.

The decree of the Probate Court must be reversed. That this

may be done, and the will denied probate, the motion for a new trial is overruled, and the cause remanded to the Supreme Court of Probate, for the entry of decree accordingly. Costs may be allowed both parties, from the estate of the decedent.

So ordered.

BARNES, J. Dissenting.

CASSIDY CASE.

Penobscot. Opinion, June 21, 1935.

EMINENT DOMAIN. PLEADING AND PRACTICE. DAMAGES.

R. S., CHAP. 27. SEC. 76.

R. S., Chap. 27, Sec. 76, which authorizes the taking of land to secure a change of alignment of a highway and which directs the procedure, provides that parties aggrieved by the estimate of damages of the county commissioners shall have like remedy as provided by statute for appraisal of damages for land taken by towns for highway purposes.

Appeal properly lays the case before the Superior Court, and one method of trial there is by jury.

The case may be brought before the Law Court on motion or exception.

Appellants from estimate of damages will be heard when the estimate is attacked as excessive or inadequate.

What the owner is entitled to, is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact.

In the case at bar, the verdict, in the estimate of men of the vicinity was just compensation. The court holds that it can not say it is so much less as to require a new trial.

On general motion for new trial by appellants. A proceeding under Chap. 27, Sec. 76, R. S., incident to taking land by eminent domain. Hearing was had by the County Commissioners for the

County of Penobscot who made a finding and award in the sum of $33,976.68, as damage for the land taken. Appeal was had to the Superior Court for the County of Penobscot. The jury rendered its verdict in the same amount as determined by the County Commissioners. A general motion for new trial was thereupon filed by appellants. Motion denied. The case fully appears in the opinion.

Edgar M. Simpson, for appellants.

William S. Cole, for City of Bangor.

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

DUNN, J. Dissenting.

BARNES, J. By regular statutory proceedings the city of Bangor took a parcel of land, with buildings thereon, for public use in changing the alignment of a public way, in said city, under the authority of R. S., Chap. 27, Sec. 76, and, after hearing, the county commissioners of Penobscot County, on petition of the municipal officers determined the damages in the sum of $33,976.68, ordering the city to pay that sum to the appellants.

The latter, considering themselves aggrieved by the estimate of damages of the county commissioners took an appeal to the superior court, which resulted in a verdict for appellants in the same amount as determined by the county commissioners, and the case is argued here on a motion for new trial in the usual form, and "because the damages are entirely inadequate and insufficient."

The land taken is a corner lot in the wholesale section of the city of Bangor at the end of the concrete bridge across Kenduskeag stream, on the westerly side of Broad Street, bounded southerly by Independent Street, westerly by Haymarket Square and terminates in a party wall on the northerly side.

The area of the lot is 8,889 square feet, or a little more, and for structures contained a warehouse building, a two and one-half story building, used as a restaurant and a metal workers shop, a blacksmith's shop and a party wall of brick between this lot and the lot adjoining on the north.

Pickering Square is at such elevation above Broad Street that the entrance to buildings on this lot at the margin of the square

would be on the second floor of such buildings continued to Broad Street.

Such was the construction of the warehouse building, enhancing its value, as claimed, for use in receiving, storing, and discharging heavy merchandise.

The City contends that the finding of the jury furnishes the just compensation to be found as damages for such taking of private property; the appellants that the damages found by the jury are so inadequate as to justify the awarding of a new trial, and particularly because the sum found by the jury is exactly equal to that previously estimated by the county commissioners.

Thus we are confronted with a question of jurisdiction, whether or not the appellants are entitled to a hearing on their motion for a new trial.

The statute already cited, which authorizes the taking of land to secure a change of alignment of a highway and which directs the procedure provides that parties aggrieved by the estimate of damages of the county commissioners "shall have like remedy as provided by statute for appraisal of damages for land taken by towns for highway purposes."

Appeal properly lays the case before the superior court, and one method of trial there is by jury.

Error may creep into a case in a trial court, and, as broadly stated in somewhat analogous proceedings in *Carvill* v. *Carvill*, 73 Me., 136, 139, "Whenever a jury trial is had, there may be a motion or exceptions for the correction of errors, whether of the court or jury."

This practice has been followed in *Lenox Petitioner* v. *Knox & Lincoln R. R. Co.*, 62 Me., 322; *Wilson* v. *So. Portland*, 106 Me., 146, 76 A., 284; *Chase* v. *Portland*, 86 Me., 367, 29 A., 1104; *Sherburne* v. *Inhabitants of Sanford*, 113 Me., 66, 92 A., 997; *Simoneau* v. *Livermore Falls*, 131 Me., 165, 159 A., 853.

Appellants from estimate of damages will be heard when the estimate is attacked as excessive or inadequate. *Leavitt* v. *Dow*, 105 Me., 50, 72 A., 735; *Conroy* v. *Reid*, 132 Me., 162, 166, 168 A., 215.

As to the coincidence of amounts found as damages, it is too much to say that the amount found by the jury was arrived at in-

dependently of and with no knowledge of the amount estimated by the County Commissioners.

But what is there censurable about the action of the jurors, if after studying and giving due weight to all pertinent evidence, each juror found the damages suffered in the very amount of the commissioners' estimate?

Local experts testified as to the value of the property taken.

In their estimates of value of the land the range was from $1.50 to $4.00 a square foot; of the land, with structures thereon, from $26,386.77 to $53,000.00.

Much testimony was given as to reproduction cost, less depreciation.

The jury had the testimony of apparently disinterested men on what the property would have earned annually, if cleared and devoted to the business of a filling station, in supplying the needs of operators of motor vehicles. They heard testimony of the relation between annual rental value and market value. They inspected the lot; studied its location.

It was their duty to report their opinion of the value of the property as of the last week of April in 1934.

They must agree, if agreement can be reached, on what is just compensation for the property, taken on that day.

Property has been taken for public use in the flood of good times.

It was taken from the Cassidy estate during the ebb tide of a most distressing financial depression.

It was for the jury to determine the amount of money the city must pay in reimbursement.

That their conclusion was identical with that of the commissioners of the county is not of itself enough to justify setting their finding aside. No improper motive on their part is suggested. It may be that they severally settled upon the amount appealed from, as the deliberate decision of each. That is all the law requires of jurors.

Land owners have, heretofore complained of estimates of damages for property taken. They may complain in the future. "What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair

market conditions would have given for it in fact." *City of New York* v. *Sage*, 239 U. S., 57.

It was the duty of the jury to find the value of the property taken, as of April 26, 1934.

To find less would be to deprive the owners of property without just compensation.

To find more, because of prevailing low prices, would be to capitalize a hope.

The verdict in the estimate of men of the vicinity is just compensation. We can not say it is so much less as to require a new trial.

Motion denied.

DUNN, J. I dissent. The State is constitutionally prohibited from taking private property, for its own needs, except upon due compensation.

In the instant case, the award of damages is inadequate, to the extent of being against the weight of the evidence.

CHARLES BOUCHARD *vs.* CITY OF AUBURN.

Oxford. Opinion, June 29, 1935.

MUNICIPAL CORPORATIONS. NEGLIGENCE.

It is settled law in this State that when the employees of a municipal corporation are engaged in what might be called a governmental function, or public duty, the municipal corporation is not liable for their acts of negligence.

Municipalities are obliged to keep their streets safe and convenient for travel.

A rotten limb, overhanging a sidewalk presents a danger which it is the duty of a municipality to remove.

Negligence of employees of a municipality in removing such a limb creates no liability against the municipality.

On exceptions by plaintiff. An action to recover damages for injuries received by the plaintiff from the falling of a limb of a tree overhanging a sidewalk. It was alleged that the injuries were caused by the negligence of the employees of the defendant who were removing the limb, and that this negligence was attributable to the defendant. Trial was had at the March Term, 1935, of the Superior Court for the County of Oxford. To the granting of a directed verdict, for the defendant, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Albert Beliveau, for plaintiff.

Donald W. Webber, for defendant.

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

PATTANGALL, C. J. Exceptions. Verdict ordered for defendant. Action brought to recover damages for injuries received by plaintiff from the falling of a limb of a tree overhanging a side-walk in defendant city. It was alleged that the injuries were received by negligence of defendant's employees who were removing the limb.

The defences set up were: that the employees were not negligent; that the plaintiff was guilty of contributory negligence; that the plaintiff failed to give required notice and that the employees were engaged in removing that which was a menace to the safety of the traveling public, a governmental function.

It is unnecessary to consider any but the last named defence. It is settled law in this state that when the employees of a municipal corporation are engaged in what may be called a governmental function, or public duty, the municipal corporation is not liable for their acts of negligence. *Brown* v. *Vinalhaven*, 65 Me., 402; *Woodcock* v. *Calais*, 66 Me., 234; *Burrill* v. *Augusta*, 78 Me., 118, 3 A., 177.

The evidence shows that the tree in question was partly within the limits of the highway and partly on private land. The limb was thirty-three feet long and overhung both the side-walk and street in a thickly settled portion of the city. Under these circumstances a rotten limb presented a danger which it was the duty of defend-

ant to remove. *Dyer* v. *Danbury*, 85 Conn., 128, 81 A., 958; *Valvoline Co.* v. *Winthrop*, 235 Mass., 515, 126 N. E., 895.

Municipalities are compelled to keep their streets safe and convenient for travel. Sec. 65, Chap. 27, R. S. 1930. They are not liable to a private action for negligence in the performance of corporate duties imposed upon them by the legislature unless such a liability has been imposed by statute. In *Keeley* v. *Portland*, 100 Me., 260, 61 A., 180, 183, it is pointed out that, "There are limitations to this rule or conditions to which it is not applicable, the most important perhaps of which is this: A municipal corporation lawfully owning and controlling property, not in the performance of a public duty enjoined upon it by law, but wholly or partially for its own profit or gain, is liable for negligence in the management of such property to the same extent as a business corporation or individual would be."

The instant case does not come within the exception. The general rule controls. The verdict was properly ordered.

Exceptions overruled.

EMMA M. PATTERSON

vs.

HIRAM ADELMAN AND CHARLES A. GALLUPE.

Aroostook. Opinion, July 5, 1935.

EQUITY. MORTGAGES. PLEADING AND PRACTICE.

Upon a bill to redeem from an equitable mortgage on real estate upon which, the amount due having been determined and stated, it is ordered that the mortgagor shall pay the sum with interest thereon within three months from the date of the decree, failure so to pay (no appeal being taken) works a strict foreclosure and bars later redemption.

Failure to fix a reasonable length of time for redemption is a grievance that may be taken advantage of on appeal.

On report on an agreed statement of facts. A bill in equity to redeem from an equitable mortgage. Bill dismissed. The case fully appears in the opinion.

Ralph K. Wood, for plaintiff.

W. S. Brown, Jr., for defendants.

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

HUDSON, J. Law on agreed statement. This is a bill in equity in which the plaintiff seeks to redeem from an equitable real estate mortgage.

It appears that previously to the commencement of this action "on the 2nd day of March, 1932, plaintiff brought a Bill in Equity in the Supreme Judicial Court against these defendants praying that the deed . . . be declared a mortgage; that an account be taken of the amount justly and accurately due under said mortgage; that the plaintiff be allowed to redeem said mortgaged premises by paying to the defendants such sum as may be found due the defendants by said account; that the defendants be ordered upon the payment of said sum to release all their right and title in the premises to the plaintiff; and that the plaintiff have such other and further relief as the nature of the case may require."

The Justice hearing said former action, on February 2, 1933, decreed that the conveyance "purporting to be a Warranty Deed was in truth and in fact a Mortgage Deed" with right of redemption. Having determined the amount due on it, he further decreed "that the plaintiff be and hereby is ordered to pay said sums of money with interest thereon to the defendants within three months from the date of this decree" to wit, February 2, 1933. Not appealing from said decree, the plaintiff did not pay as ordered but now in this new bill seeks the right to redeem by payment of such a sum as this Court finds equitably due on said mortgage.

The contention of the plaintiff is that said decree fixed only a "due date before which the mortgage could not be foreclosed" while the defendants claim that its effect was strictly to foreclose the right to redeem subsequently to the said three months.

By the agreed statement two questions are presented for answer, namely:

> "1. Has the plaintiff an equity of redemption in the premises or has she lost her right to redeem either by failure to comply with said decree or by laches?
>
> "2. If the plaintiff has a nequity of redemption, to what extent must the defendants account for the profits arising from operation of the premises during the period they were in possession thereof?"

In *Sposedo* v. *Merriman*, 111 Me., 530, 90 A., 387, 391, is found the answer to Question 1. In that case, wherein the plaintiff sought to redeem from an equitable mortgage on real estate, it was decreed "that the plaintiff shall pay to the defendants the amount found by said master to be due to them, such payment to be made within sixty days from the date of the acceptance of the master's report, and the defendants shall thereupon surrender possession of said premises to the plaintiff, and the said" (mortgagees) "shall execute and deliver a deed of release to the plaintiff of the premises described in said bill . . ." The payment was not made as ordered and the Court held consequently that there was no later right of redemption, citing as authority *Pitman* v. *Thornton*, 66 Me., 469, and *Stevens* v. *Miner*, 110 Mass., 57. In *Sposedo* v. *Merriman*, supra, on page 545, Justice King said:

> "The decree fixes definitely the time within which the plaintiff must pay the amount found due by the Master. If he does not so pay his right of redemption then expires, and becomes forever barred."

Reasons for such a conclusion are stated in *Pitman* v. *Thornton*, supra, on pages 470 and 471:

> "It is clearly within the province of courts of equity having full equity jurisdiction, as this Court now has, to render such a decree as substantial justice requires between the parties. By filing his bill for redemption, the mortgagor invokes the aid of the Court to enable him to determine and adjust the differences between him and his mortgagee. He declares that he

desires to pay the mortgage debt, and thus relieve the mortgaged premises from the incumbrance. The Court takes him at his word and ascertains the amount due, fixes the time when it must be paid, and the consequences of default of payment, to wit: Expiration of the right of redemption, and a foreclosure of the mortgage. We do not perceive anything inequitable or unjust in such a decree. The action of the mortgagor subjects the mortgagee to expense in defending the bill; and he has rights to be regarded as well as the mortgagor. Both parties being in court either has a right to demand, and substantial justice requires, that the court should put an end to their controversy. To allow the time of redemption to remain open after default of payment as fixed by the decree would be to subject the mortgagee to the caprice of the mortgagor and compel an indefinite postponement of the controversy, which the mortgagor himself prayed to have determined by his bill."

It may not be amiss herein to state that if one be aggrieved by the fixing of an unreasonably short length of time in which to redeem, such grievance is open on appeal from the decree. No such contention is now before us.

Answering Question 1 as we have makes unnecessary answer to the second question. The entry must be,

Bill dismissed.

SACO & BIDDEFORD SAVINGS INSTITUTION

vs.

ILO M. JOHNSTON, ADMX., AND CECILIA JOSE.

York. Opinion, July 12, 1935.

BANKS AND BANKING. EQUITY.

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

In the case at bar, the record proved that after the oral agreement of transfer between Mr. Johnston and Mrs. Jose evidence of that transfer on a form furnished by the bank, duly witnessed, was delivered, in the presence of a subscribing witness, to Mrs. Jose together with the book of deposit. Mrs. Jose performed to the letter her contract to care for Mr. Johnston and to furnish him proper burial.

Nothing in the bank form of transfer should be interpreted as intended to prevent the vesting of title to the entire balance of the deposit in Mrs. Jose, upon complete fulfillment of her agreement.

With the deposit book he gave her what interest he had in the account, relying upon her agreement with him.

Such an agreement is to be upheld.

Appeals from decrees in equity dismissing bill of an administratrix on the ground that title to cash deposit of decedent, passed on his death to a claimant by virtue of a contract to care for and bury him, such contract being fully performed on the part of the other party thereto. Decrees affirmed. The case fully appears in the opinion.

C. Wallace Harmon,
Robert B. Seidel, for plaintiff.
Willis T. Emmons, for Mrs. Jose.
John P. Deering, for Administratrix.

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

BARNES, J. The action in this case was presented in the Superior Court on bills in equity, its purpose being to determine the owner or owners of a deposit in the Saco & Biddeford Savings Institution, headed or entitled, at the time of the death of Thomas Johnston, "Mrs. Cecilia Jose, or Thomas Johnston Saco, Maine Payable to either or survivor."

Mr. Johnston died, intestate, on April 19, 1934, and in due time thereafter a daughter, Ilo M. Johnston, was duly appointed administratrix of his estate, and as such, made claim to the deposit.

Mrs. Cecilia Jose also made claim to the deposit, and the Saco & Biddeford Savings Institution brought a bill in equity, asking that the two claimants come into court and interplead. A decree of interpleader was seasonably made and each claimant brought a bill in equity against the other. The claim of Mrs. Jose is to be determined from facts and the law applicable thereto, transpiring in the winter and spring of 1934.

It appears that at the beginning of that period Thomas Johnston, almost 81 years of age, was living alone in a tenement on Dyer Street, Saco. Mrs. Jose lived in a tenement over the Johnston tenement. He was in feeble health and she established the practice of doing neighborly acts of kindness to the old man.

In the late winter physicians suggested that he enter a hospital, or have a caretaker in constant attendance. His estate at that time consisted of deposits in the plaintiff bank and in another bank, but deposited as a whole in the plaintiff bank in the sum of $2,645.64 on April 2, 1934.

In accordance with the advice of the physician, Mrs. Jose removed Mr. Johnston to her tenement and claims that on March 8, 1934, they entered into an agreement whereby she was to take care of him during the rest of his life and give him burial, and that in consideration of such promise on her part he agreed to assign his bank deposits to her.

On that date a paper was executed by the two. It is in the record, "Jose's Exhibit A," and reads as follows:

"'JOSE'S EXHIBIT A'

Saco, Maine, March 8, 1934.

The undersigned request the Saco & Biddeford Savings Institution to open an account in the names of

Thomas Johnston or
Mrs. Cecilia Jose

said deposit account Number 31468 to be payable to either or the survivor.

This account is not opened for the purpose of transferring title to the same or any part thereof after the decease of any of the joint depositors, nor for the purpose of evading the inheritance laws of this State.

Each of the depositors has a present bona fide legal interest therein.

Signed, Thomas Johnston
Mrs. Cecilia Jose

Witness, James Snyder"

Mrs. Jose contends that at the time of the execution of Exhibit A, in the presence of James Snyder, the witness to the several signatures of the parties, Mr. Johnston delivered the Saco bank book to Mrs. Jose and said, "I will give you this bank (deposit book admitted as plaintiff's Exhibit 1 by agreement of counsel) book to take care of me as long as I live and pay my burial expenses in the presence of James Snyder," and delivered the book to her.

It seems from the record that the bank book was in the possession of Mrs. Jose from the date of the execution of the agreement, and that in pursuance of said agreement she caused the withdrawal from the Plymouth Bank and deposited the same in the plaintiff bank.

Mrs. Jose fulfilled her contract; Mr. Johnson remaining with her and in her care until he died. He was buried at her expense.

Ilo M. Johnston bases her claim as administratrix on the theory that there was no joint tenancy of Mrs. Jose and Mr. Johnston in the deposit, in that the same was put in a deposit in the names of both solely for the convenience of Mr. Johnston, and in order that Mrs. Jose might the more readily withdraw money for his use; or that Mr. Johnston acted as he did in an attempt to make a testa-

mentary disposal of property, contrary to the statute, and that in either case she is entitled to the deposit as administratrix.

Hearing was had on bills, answers, and replications, and the sitting Justice made a finding that the deposit belonged to Mrs. Jose, and that the plaintiff bank should pay the same to her. Decrees were made dismissing the bill of Ilo M. Johnston, Admx., and sustaining that of Mrs. Jose. The Administratrix seasonably appealed and in this action it is to be determined whether or not Mr. Johnston, on the day when he executed the agreement herein above quoted, made a valid transfer of the deposit to Mrs. Jose for a valuable consideration.

It is nowhere denied or questioned that Mrs. Jose executed what she considered she had agreed to do. It is the position of the appellee, Mrs. Jose, that the appellant must satisfy this Court, either:

1. That the findings of fact of the Justice below which were necessary to support his decree are clearly erroneous, or
2. That such findings are not sufficient in law to support the decree.

As this Court recently ruled, "The decision, as to matters of fact, of a single Justice sitting in a case in equity should not be reversed, unless it clearly appears that such decision is erroneous. The burden to show the error is upon the appellant." *Brickley* v. *Leonard*, 129 Me., 94-97, and cases cited.

It appears in the record that upon request being made to the plaintiff bank to entitle the Johnston deposit as a deposit payable to Mr. Johnston, Mrs. Jose, or the survivor of them, the bank furnished for the signatures of the parties a paper upon which there was some printed matter and space for further provisions, if any were to be made, and for the signatures of the parties; that this paper was, for some reason, not satisfactory, and that the bank furnished a second form, part of which was likewise printed; the remainder, with signatures, was added in writing, the finished paper being "Jose's Exhibit A."

We find it proved of record that, after oral agreement of transfer, evidence of that transfer, "Jose's Exhibit A," duly witnessed, was delivered, in the presence of subscribing witness, to Mrs. Jose, together with the book of deposit.

It is not questioned that Mrs. Jose performed her contract to the letter.

With the contention that Mr. Johnston's act was with intent to make a testamentary disposal of property, contrary to the statute of wills, we can not agree. The evidence presents instead purchase of security and the prospect of such comfort as property can purchase.

With the title under which the deposit was carried on the books of the bank we are not concerned. The form furnished by the bank for evidence of the transfer does not much concern us.

That form was undoubtedly preferred by the bank for its convenience and protection under a statute applicable to deposits payable to two persons or the survivor of them.

The last sentence of Exhibit A can not, in harmony with our understanding of the facts presented by the record, be interpreted as intended to prevent the vesting of title to the entire balance of the deposit in Mrs. Jose, upon complete fulfillment of her agreement.

So far as the bank is concerned, during the lifetime of Mr. Johnston, either he or she could draw against the deposit. It seems that is all this concluding sentence should be held to mean.

We are satisfied that Mr. Johnston agreed to give Mrs. Jose his cash in plaintiff bank, to be used by her if needed to care for him so long as he should live, and to be expended for his funeral as far as needed; the residue hers.

With the deposit book he gave her what interest he had in the account, relying on her agreement with him.

Such an agreement is to be upheld.

Both appeals are dismissed, and Decree of the sitting Justice on each bill is affirmed.

EASTERN TRUST AND BANKING COMPANY, TRUSTEES

vs.

PAUL M. EDMUNDS ET ALS.

Penobscot. Opinion, July 15, 1935.

WILLS. TRUSTS. REMAINDERS.

The waiver of the provisions of a will providing a life estate for a widow and her acceptance of her interest in the estate as provided in Sec. 13, Chap. 80, R. S. 1930, terminates the trust established for her benefit as effectually as would her death, so far as remaindermen are concerned.

The fact that the remainder was contingent does not prevent acceleration provided that the time for distribution has arrived and the donees are ascertained, as in the case at bar.

Distribution of the estate is ordered as indicated in the opinion.

On appeal. A bill in equity for construction of a will. The issue involved the question of the termination of a trust and distribution to remaindermen. Appeal sustained. Decree accordingly. The case fully appears in the opinion.

Edgar M. Simpson, for plaintiff.

Andrews, Nelson & Gardiner, for Paul M. Edmunds and Warren F. Edmunds.

James E. Mitchell, guardian ad litem, for Eleanor Marie Edmunds.

William M. Warren, for Ruby F. Graffam.

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

PATTANGALL, C. J. Appeal. Bill in Equity asking for construction of a will and the determination of the present rights of remaindermen. After disposing of certain property by special be-

quests the testator created a trust embracing the residue of his estate, for the following purposes:

"This trust to continue in any event during the life of my wife, Roberta Mae Edmunds, and it shall cease at her death, if my grandson, hereinafter mentioned, shall not then be living, or, if he shall then have arrived at the age of thirty years: and if, at the time of the decease of my said wife, my said grandson, Robert Dole Edmunds, shall be living, and shall not then have arrived at the age of thirty years, then this trust shall continue up to the time when my said grandson, Robert Dole Edmunds, shall arrive at the age of thirty years, or, it shall continue up to the time of the decease of my said grandson, if he shall decease before arriving at the age of thirty years, and if he shall survive my wife.

"My said trustee to manage all my said estate prudently and carefully, and keep the same insured, and to invest and reinvest my personal estate in safe and reliable securities. And it, my trustee, shall pay every three months from the time of my decease one-third part of the net income of all my said estate to my said wife, during the term of her natural life, and my said trustee shall pay out of said net income to Ruby Fay Edmunds the sum of One thousand dollars per year, to be paid to her in quarterly payments until this trust shall cease, as above specified, or, up to the time of her death, if she dies before the termination of this trust, or, up to the time of her marriage, should she marry, and if she shall marry then the same shall cease absolutely: and all the remainder of said net income shall be paid during the continuance of this trust in quarterly payments as follows: To my said grandson, Robert Dole Edmunds (or to his Guardian up to the time he shall arrive at the age of twenty-one years) while living, and thereafter to his children, if any; and if during the continuance of this trust, said grandson shall decease, leaving no children surviving him, then said net income shall be paid during the continuance of this trust to my brother, Frank H. Edmunds, if he shall be living, and if he shall not be living, then the same

shall be paid during the continuance of this trust to his children, if any, in equal shares.

"At the termination of said trust, all of my said estate in whatever form the same shall then be, shall become the property absolutely of the following named persons, in the following named order: My said grandson, Robert Dole Edmunds, if he shall be living, and if he shall not be living at the time of the termination of this trust, then to his children equally, if there shall be any of his children living at the termination of this trust; and if my said grandson shall not be living at the time of the termination of this trust, then to my brother, Frank H. Edmunds, if he shall be living at the time of the termination of this trust; and if he, Frank H. Edmunds, shall not be living at the time of the termination of this trust, then the same shall go to the Lineal descendants of my said brother, Frank H. Edmunds, in accordance with the laws of the State of Maine relative to the descent of real and personal estate.

"The foregoing provision in favor of my said wife, Roberta Mae Edmunds, to be in full for all her right of dower, right by descent, right to claim an allowance, right to a distributive share, and all other rights under the laws of the State of Maine, in and to all my estate, real, personal and mixed."

The will is dated February 6, 1919. Testator died August 17, 1926. Roberta Mae Edmunds, who is still living, seasonably waived the provisions of the will and claimed and received the right and interest given her in the estate by Sec. 13, Chap. 80, R. S. 1930. Frank H. Edmunds, testator's brother, died September 29, 1926, leaving two sons, Paul M. and Warren F. Edmunds. Paul M. has a minor daughter, Eleanor Marie Edmunds. These three are the only descendants of Frank H. Edmunds. Robert Dole Edmunds, grandson of the testator, died, unmarried, before the age of thirty. Ruby Fay Edmunds has married.

The question is whether or not the remainder of the trust may be accelerated and presently distributed.

It is apparent that at the death of testator's widow, in view of the foregoing, the estate would pass to such of the descendants of Frank H. Edmunds as were living at the time of her decease. Her

election was, so far as the rights of the remaindermen were concerned, equivalent to her death. *Fox* v. *Rumery*, 68 Me., 121 (at page 129); *Adams* v. *Legroo*, 111 Me., 320 (at page 307), 89 A., 63; *Ladd* v. *The Baptist Church of East Randolph, Vermont*, 124 Me., 386 (at page 388), 130 A., 177; *Roe* v. *Doe*, 93 A., 373 (Del.); *Coover's Appeal*, 74 Penn., 143, 147; *In re Woodburn's Estate*, 25 A., 145, 151 Penn., 586; *O'Rear* v. *Bogie*, 163 S. W., 1107, 157 Ky., 666; *Meek* v. *Trotter*, 180 S. W., 176, 133 Tenn., 145; *Boynton* v. *Boynton*, 266 Mass., 454, 165 N. E., 489.

The lineal descendants took under the will contingent remainders. But contingent remainders may be accelerated. *Nelson* v. *Meade*, 129 Me., 161, 149 A., 626, 628.

> "The extinction of the first interest carved out of the estate accelerates the right of the second taker. There is an apparent conflict of authority as to whether or not contingent remainders may be accelerated. But the conflict is more apparent than real. A study of the cases discloses a clearly defined and logical line of demarkation between those in which the court has refused to accelerate contingent remainders and those in which acceleration has been permitted.
>
> "The application of the doctrine is not dependant upon the circumstance, that the remainder is or is not vested. The fact that a remainder is contingent is not conclusive of the right of acceleration. The vesting of a remainder by the premature termination of the preceding life estate being based on the presumed intention of the testator, there need be no distinction made between vested and contingent remainders in its application. It is immaterial whether the remainder is vested or contingent if the time for distribution has in fact arrived, as in such case the contingency is determined and the donees ascertained.
>
> "A contingent remainder will not be accelerated if there still remain undetermined contingencies so that it is impossible to identify the remaindermen or if there is evidence of an intention to postpone the taking effect of the remainder. But when no such intention appears and no such uncertainties prevent so that the contingency is determined and the donees ascer-

tained, the doctrine applies as well to a contingent as to a vested remainder."

The gift is to a class, the members of which are to be ascertained at the time of the termination of the trust. The trust having terminated by action of the widow, death of the grandson, death of the brother and marriage of Ruby Fay Edmunds, the members of the class are determined and the remainder should be distributed.

Appeal sustained.
Decree accordingly.

FIRST NATIONAL BANK OF LEWISTON *vs.* ALBERT H. CONANT.

Androscoggin. Opinion, July 19, 1935.

PLEADING AND PRACTICE.

The law is liberal in permitting a suitor to amend an insufficient statement of his cause of action. An intended cause, defectively set forth, may be corrected and made perfect. Authority rests in statute and rule of court. Allowing an amendment which, in its nature, can be allowed, is within the sound judicial discretion of the trial judge.

Amendments are always limited by a due consideration of the rights of the opposite party; no amendment which is unfair to him will be allowed.

No new cause of action may be added or substituted by an amendment.

The amendment in the case at bar falls within the authority to allow amendments. It is not a change in, but an addition to the description of the sole note in suit; there is no enlargement of right to recovery. The amendment is a legitimate step in the pursuit of judgment. It makes proper the introduction into the evidence, without disagreement between allegation and proof, of the very written promise for asserted breach whereof action was begun.

On exception by defendant. An action of assumpsit on a promissory note. To the allowance of an amendment to the declaration in plaintiff's writ, defendant seasonably excepted. Exception over-

ruled. To preserve the attachment lien, case remanded for entry of judgment in favor of the prosecuting plaintiff. The case fully appears in the opinion.

Donald W. Webber, for plaintiff trustee.

Seth May, for defendant.

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

DUNN, J. The defendant had, within four months following general attachment of his real estate on the writ in this action, been adjudicated a voluntary bankrupt. The trustee in bankruptcy intervened, for the preservation of the lien, otherwise annulled, for the benefit of the estate. *Remington on Bankruptcy*, Secs. 627, 628. The defendant's wife, to whom he had, years before, conveyed the family home, but whose deed was not recorded until five days after the attachment, was joined as party defendant in the writ. She is defending. The question for decision is the propriety of the allowance by the trial court, of an amendment to the single count in the declaration.

The declaration, as originally drawn, on a negotiable promissory note, failed to describe the note as payable at "the banking rooms" of the payee. On perceiving this mistake in the manner of description, the bankruptcy trustee prosecuting moved for leave to amend, which was granted. Defendant excepted. Accompanying the bill of exceptions is a stipulation that if exception be not sustained, final appropriate judgment shall be entered.

The law is liberal in permitting a suitor to amend an insufficient statement of his cause of action. An intended cause, defectively set forth, may be corrected and made perfect. *Pullen* v. *Hutchinson*, 25 Me., 249; *Frost* v. *Cone Taxi and Livery Co.*, 126 Me., 409, 139 A., 227. Authority rests in statute and rule of court. *Anderson* v. *Wetter*, 103 Me., 257, 69 A., 105. Allowing an amendment which, in its nature, can be allowed, is within the sound judicial discretion of the trial judge. *Newall* v. *Hussey*, 18 Me., 249; *Garmong* v. *Henderson*, 112 Me., 383, 92 A., 322; *Fournier* v. *Great Atlantic & Pacific Tea Co.*, 128 Me., 393, 148 A., 147.

Amendments are always limited by a due consideration of the

rights of the opposite party; no amendment which is unfair to him will be allowed.

It follows from this that no new cause of action may be added or substituted by an amendment. *Newall* v. *Hussey*, supra; *Milliken* v. *Whitehouse*, 49 Me., 527; *Cooper* v. *Waldron*, 50 Me., 80; *Farmer* v. *Portland*, 63 Me., 46; *Lawry* v. *Lawry*, 88 Me., 482, 34 A., 273; *Anderson* v. *Wetter*, supra.

In the present case, the position of the defendant is that because of changing the form or ground of action, i.e., introducing a different cause than that meant to be put in suit, the amendment was not allowable. Plaintiff contends to the contrary.

What does or does not constitute the introduction of a new cause of action has given rise to many decisions.

Where an action was brought on a promissory note by an indorsee thereof, and the note was not negotiable, an amendment, striking out the name of the existing plaintiff and inserting that of the payee, was allowed. *Costello* v. *Crowell*, 134 Mass., 280.

In *Cain* v. *Rockwell*, 132 Mass., 193, the name of the plaintiff was amended from "Mary" Cain to "Ann" Cain, thus correcting a mere clerical error or misnomer, as the court there say.

Cramer v. *Lovejoy*, 41 Hun, 581, was an action on a promissory note. Amendment to an action for money lent, with an allegation that the note was given as security, was permissible.

In *Kellogg* v. *Kimball*, 142 Mass., 124, the declaration contained one count in tort and another in contract; it was demurred to because the two counts did not refer to the same primary right in the plaintiff. He was, however, allowed to strike out the count in tort, and include one based on the same cause as the count in contract.

Warren v. *Ocean Insurance Company*, 16 Me., 439, was begun on a policy of insurance. The plaintiff was permitted to amend by adding a new count, varying from the original only in the date of the policy declared on.

> "If any error arises in misdescribing a contract or judgment in suit, it is a matter of discretion on the part of the presiding Judge, when and on what terms to permit its correction." *Cummings* v. *Buckfield Branch Rail Road*, 35 Me., 478.

Where a writ upon a policy of insurance did not set out the statute notice, an amendment was admissible. *Lewis* v. *Monmouth, etc., Ins. Co.*, 52 Me., 492.

In *Dodge* v. *Haskell*, 69 Me., 429, the note was declared upon as dated November 23, 1869. The date in the count was amended to August 23, 1869. In reference to the amendment, the court said:

> "It does, in one sense, permit a new cause of action to be described, but not in the sense that the rule is to be understood. The declaration, amended, describes the note correctly; unamended, it described it incorrectly. Still, it identified it, there being but one note."

Obviously, the expression "there being but one note" meant the one note in litigation. It was not incumbent on the plaintiff, in moving to amend, any more than in suing, to negative the existence of any other note.

Whether the instant amendment introduced a new cause of action was determinable, not by the aid of extrinsic evidence, but, as a question of law, entirely by inspection of the original count with that proposed to take its place. *Haley* v. *Hobson*, 68 Me., 167.

Nickerson v. *Bradbury*, 88 Me., 593, 34 A., 521, quotes approvingly, touching the doctrine of admissible amendments, from *Stevenson* v. *Mudgett*, 10 N. H., 338, thus:

> "An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the cause of the action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject matter, upon which the action was in fact founded. So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed,

and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case."

The amendment in the pending case falls within the authority to allow amendments. It is not a change in, but an addition to the description of the sole note in suit; there is no enlargement of right to recovery. The amendment is a legitimate step in the pursuit of judgment. It makes proper the introduction into the evidence, without disagreement between allegation and proof, of the very written promise for asserted breach whereof action was begun.

The exception is overruled.

To preserve the attachment lien, the case is remanded for the entry of judgment in favor of the prosecuting plaintiff.

So ordered.

JOHN E. EATON *vs.* MILDRED C. AMBROSE.

Penobscot. Opinion, July 19, 1935.

MOTOR VEHICLES. NEGLIGENCE. EVIDENCE. NEW TRIAL.

Contributory negligence exists where, but for the negligence or wrong of both parties, there would have been no injury.

The sufficiency of the evidence to maintain a given fact, such as plaintiff's due care, is primarily for the trial court, but the triers must find facts, not from speculation or conjecture, but from evidence. If the evidence, on a point essential to sustain the verdict, is clearly against the verdict, a new trial should be granted. That the jury had a view presents no insuperable obstacle to granting a new trial, on the ground that the verdict does not accord with the evidence.

The driver of a motor vehicle, although he may have the technical right of way, when proceeding across an intersection, is not relieved of the duty of maintaining a lookout. The supreme rule of the road is the rule of mutual forbearance.

In the case at bar, the evidence leaves little or no room for doubt that had plaintiff, after seeing the approaching automobile, kept a proper lookout, and taken the movements of the car into consideration, opportunity for him, as the

car turned into the avenue, to have avoided the accident, would have been ample.

His impulsive act in attempting to drive his motorcycle in front of the automobile, was without relation to the proper theory and practice of the control of motor vehicles in like situations.

Where, as in the case at bar, the testimony shows contributory negligence, the verdict cannot stand.

Upon general motion for new trial by defendant. An action on the case to recover for personal injury and property damages resulting from a collision of the plaintiff's motorcycle and automobile driven by the defendant. Trial was had at the November Term, 1934, of the Superior Court for the County of Penobscot. The jury rendered a verdict for the plaintiff in the sum of $1,548.00. A general motion for new trial was thereupon filed by the defendant. Motion sustained. Verdict set aside. New trial granted. The case fully appears in the opinion.

Frank B. Foster,
Percy A. Smith, for plaintiff.
Fellows & Fellows, for defendant.

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

DUNN, J. On August 19, 1934, a Super X motorcycle and a Ford automobile collided, in Bangor, to the personal injury of plaintiff, and damage to both vehicles. The accident happened in the space common to Broadway, Center Street, and Earle Avenue. Broadway, a street which, as traveled, is twenty-four feet wide, runs approximately northwest and southeast. Center Street, thirty-six feet wide, enters Broadway from the south. These streets join in front of Earle Avenue, which, commencing here, extends westward. In this vicinity, no street is intersecting either Broadway or Center Street from the east. The width of the cement pavement from Earle Avenue to the opposite side of Broadway is thirty-eight feet and nine inches.

Plaintiff was driving the motorcycle. He has the general verdict, in this action against the automobile driver, for $1,548.00. De-

fendant moves for a new trial, assigning the verdict against the evidence, or the weight of the evidence, and the damages excessive.

The motion narrows, on argument, to the question of contributive negligence. Contributory or cooperative negligence exists where, but for the negligence or wrong of both parties, there would have been no injury. *Alexander* v. *Missouri, etc., Railroad Company*, 287 S. W., (Tex. Civ. App.) 153, 155.

The motorcycle was proceeding southeasterly, on its own side of Broadway, the intention of its driver being to bear right, pass the mouth of Earle Avenue, (twenty-five feet plus shoulders,) and thence go toward and into Center Street. Estimates of speed by several witnesses differ within the limits of twenty to thirty miles per hour. A prospective purchaser of the machine was riding on its rear seat.

Defendant's automobile (hers at least for the time being) was going northerly on Center Street. She testifies, without contradiction, that the car was traveling slowly, and that on the "turn" of later mention, its speed was ten to fifteen miles, hourly.

The day was fair; the time around noon; no other traffic was in sight; the view of each driver was unobstructed for a considerable distance.

Witnesses testified with reference to a crayon sketch, absence of which makes it difficult to understand the meaning intended by "here" and "there," words of rather frequent recurrence in the printed transcript of the testimony.

However, while the motorcycle was yet on Broadway, definitely where is not shown, but north of the northerly junction of Earle Avenue, plaintiff, on observing the automobile on Center Street, said to his passenger: "Which way is that fellow (defendant) going?" This is not further detailed.

Plaintiff drove forward, speed unchecked. He claims to have entered the intersection area first, and blames the collision wholly on the defendant. Plaintiff testifies: "The car swung towards me and I didn't know which way the girl was going to go, and I swung in towards the curb. I could see the bumper coming towards me, and that is the last I remember."

The postulate of plaintiff's case is that the automobile, making its appearance, suddenly and in violation of road regulation, in

the area south rather than north of a prolongation of the middle line of Earle Avenue, barred the path of the motorcycle, creating an emergency; that thereupon plaintiff quickly veering to the extreme right, drove in front of the automobile the remaining distance across the street mouth to where the automobile pushed his motorcycle and those on it violently against the stone curbing. His contention is that he exercised due care to escape collision, and that though, in retrospect, he may appear to have erred in judgment, yet the error was one for which he should not be penalized.

The motorcycle passenger, while on the witness stand, said that one hundred feet north of Earle Avenue he saw the automobile opposite that avenue; that the motorcycle was in the "section" (in one place he states that it was half way across,) before the automobile started to turn. On cross-examination, he said that when the automobile, on Center Street, turned for Earle Avenue, the motorcycle driver attempted to go around the front end of the car, and "didn't quite make it."

Defendant testified: "I made my turn and my car was about facing Earle Avenue, and all of a sudden a motorcycle came right on top of me." Again: "I did not see anything coming either way, up Center Street in back of me, and I did not see the motorcycle until it crashed right into me."

No other person, except defendant's daughter, appears to have seen the accident. Men who, as testimony discloses, came promptly, testify to physical facts indicative of the place of initial impact, namely, at or near the southwest corner of Earle Avenue and Center Street. The jury viewed the locus.

The sufficiency of the evidence to maintain a given fact, such, for example, as plaintiff's due care, is primarily for the trial court, but the triers must find facts, not from speculation or conjecture, but from evidence. If the evidence, on a point essential to sustain the verdict, is clearly against the verdict, a new trial should be granted. *Chesley* v. *King*, 74 Me., 164. That the jury had a view presents no insuperable obstacle to granting a new trial, on the ground that the verdict does not accord with the evidence. *Davis* v. *Jenney*, 1 Met., 221; *Tully* v. *Fitchburg Railroad Company*, 134 Mass., 499.

The majority of the members of the court are of opinion that

there was small choice in the negligence of the parties; further, that negligence on plaintiff's part justifies declaring, as a matter of law, that he did not exercise, for his own safety, the measure of care a prudent man would in the same circumstances; indeed, that the evidence tends, not to affirmative proof of the exercise of ordinary caution, but to negative it.

In driving, plaintiff had the right of way, but abstract rights sometimes have to yield to concrete realities. "The supreme rule of the road is the rule of mutual forbearance." *Fitts* v. *Marquis*, 127 Me., 75, 140 A., 909.

The driver of a motor vehicle, when proceeding across an intersection, is not relieved of the duty of maintaining a lookout. The evidence, as the majority read and understand it, leaves little or no room for doubt that, had plaintiff, after seeing the approaching automobile, (then quite as near one side of the area as his motorcycle was to the other,) kept a proper lookout, and taken the movements of the car into consideration, opportunity for him, as the car turned into the avenue, to have avoided accident, would have been ample.

His impulsive act in attempting to drive his motorcycle in front of the automobile, was without relation to the proper theory and practice of the control of motor vehicles in like situations.

Where, as in the present case, the testimony shows contributory negligence, the verdict cannot stand. *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872.

Motion sustained.
Verdict set aside.
New trial granted.

EVERETT C. STETSON *vs.* FRED PARKS.

Androscoggin. Opinion, July 19, 1935.

BANKRUPTCY. STATUTE OF FRAUDS.

In bankruptcy proceedings agreements induced by or based upon a secret arrangement with one or more favored creditors, are invalid.

The Statute of Frauds (R. S., Chap. 123, Sec. 1, Cl. 6), provides that no action shall be maintained upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, unless the promise or contract on which the action is brought, or some memorandum or note is in writing and signed by the party to be charged therewith.

The provision of the statute relates not to the validity of the contract, but to the remedy for a breach of it, and is constitutional.

The statute is not restricted to revival, by a promise made after bankruptcy discharge, of a debt thereby barred, but is comprehensive also of a promise made during the pendency of proceedings, to waive the expected discharge.

In the case at bar, the defendant signed nothing. The defense of the statute was well taken.

On report on an agreed statement of facts. The issue involved the validity of an oral promise to pay a debt which might be barred by bankruptcy proceedings. The defendant set up the Statute of Frauds. Judgment for the defendant. The case fully appears in the opinion.

Franklin Fisher, for plaintiff.

Frank T. Powers, for defendant.

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

DUNN, J. This case is presented on a report of agreed facts.

Plaintiff had made proof, and obtained the allowance of his claim against the estate of defendant, who had been adjudged a bankrupt under the Federal act of July 1, 1898. In the interim be-

tween adjudication and discharge, plaintiff withdrew his claim, confiding in the promise of defendant that, on his discharge, he would pay it in full.

Nothing imports a fraudulent agreement at the expense of other creditors. The equitable principle, that agreements induced by or based upon a secret arrangement with one or more favored creditors, are invalid, finds, on this record, no place for application. There is no suggestion of extortion, or attempted extortion, or of want of good faith.

The question first to be decided is whether the debt was revived by the new promise which was made subsequent to the filing of the petition and before the discharge.

The case of *Zavelo* v. *Reeves*, 227 U. S., 625, 57 Law ed., 676, contains an admirable discussion of this subject. The facts, in substance, were that the plaintiff in error, being in bankruptcy, submitted an offer of compromise, which was accepted by his creditors; but, plaintiff in error was lacking funds requisite to purpose. He induced the defendants in error, listed creditors, whose debt would be affected, to lend him five hundred dollars, orally promising them that when the composition should be confirmed he would pay them their demand, less the amount of their share of the composition dividend. In a suit on the special promise, it was held good by parol.

The opinion says:

> "It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be

actionable because of the discharge, as he is to enter into any new engagement."

In the case at bar, the defendant set up the Statute of Frauds. R. S., Chap. 123, Sec. 1, Cl. 6. One feature is that no action shall be maintained "upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, . . ." unless the promise or contract on which action is brought, or some memorandum or note, "is in writing and signed by the party to be charged therewith, . . ."

The provision of the statute relates not to the validity of the contract, but to the remedy for a breach of it, and is constitutional. *Kingley* v. *Cousins*, 47 Me., 91.

This defendant signed nothing.

The statute is not restricted to revival, by a promise made after bankruptcy discharge, of a debt thereby barred, but is comprehensive also of a promise made during the pendency of proceedings, to waive the expected discharge.

Originally enacted in 1848, the provision read as follows:

> "No action shall be brought and maintained upon any special contract or promise to pay a debt, from which the debtor has been discharged by proceedings under the bankrupt laws of the United States, . . . unless such contract or promise be made or contained in some writing, signed by the party chargeable thereby." Public Laws, 1848, chap. 52.

The act was, in essence, reenacted in 1857. R. S., (1857) Chap. 111, Sec. 1.

In the reenactment of 1871, these words are used:

> "Upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, . . ." R. S., (1871) Chap. 111, Sec. 1, Cl. 6.

The phrasing continues the same in all later revisions of the statute, the latest being that of 1930.

Plainly, the first statute, denying remedy in those instances where its provisions were not satisfied, had relation only to promises made after a discharge in bankruptcy had been duly granted.

In the revised statute of 1871, there is, as has before been noticed, significant change in phraseology. This, obviously, was for more inclusive protection against suits based on the theory that an express promise had revived the claim. The new promise, whether made after the discharge, or between the adjudication and the discharge, is within the Statute of Frauds.

Such is plain intention. Interpretation otherwise would force construction beyond perceptible meaning of language.

In *Corliss* v. *Shepherd*, 28 Me., 550, and *Otis* v. *Gazlin*, 31 Me., 564, the promise, recognized in both instances as open to proof, was made between the adjudication and the discharge, under the United States bankruptcy act of 1841. These actions having been commenced before the enactment, in 1848, by way of amendment, to the local Statute of Frauds, of the requirement that the promise be in writing, that statute was inapplicable. *Spooner* v. *Russell*, 30 Me., 454; *Otis* v. *Gazlin*, supra.

The defense of the statute is well taken.

The case will be remanded for the entry of

Judgment for defendant.

HARRIS FEURMAN *vs.* THOMAS J. ROURKE.

Cumberland. Opinion, July 19, 1935.

NEW TRIAL. JURY FINDINGS.

On motion to grant a new trial, the reviewing court will not reverse upon a question of fact if there is sufficient evidence to support the verdict, especially if it is against the party having the burden of proof.

In the case at bar, the court holds that there was sufficient evidence to warrant the jury finding.

On general motion for new trial by plaintiff. An action of tort for negligence brought by plaintiff, a pedestrian, to recover damages sustained by him when hit by defendant, a driver of a truck.

Trial was had at the December Term, 1934, of the Superior Court for the County of Cumberland. The jury rendered a verdict for the defendant. A general motion for new trial was thereupon filed by the plaintiff. Motion overruled. The case sufficiently appears in the opinion.

Bernstein & Bernstein, for plaintiff.

William B. Mahoney, for defendant.

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

DUNN, J. While crossing Congress Street, in Portland, on foot, at about 9.30 P.M., on March 17, 1934, at a point where there was no marked pedestrian lane or crosswalk, plaintiff suffered personal injury occasioned by a motor vehicle, a Chevrolet truck, which defendant was driving, striking him.

Plaintiff sued for damages. On issue joined, the jury found for the defendant. Motion for a new trial is on the ground that the verdict is contrary to the evidence, or the weight of the evidence.

Two things are essential to the success of an action such as was brought in the present case, namely; actionable negligence on the part of the defendant, and freedom on the part of the plaintiff from contributory negligence.

Not only must the declaration in the writ allege these essentials, but a reasonable preponderance of all the evidence must support them; failure so to sustain either bars recovery.

The jury determined, in effect, without regard to mere numerical array of witnesses, that, as to one, or both, of the problems of fact which the case involved, the weight, credit and value of the aggregate evidence on plaintiff's side did not sufficiently sustain the burden of proof.

Certainly, the verdict is not clearly wrong; it stands.

Motion overruled.

STATE OF MAINE *vs.* OLD TAVERN FARM, INC.

Cumberland. Opinion, July 22, 1935.

CONSTITUTIONAL LAW. FOURTEENTH AMENDMENT. POLICE POWER.

P. L. 1933, CHAP. 210, SEC. 2, CHAP. 283.

Police power in its broadest acceptation, means the general power of a government to preserve and promote the public health, safety, morals, comfort or welfare, even at the expense of private rights. Speaking generally, police power is a power not granted in the Federal Constitution, but reserved to the States respectively. Such power should, however, observe its bounds; it cannot go beyond the State and Federal constitutions.

The Legislature cannot, under pretense of exercising the police power, enact a statute which does not concern the welfare of society. When, from perusal, there is no fair, just and reasonable connection between a statute and the common good, and it is manifest that such was not the object of the statute, it will not be sustained. What is called "class legislation" would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment.

The Fourteenth Amendment does not prevent reasonable classification as long as all within a class are treated alike. The liberty guaranteed is not freedom from all restraints, but from restrictions which are without reasonable relation to a proper purpose, and are unjustly arbitrary and discriminatory. What is reasonable depends upon a variety of considerations.

Subject to the limitation that the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the Constitution.

The Fourteenth Amendment was not designed to interfere with due exercise of the police power by the State.

The State, having authority to control foods, in intrastate aspects of the public health, may make rules on the subject. Statutes forbidding the sale of unwholesome articles of food and drink exist in many of the States. Our own statutes are expressly regulatory of the production and sale of milk.

The rights of every person must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and

every partial or private law which directly proposes to destroy or modify personal rights, or does the same thing by restricting the privileges of certain classes, and not of others, where there is no public necessity therefor, is unconstitutional and void.

In the case at bar, without attempting to define the limits of the power of the Legislature of Maine to control the right to make contracts, the conclusion reached by the court is, that the Legislature had no right to require, as a condition precedent to obtaining a license, that a gathering station proprietor give bond, or deposit money or securities, to secure the payment of them from whom he might buy milk and cream. The legislation is not within the scope of the police power; it trenches upon the State and Federal constitutions.

On report on an agreed statement of facts. Complaint against the defendant under P. L. 1933, Chap. 210, was made in the Municipal Court of the City of Portland. Defendant was found guilty and fined $10.00 and costs. Appeal was filed and case brought forward on an agreed statement of facts. The issue involved the constitutionality of the statute requiring buyers of milk or cream from producers within the state, as a prerequisite to obtaining a license to do business, unless excused by showing of financial responsibility, to file bonds with the state, conditioned in part that the licensees shall pay the producers. Case dismissed. The case fully appears in the opinion.

Walter M. Tapley, Jr., County Attorney for State.

Robinson & Richardson, for defendant.

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

THAXTER, HUDSON, JJ. Dissenting.

DUNN, J. A statute of this State, enacted in 1933, entitled: "An Act Requiring the Licensing of Operators of Milk Gathering Stations," declares that persons, firms, associations or corporations shall not engage or continue in the business of buying milk or cream within the State from producers, for sale, resale, manufacture or shipment to cities for consumption, without annually procuring licenses from the Commissioner of Agriculture, and posting bonds to that official in penalty not less than five hundred, nor more than one hundred thousand dollars, conditioned, among other things,

that the licensees will meet obligations arising from the purchase of such dairy products. Deposit with the Commissioner of money, or securities legalized for savings banks, would obviate giving bond. P. L. 1933, Chap. 210, Sec. 2, as amended by Chap. 283 (Special Session). The act exempts any "person" engaged in dairying who purchases not exceeding two hundred and fifty quarts daily "as a supplement to his own supply." The Commissioner may grant or decline a license, or revoke one already granted after due notice and a hearing, action being subject to review on certiorari.

The license fee is five dollars; violation of any provision of the act is punishable, upon conviction, as a misdemeanor.

The respondent, a domestic corporation, dealt, within State limits, in milk and cream, as a business, without having secured a license, and without having filed any surety bond. The agreed facts are not more specific in recital. If maintainable, the case shall be remanded for trial; otherwise, direction of dismissal.

The primary and important controversy is the constitutionality of the statute.

Counsel for respondent, in opposition to every presumption of validity, contends that, in exacting milk station operators, and no others, as a prerequisite to license, to file bonds or tangibly demonstrate pecuniary ability to pay producers, the enactment is unreasonably discriminatory, and constitutes an unwarranted interference with private rights.

The attorney for the State rejoins that the act is, as a police regulation, expedient and fairly suited to purpose in bona fide exercise of the discretion of the legislative department of government.

Statutes of this kind, to be sustained, must find a reason for their existence, in that inherent, original sovereignty called the police power of the state. *Boston & Maine R. R. Co.* v. *County Commissioners*, 79 Me., 386, 10 A., 113. Police power, in its broadest acceptation, means the general power of a government to preserve and promote the public health, safety, morals, comfort or welfare, even at the expense of private rights. Cooley, *Const. Lim.*, (6th ed.) p. 704. Speaking generally, police power is a power not granted in the Federal Constitution, but "reserved to the States respectively." *Const. of U. S.*, Art. X; *Keller* v. *United States*, 213

U. S., 138, 53 Law ed., 737; *House* v. *Mayes*, 219 U. S., 270, 281, 282, 55 Law ed., 213, 218. Such power should, however, observe its bounds; it cannot go beyond the State and Federal constitutions. *New Orleans Gas, etc., Company* v. *Louisiana Light, etc., Company*, 115 U. S., 650, 661, 29 Law ed., 516.

Health being the necessity of all personal enjoyment, and hence a special ward of the police power of the State, it is not only the right, but the duty, of the Legislature to pass such laws as may be reasonably necessary for the preservation of the public health. *Com.* v. *Waite*, 11 Allen, 264; *Johnson* v. *Simonton*, 43 Cal., 224.

Still, the Legislature cannot, under pretense of exercising the police power, enact a statute which does not concern the welfare of society. To illustrate, it is not enough that sanitation be merely incidental; it must have been intended to be effected. When, from perusal, there is no fair, just and reasonable connection between a statute and the common good, and it is manifest that such was not the object of the statute, it will not be sustained. *Austin* v. *Murray*, 16 Pick., 121, 126.

"What is called 'class legislation' would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment." *Civil Rights Cases*, 109 U. S., 3, 24, 27 Law ed., 836, 843. It is true that this remark was made in regard to a different question than this case involves, but it applies here.

The Constitution of the State of Maine affirmatively secures to all persons an equality of right to pursue any lawful occupation under equal regulation and protection by law. Its words are these:

"All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." *Const. of Maine*, Art. 1, Sec. 1.

Pertinent provisions of the Fourteenth Amendment to the Constitution of the United States are:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States is, within its province, through all times and events, as a governmental chart, supreme

throughout the Union. It invalidates all conflicting laws. *National Prohibition Cases*, 253 U. S., 350, 64 Law ed., 946. One of the greatest steps the Federal Constitution ever took was when Chief Justice Marshall gave distinct notice that it was the ultimate law against which nothing could prevail. *Marbury* v. *Madison*, 1 Cranch, 137, 2 Law ed., 60.

The civil "liberty" safeguarded is not merely freedom of the person from unjust or unlawful imprisonment. Liberty is freedom from all restraints except such as are justly imposed by law to secure the common welfare. The principle upon which liberty is based is equality under the law of the land. *Allgeyer* v. *Louisiana*, 165 U. S., 578, 589, 41 Law ed., 832; *Meyer* v. *Nebraska*, 262 U. S., 390, 67 Law ed., 1042.

The Fourteenth Amendment does not prevent reasonable classification as long as all within a class are treated alike. The liberty guaranteed is not freedom from all restraints, but from restrictions which are without reasonable relation to a proper purpose, and are unjustly arbitrary and discriminatory. *Miller* v. *Wilson*, 236 U. S., 373, 59 Law ed., 628. What is reasonable depends upon a variety of considerations. It is an elastic term of uncertain value in a definition. *Sussex Land, etc., Co.* v. *Midwest Refining Co.*, 294 Fed., 597.

The guaranties and assurances of the Constitution of Maine, and of the Constitution of the United States, are positive, direct, unchanged and unrelaxed by circumstances.

"Subject, however, to the limitation that the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the Constitution." *People* v. *Havnor*, 149 N. Y., 195.

The Fourteenth Amendment was not designed to interfere with due exercise of the police power by the State. *Barbier* v. *Connolly*, 113 U. S., 27, 28 Law. ed., 923.

In the case at bar, the defense is rested mainly on *State* v. *Latham*, 115 Me., 176, 98 A., 578.

That was a criminal proceeding against an individual. A statute (1915 Laws, Chap. 32,) undertook to lay down that certain purchasers of milk or cream should (except where a written contract

stipulated differently,) pay producers semi-monthly; and to prescribe a fine for non-observance.

The statute was of no legal force. It was held to afford milk producers, and no other creditors, the use of the criminal law in collecting mere civil obligations, and to contravene the Fourteenth Amendment.

The instant act is, in many respects, a literal copy of one in New York, there adjudged valid, first on the ground that, being severable, it was applicable, in view of power antecedently reserved to the Legislature of that State to amend, alter or repeal corporate charters, to corporations of local creation. *People* v. *Beakes Dairy Company*, 222 N. Y., 416, 119 N. E., 115. More recently, the law was held to apply to natural persons. *People* v. *Perretta*, 253 N. Y., 305, 171 N. E., 72.

There had been reserved to the Maine Legislature power to amend, alter or repeal corporate franchises, (R. S., Chap. 56, Sec. 2,) but its present enactment seems incapable, on first reading, of being separated or divided into component parts, so as to be incumbent by way of franchise alteration or amendment, on corporations, regardless of the inclusion of persons, firms and associations.

The language of Section 2, (Chap. 210, 1933 Laws,) so far as now material, is as follows:

"No person, firm, association or corporation, shall buy milk or cream within the state from producers for the purpose of sale or resale, or for manufacture, or for shipping the same into any city for consumption . . ." (unless annually licensed). "A license shall not be issued . . . , unless the applicant for such license shall file with the application a good and sufficient surety bond. . . . Such applicant may in lieu of such bond deposit . . . money or securities . . . , in an amount equal to the sum secured by the bond. . . ."

Use of the term "person" alone, would likely have been sufficient.

A corporation is a "person" within the meaning of constitutional clauses, and may invoke the benefit of civil rights and their guaranties. *Hammond Beef, etc., Co.* v. *Best*, 91 Me., 431, 40 A., 338.

In determining whether a statute "amends" or "alters" a corporate franchise, it is essential to ascertain the intent and object of the statute. On more careful examination, intent and object of the statute in judgment may be said to be, not the alteration or amend-

ment of the franchise of the respondent corporation, or franchises of that class of corporations to which it belongs, but subjugation to legislation which arbitrarily denies to them, and certain individuals, as well, what is accorded to others, in like case.

There is no food in more general use than milk; it is not only an important article of diet, but peculiarly liable to contamination and adulteration; if not properly supervised and cared for, it offers opportunity for the spread of disease.

The State, having authority to control foods, in intrastate aspects of the public health, may make rules on the subject. Statutes forbidding the sale of unwholesome articles of food and drink exist in many of the States. Our own statutes are expressly regulatory of the production and sale of milk. R. S., Chap. 42. Such legislation is within the police power. *State* v. *Smyth*, 14 R. I., 100.

The uniformity with which regulations of the kind have been upheld is shown in divers decisions, some being: *People* v. *Van de Carr*, 199 U. S., 552, 50 Law ed., 305; *Burmingham* v. *Goldstein*, 151 Ala., 473, 44 So., 113; *Koy* v. *Chicago*, 263 Ill., 222, 104 N. E., 1104; *State* v. *Schlenker*, 112 Iowa, 642, 84 N. W., 698; *Sanders* v. *Com.*, 117 Ky., 1, 77 S. W., 358; *State* v. *Broadbelt*, 89 Md., 565, 43 A., 771; *Com.* v. *Waite*, supra; *Com.* v. *Wheeler*, 205 Mass., 384, 91 N. E., 415; *Black* v. *Powell*, 248 Mich., 150, 226 N. W., 910; *State* v. *Campbell*, 64 N. H., 402, 13 A., 585; *State* v. *Smyth*, supra; *Norfolk* v. *Flynn*, 101 Va., 473, 44 S. E., 717; *Adams* v. *Milwaukee*, 144 Wis., 371, 129 N. W., 518, affirmed 228 U. S., 572, 57 Law ed., 971.

Munn v. *Illinois*, 94 U. S., 113, 24 Law ed., 77, and *German Alliance Insurance Company* v. *Lewis*, 233 U. S., 389, 58 Law ed., 1011, sustain the right of a State to control private business when clothed with a public use. These two cases, however, go only to fixing prices.

"All businesses are subject to some measure of public regulation, . . . that the business of . . . the dairyman may be subjected to appropriate regulation in the interest of public health, cannot be doubted." *New State Ice Company* v. *Liebmann*, 285 U. S., 262, 76 Law ed., 747.

Nebbia v. *People*, 291 U. S., 502, 78 Law ed., 940, holds that, as to prices of milk produced within the State, the industry may be

regulated, within reason, if the public interest demands.

Not price fixing, but the requirement of bond to pay the price, is now the test.

The proprietary plan of dealing in and with dairy products is much like any other business. The proprietor buys, is liable for purchases, and assumes risks and profits. There are, as is true of many concerns, some which result in failure. Injudicious locations, excessive capitalizations, have contributed, now and again, to brief careers. Mismanagement, fires, rivalry, add to the causes. Businesses come and go, and losses are inevitable. A business is without constitutional protection against the hazards of competition. *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S., —, 79 Law ed, —.

Price security, counsel for the State contends, is vital to sanitary security. Producers, there is stress, needs must have assurance of pay, that they may be in situation to maintain sanitary conditions requisite to the purity of milk.

The rights of every person must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or modify personal rights, or does the same thing by restricting the privileges of certain classes, and not of others, where there is no public necessity therefor, is unconstitutional and void. *State* v. *Goodwill*, 33 W. Va., 179, 25 A. S. R., 863.

What reasonable ground of discrimination, as pertains to public health or hygiene, is there between milk producers selling to gathering stations (who may be described as buying at wholesale,) and producers of perishable fruits and vegetables selling to wholesalers, and payment for what these producers sell? Such foods are liable to contamination, and are capable of transmitting infection. Why is the statute selective in its application? What, as a practical matter of cold fact, with respect to security for pay, is the real difference between the vendor supplying gathering stations, and any other vendor of milk? Why not equal rights among milk vendors? Why may milk producers sell to whom they will, except to gathering stations, without buyers having to put up bonds? Shall it not be lawful for the producer as seller, and the gathering

station as buyer, to sell and buy milk or cream, as other sellers and buyers are at liberty to do? Why, only, of purchasers, are those operating stations liable to punishment for not filing bonds or depositing money or securities?

The Legislature, to be sure, is not to be barred from classifying according to general considerations and prevailing conditions; it is not bound to extend regulation as far as it might be made to reach; but why the distinction as to operators of milk gathering stations? What evil was specially experienced in the general nature of that particular branch of business? What differences were recognized to exist? The answer is not evident in the statute.

Looking through form to substance, *State* v. *Latham,* cited before, decided that the exaction of semi-monthly payments for milk and cream, but not for any other product bought of a producer, lacked valid reason for differentiation, determined without method, was not reasonable as to classes and conditions, and infringed fundamental rights which organic laws protect.

The legislation was denominated class legislation, transgressing permissible discretion, in violation of the Fourteenth Amendment. The equality clause was selected for special comment. The opinion is based on the doctrine of liberty of personal contract. *State* v. *Latham,* supra.

The Latham Case is of controlling analogy.

Without attempting to define the limits of the power of the Legislature of Maine to control the right to make contracts, conclusion reached is that it had no right to require, as a condition precedent to obtaining a license, that a gathering station proprietor give bond, or deposit money or securities, to secure the payment of them from whom he might buy milk and cream. The legislation is not within the scope of the police power; it trenches upon the State and Federal constitutions. *State* v. *Latham,* supra; *Const. of Maine,* supra; *Const. of U. S.* (Fourteenth Amendment), supra.

The complaint should be dismissed.

So ordered.

DISSENTING OPINION.

HUDSON, J. The statute in question makes as a condition precedent to the issue of a license to a milk gatherer that he deposit money or securities or file a good and sufficient surety bond conditioned for faithful compliance with its provisions and particularly "for the payment of all amounts due to persons who have sold milk or cream to such licensee, during the period that the license is in force." It is claimed that this law is unconstitutional because of the optional deposit or filing of the bond. As I read the opinion, it holds as an abstract principle of law that the incorporation of this condition renders the law unconstitutional.

It states:

> "Without attempting to define the limits of the power of the legislature of Maine to control the right to make contracts, conclusion reached is that it had no right to require, as a condition precedent to obtaining a license, that a gathering station proprietor give bond, or deposit money or securities, to secure the payment of them from whom he might buy milk and cream. The legislation is not within the scope of the police power; it trenches upon the State and Federal Constitutions."

If unconstitutional, it is because it is not within the proper exercise of the police power.

> "The police power has been defined to be devoted to the protection of the lives, health and property of citizens and the maintenance of good order. . . . *Patterson* v. *Kentucky*, 97 U. S., 501; *Barbier* v. *Connolly*, 113 U. S., 27." *Bierly Police Power*, page 9.

> "With the Legislature, the maxim of the law, 'salus Populi Suprema lex' should not be disregarded. It is the great principle on which the statutes for the security of the people is based. It is the foundation of criminal law, in all governments of civilized countries, and other laws conducive to safety and consequent happiness of the people. This power has always been exercised by government, and its existence can not be rea-

sonably denied. How far the provisions of the legislature can extend, is always submitted to its discretion, provided its Acts do not go beyond the great principle of securing the public safety—and its duty, to provide for this public safety, within well defined limits and with discretion, is imperative." *State* v. *Noyes*, 47 Me., 189, 211, 212.

In *Boston Maine Railroad Company* v. *County Commissioners*, 79 Me., 386, our Court held a statute constitutional which placed upon railroads the burden of bearing the expense of building and maintaining so much of a town way or highway as was within the limits of the railroad where such way crossed the track at grade. Justice Emery said:

"This power of the Legislature to impose uncompensated duties and even burdens, upon individuals and corporations for the general safety, is fundamental. It is the 'police power.' Its proper exercise is the highest duty of government. . . . This duty, and consequent power, override all statute or contract exemptions. . . . All personal as well as property rights must be held subject to the police power of the State. . . . Its exercise must become wider, more varied and frequent, with the progress of society. . . . The case *State* v. *Noyes*, 47 Me., 189, decided in 1859, is now generally considered too narrow and strict an interpretation. Broader views have prevailed since then."

Later, in *State* v. *Starkey*, 112 Me., 8, 12, this:

"The police power of the State is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

In *State v. Robb*, 100 Me., 180, Justice Savage with approval quoted Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush., 83, at page 85, as follows:

"The power we allude to is rather the police power, the power vested in the Legislature by the Constitution to make,

ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

And on page 85 Justice Savage said:

"And all persons exist, and all property is held subject to that power and right. . . . All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . . The constitutional guaranties that no person shall be deprived of life, liberty or property, without due process of law, and that no State shall deny to any person within its jurisdiction the equal protection of the laws were not intended to limit the subjects upon which the police power of a state may lawfully be exerted. *Minneapolis Railway Co.* v. *Beckwith,* 129 U. S., 26; *Jones* v. *Brim,* 165 U. S., 180."

Later, in *State of Maine* v. *Latham,* 115 Me., 176, on page 177, Chief Justice Savage stated:

"That the Fourteenth Amendment was not designed to interfere with the proper exercise of the police power by the State . . . And the doctrine has been reaffirmed since in many cases, both in the Federal and in the States courts. It is settled doctrine. *State* v. *Montgomery,* 94 Me., 192; *State* v. *Mitchell,* 97 Me., 66; *State* v. *Leavitt,* 105 Me., 76."

In *Guilford Water Company,* 118 Me., 367, on page 371 Justice Dunn quoted with approval the following from *Atlantic Coast Line Railroad Company* v. *Goldsboro,* 232 U. S., 548:

"Neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; . . . and that all contract and property rights are held subject to its fair exercise."

The opinion in the instant case neither expressly nor impliedly denies that the Legislature has the right to compel a milk gatherer to obtain a license. It is assumed. Many times has our Legislature under the police power, as have legislatures in most of the states, legislated to control and regulate the milk industry.

The question, then, is whether or not the compelled performance of this condition in this statute as a prerequisite to the issue of the license extends beyond legislative right in the exercise of the police power. The Chief Justice and my associates, save one, give an affirmative answer in the form of a declaration of abstract law. To my mind, this case is not one that may yield to such abstractness.

Whether a statute is within or without the police power must depend upon the facts attending its enactment. This case comes to us on an agreed statement of facts and unfortunately the statement is so brief and so incomplete (containing hardly more than the language of the statute without preamble) that we do not have any facts even tending to show the reason for its enactment, whether to satisfy a public exigency or to serve only the milk producer.

Except for a copy of the complaint and a statement that the respondent was found guilty and fined, from which judgment he appealed, the only facts reported are these:

> "At the time the complaint was made the defendant corporation was engaged in the business of dealing in milk and cream in Portland and vicinity; had not secured a license from the Department of Agriculture of the State of Maine, and had not filed any surety bond with the Commissioner of Agriculture of the State of Maine."

Thus we have no way of determining, except as we conjecture, (and we have no right to indulge ourselves in that realm) as to what induced the Legislature to enact this law. It goes without saying that with the presence of certain facts and to accomplish certain purposes a law may be constitutionally enacted within the exercise of the police power when not under other circumstances and for other purposes. True, if this Legislature passed this law solely in the interest of the milk producer and to give him a right

over other creditors in other businesses to have a special means of collection (even to the extent of the employment of the criminal law), it would not be in the interests of the public and could not be upheld under the police power. But what right have we to say that that was the object of the Legislature in passing this law rather than to aid the milk consuming public by making it more certain that the farmer by being paid would be enabled to produce the necessary supply.

> "Where two courses are open and one interpretation upholds the law as constitutional and the other defeats it, the courts must adopt the one that preserves the law's validity." *Seward* v. *State ex rel Kratt*, 195 N. E., 241, 242 (Ohio).

The law is presumed to be constitutional. Presumably facts produced before the Legislature presented a situation (and where it does not otherwise appear we must assume that there was such a situation presented) that permitted the enactment of this law within the police power. As against the presumption of constitutionality, with no facts before us evidencing the contrary, we have no right to say that this law was not passed to satisfy a public need and for its common welfare. We must assume that the Legislature adjudged that by this law as written a needed supply of milk was the better guaranteed. The presumption is that the Legislature acted within its right and that to it there was presentation of facts justifying such a law in the interests of the public. Our judgment on the exigency should not supplant that of the Legislature and can not where they had the facts and we do not.

> "Every rational presumption is indulged in favor of the validity of an act of the General Court. Enforcement of such legislative enactment will not be refused unless its conflict with some provision of the Constitution is established beyond reasonable doubt." Chief Justice Rugg in *Commonwealth* v. *City of Boston*, 195 N. E., 802, 803.
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> "In approaching this decision it must be borne in mind that a conflict between a statute and the constitution must be plain and unmistakable to warrant the Court in declaring an act unconstitutional. Every presumption is in favor of the valid-

ity of a legislative enactment. If a reasonable doubt exists, the statute should be upheld. . . . So long as a statute does not infringe any provision of the Constitution, the Court is not concerned with its wisdom, desirability, or necessity. The framers of our government saw fit to give all legislative power to the legislature. That body is primarily the judge of the regulations required by the public need. . . . The Courts must turn a deaf ear to complaints against legislation, unless it is forbidden by the fundamental law of the land." *People* v. *Ryan*, 243 N. Y. S., 644, 647, 648.

"To justify the Court . . . in declaring the statute invalid, the conflict between the act and the constitution must be clear and certain. Every presumption favors the validity of the statute. If there is a reasonable doubt, the act should be upheld. A case must be presented in which there can be no rational doubt." *In re Hauges*, 252 N. Y. S., 81, 88.

The facts and the necessities of the public determine the valid or invalid employment of the police power.

"The validity of police regulations must depend on the circumstances of each case and the character of the regulation, whether arbitrary or reasonable." *People* v. *Ryan*, supra, on page 649.

There being no evidence to rebut the presumption of validity, we should honor it and declare that on this record this statute is not to be held unconstitutional.

"Courts ought not to pronounce any act of the legislature unconstitutional unless it is plainly so—so plain as to leave no doubt on the subject. To doubt is to affirm its constitutionality. There is no such thing as a doubtful constitutional statute. Every presumption is in the favor, and there is no stronger presumption known to law. . . . All constitutional restraint must be read in the light of the police power of the state. On proper occasions this power may rise superior to both state and federal Constitutions, for in its exercise, when occasion demands, lies the right of the state to preserve its

very existence. . . . Then, too, another general principle applicable here is that a state Legislature deals with situations from a practical standpoint. It is better qualified than the court to determine the necessity, character, and degree of regulation of an industry, which new and perplexing conditions may require; and its conclusions should not be disturbed by the courts unless they are clearly arbitrary and unreasonable." *Reynolds* v. *Milk Commission of Virginia*, 179 S. E., 507, 510.

Should we judicially notice facts, if such exist, that would tend to show there was no such exigency as would warrant this exercise of the police power? Many facts may be judicially known; but "matters of uncertainty and theory, though they concern the public health" may not be so noticed. 15 R. C. L., Sec. 58, on page 1132. Facts that we might now judicially notice may have been considered by the Legislature in connection with other facts proven to it, and yet from the consideration of all such facts the Legislature determined that there was such an exigency as warranted the exercise of the police power. Disputed facts are not properly the subject of judicial notice. The Legislature's conclusion as to the exigency should now obtain, unless palpably erroneous and the law unconstitutional beyond a reasonable doubt. We should not thwart the will of the Legislature and nullify its action, without evidence of the facts which induced its enactment of this law, if and simply because we may believe that conditions do not exist that reasonably necessitate such a statute. We should not usurp legislative power though indirectly by decision but leave with this coordinate branch of the government its full and unrestricted right as representatives of the people to pass laws, when not unconstitutional beyond a reasonable doubt. Unless clearly wrong according to law applied to facts in the record and those of which we have the right to take judicial notice, this statute should be declared constitutional.

"We must determine the question" (involving the validity of a statute under the police power) "with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in

regard to them, and also by reference to those dealings of the commercial world which are of like notoriety." *Schollenberger* v. *Pennsylvania*, 171 U. S., 1, 8.

"Whether it is or not" (wholesome to put boric acid in food) "is a matter of dispute. In such cases, in enacting legislation in the exercise of the police power of the state, the legislative declaration that it is unwholesome must be accepted by the courts, and they will not investigate the facts for the purpose of determining whether the declaration of the Legislature was warranted by the facts. . . . The same principle has been declared by this court in cases involving the right of a legislative body, state or municipal, to declare a thing a nuisance." *People* v. *Price*, 101 N. E., 196, 198, 257 Ill., 587.

"While, in its last analysis, it is a judicial question whether an act is an exercise of the police power, it is the province of the Legislature to determine when an exigency exists calling for the exercise of this power. When the legislative authority has decided an exigency exists calling for the exercise of the power, and has adopted an act to meet the exigency, the presumption is that it is a valid enactment, and courts will sustain it unless it appears, beyond any reasonable doubt, that it is in violation of some constitutional limitation . . . In determining the validity of legislation for the purpose for which the act under consideration was adopted, courts may take into consideration that members of the Legislature come from every part of the state and from the various callings and vocations of life, and may be presumed to have observed and become acquainted with existing conditions, the course of business, or manner in which it is conducted, and how the public interest is affected thereby. . . . These considerations, in a case of doubtful validity of a statute, are sufficient to turn the scales in favor of the validity of the act, . . . There is nothing in the record in this case and nothing within the legitimate domain of judicial knowledge that would justify us in holding there is no reasonable connection between the limitation and the health, welfare, and safety of the public." *People* v. *Elerding*, 40 L. R. A. Ann. (N. S.), 893, 896, 897.

The right to license the milk gatherer (and this is not denied) implies a right to refuse when lawfully it should not be granted.

> "Subject to such limitations as the legislature, within constitutional limits, may deem proper to impose, power to license . . . includes: The power of determining the extent to which it is advisable and necessary to exercise such power; . . . The power given to a municipality to license and regulate an occupation or privilege imposes no obligation on it to grant any licenses; but includes the power to refuse a license in a particular case, even where the statutory or preliminary requirements are complied with." 37 C. J., Secs. 22 and 28 on pages 180, 181 and 183; *Burgess* v. *Brockton*, 235 Mass., 95; *Rea* v. *Everett*, 217 Mass., 427.

In the latter case, on page 431, Chief Justice Rugg said:

> "If upon an impartial investigation of the applicants for permits, undertaken with a purpose to comply with the law, the respondent should be of opinion that no one of the applicants was regularly and lawfully conducting a general express business or was of such character that he could not be trusted to comply or honestly to attempt to comply with the terms of the statute, they would not be required to issue a permit."

Were it shown that the prospective licensee on account of previous fraudulent practices were one who should not receive a license, its denial would and should be upheld in the interests of the public. Likewise, if it appeared that a milk gatherer were one about to engage in so large a volume of business that it could be known with reasonable certainty that he would contract debts which he could not pay, a license to him would rightly be denied, else the State would knowingly make itself a party to the possibility if not probability of transactions whereby its people would be deprived of their property without payment. A license by the State may be construed as an act of approval of the licensee as one somewhat worthy of respect and possessed of necessary qualifications, including honesty, for carrying on his permitted business.

"The Legislature has a wide discretion in protecting the public from the dishonest and irresponsible." *People* v. *Ryan*, 243 N. Y. S., 644, 649, 650.

If the license may be refused to him altogether, why should not the Legislature have the right to do the lesser thing—issue the license qualifiedly upon the making of the deposit or the filing of the bond? Under the instant statute, the milk gatherer, if he can obtain the bond required, will be aided, for although financially unable from his own means to finance the business, he may receive the license. Thus this law makes a concession to him.

True, this is an interference with the right to conduct private business. So is the necessity of the license. Every exercise of police power no doubt affects the right of private contract. Choice must be made between the right of the individual and the right of the public at large. When the facts necessitating the legislation are so compelling in the interest of the public, the individual must yield.

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference but neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. . . . Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined

which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need. . . . And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." *Nebbia* v. *New York*, 291 U. S., pages 523, 524 and 525.

The police power is "not the offspring of constitutions. It is older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved 'to the states respectively or to the people.' Limitations expressed or necessarily implied in the Federal Constitution are the frontiers which the Police Power cannot pass. Within those frontiers its authority is recognized and respected by the constitution and given effect by all courts. We have seen that private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare. Under the police power statutes and authorized ordinances give this condition practical effect by restrictions which regulate or prohibit such uses." *York Harbor Village Corporation* v. *Libby et al.*, 126 Me., 537, 540.

"The two considerations involved in all of these statutes are the right of a man to run his private business as he pleases, on the one side, and the protection of society against irresponsible individuals or companies, on the other. The courts which hold all of the above mentioned statutes unconstitutional and value the independent right to do business without

restriction as a supreme right are in the minority. The modern tendency is to safeguard the public against being defrauded." Note on *People* v. *Perretta*, 253 N. Y., 305, 171 N. E., 72, in the *St. Louis Law Review*, Vol. 16, No. 2, page 170, February, 1931.

State v. *Latham*, 115 Me., 176, is relied upon by the defence. In that case the Court held a statute unconstitutional that provided that the buyer of milk or cream should pay the seller semi-monthly unless other provision were made by written contract between the parties. In that case the Court found as a fact (and it does not appear that the Court did not have before it a complete record of the facts) that the statute was "designed to compel purchasers of a particular product, intended for a particular use, to pay their purchase debts at particular times on pain of criminal prosecution, punishment by fine, and, of course, imprisonment for thirty days, if the fine is not paid." It does not hold that there could not be facts that would justify constitutionally such a provision, facts sufficiently showing the necessity of such legislation in the interests of the public. Chief Justice Savage, on pages 177 and 178 said:

"Whether such a statute, designed to aid in the collection of mere civil obligations by the use of the strong arm of the criminal law is within the proper exercise of the police power is at least questionable. Certainly it is not unless the regulation intended be for the promotion of the public health, safety, morals, comfort or welfare."

If the public need of such a law be urgent (as if, for instance, the welfare of a congested urban population demands the assurance of a supply of this commodity which otherwise it would not receive —and this is for the judgment of the legislature), then such legislation may be enacted under the police power, in my judgment, and the exercise of it will not offend the Fourteenth Amendment so long as it is not arbitrary or discriminatory legislation.

In *York Harbor Village Corporation* v. *Libby*, supra, on page 542, Justice Deasy said:

"The defendants also contend that they have been denied the 'equal protection of the laws' guaranteed by the Fourteenth Amendment. The statute is, they urge, discriminatory but discriminatory statutes are not, for that reason, invalid. In the enactment of many statutes, classification of persons is proper, legal and indeed necessary. . . . A classification must not be arbitrary. It must be natural and reasonable. . . . It must be based upon an actual difference in the classes bearing some substantial relation to the public purpose sought to be accomplished by the discrimination in rights and burdens. . . . If a classification, though necessarily discriminatory, stands these tests, it is not a denial of equal protection of the laws."

So tested, this provision is neither arbitrary nor discriminatory in the proper legal sense of being unnatural and unreasonable. The fact that other creditors than producers of milk, as sellers of fuel or perishable goods, are not compelled to take out licenses and perform the condition does not necessarily prove illegal discrimination, for paraphrasing Justice Deasy's language, it can be said there may well be found to be such natural differences (as hereinafter noted) bearing upon some substantial relation to the public purpose sought to be accomplished as to make it non-arbitrary and undiscriminatory. In the judgment of the Legislature, it may well be that under one set of circumstances with relation to a certain industry or trade it is perfectly natural and reasonable that a creditor selling to such an industry or trade be so protected, while under other circumstances with relation to an entirely different industry or trade it will not.

It has been well said in *Nebbia* v. *New York*, 291 U. S., 502, that,

". . . milk is an essential item of diet. It can not long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination. The production and distribution of milk is a paramount industry of

the state, and largely affects the health and prosperity of its people. . . . The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control." (See pages 516 and 517.)

The leading case upholding the constitutionality of such a bond provision I believe to be *People* v. *Perretta*, supra. In that case the bond was imperative, conditioned for the prompt payment of all amounts due producers of milk. Our statute bears very close resemblance to the New York statute. First the law was held unconstitutional (See 236 N. Y. S., 293), but on appeal the decision was reversed in 253 N. Y., 305, 171 N. E., 72. It is to be noted that in that case there was no time limit on the legislation as there was in *Nebbia* v. *N. Y.*, supra, and thus it was decided free from the argument of emergency. Justice Pound in his opinion quoted with approval from the Beakes case in 166 N. Y. S., 209, 210, as follows:

"It is vital to the public welfare that the cities of the state be supplied with pure and wholesome milk. It is of the utmost importance to the public welfare that the farmers should be induced to produce milk for use in the cities, and that the persons purchasing and shipping milk for city use shall be responsible persons, so that the seller shall receive pay for his milk. It is a fact too well known to need discussion that the farming community has suffered great damage by irresponsible persons buying on credit their milk for shipment to the large cities without paying therefor. Such transactions naturally tend to convince the farmer that it is better for him to limit his production of milk, or take it to the home factory to be manufactured there, dealing with people whom he knows, rather than to sell it for city use. It is apparently recognized as impracticable that the payments should be made to the farmer upon the delivery of each sale of milk. When a person seeks to buy milk from the farmers of the state to ship to the cities of the state for use and consumption, his transactions affect the public interest, and the welfare of the farming community means the welfare of the public, and the state may

properly protect the farmer from irresponsible dealers, who seek his milk for shipping to the cities. This law, as we have indicated, has more than one aspect. It naturally benefits the farmers, but it guarantees the city a supply of milk. . . .

"The producer of milk for the city market desires to find a ready purchaser near at hand to take his product from the source of supply to the point of consumption. He can not peddle his product from door to door, or hold it to await a rise in market prices or a cash purchaser. He must sell it to milk gatherers; deliver it fresh, and often on credit. Such are the conditions of the market peculiar to the handling of milk. The law deals with a definite class, i.e., the milk gatherers. It is not wholly for the benefit of the farmer."

In concluding his opinion, Justice Pound further said:

"When the Legislature has power to act, it may act without interference from the courts. The Legislature has, we find, acted on reasonable grounds and in a reasonable manner."

It is of interest to note that in *People* v. *Perretta*, supra, Justice Pound said this of *State* v. *Latham*, supra:

"If it gives him 'a club to aid in the collection of debts which is not given to other creditors' it gives it to him to keep open the stream of milk flowing from farm to city as well as to guard him from financial loss."

The New York Court likewise, including reference to *State* v. *Latham*, supra, stated that "the reasoning in these cases rests on the abstract doctrine of liberty of contract rather than the practical necessities of the case." The words, "these cases" refer only to two other cases besides *State* v. *Latham*, namely *State* v. *Porter*, 94 Conn., 639, and *State* v. *Levitan*, 190 Wis., 646.

The great weight of authority is to the contrary and in accord with *State* v. *Perretta*, supra. It is of interest, as well as informing, to note the comments of the leading Law School Journals on *State* v. *Perretta* and therein may be found collated many cases which either directly or by analogy uphold the constitutionality of such a bond provision.

The *Columbia Law Review*, in its issue of November, 1929, Vol. XXIX, page 1012, before the constitutionality of the New York statute was upheld on appeal, stated:

> "In any event, it is not so clearly unreasonable as to warrant overriding the judgment of the Legislature by holding it unconstitutional."

In February, 1931, the *Minnesota Law Review*, Vol. 15, No. 3, said:

> "It would seem that in view of comparative evils in other situations in which it has been held that similar regulations were justified under the police power, the decision in the instant case was correct."

In March, 1931, the *Michigan Law Review*, Vol. XXIX, page 629, stated:

> "It seems that the validity of the statute is correctly sustained if we can agree with the Court on the fact decision that the Legislature reasonably determined that the law was necessary."

Also in February, 1931, the *St. Louis Law Review*, Vol. XVI, No. 2, stated:

> "The courts which hold all of the above-mentioned statutes unconstitutional and value the independent right to do business without restriction as a supreme right are in the minority. The modern tendency is to safeguard the public against being defrauded."

No note on *State* v. *Perratta* has been written as yet in the *Harvard Law Review* but *People* v. *Nebbia*, supra, and herein later referred to and dealt with, has been commented upon in this Review, prior, however, to the final decision of said case by the United States Supreme Court. It will be recalled that in the lower court that statute was declared constitutional, which decision was affirmed by the United States Supreme Court. Referring to the decicision in the lower court, the *Harvard Law Review* of November, 1933, Vol. XLVII, No. 1 on page 130, said:

"Even if, as the dissenting Judge believed, relief of the producers was the essential object of the Act, the amelioration of a minority group may be a proper exercise of the police power."

It should be born in mind that the decision of our Court in *State* v. *Latham*, supra, was rendered nineteen years ago.

It may be said, as was said, by quotation, in *People* v. *Bratowdky*, 276 N. Y. S. on page 425.

"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract; . . . with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view . . . ; and that mere novelty is no objection to legislation. . . ."

Quite akin, if not controlling, is the law enunciated in *Nebbia* v. *New York*, 291 U. S., 502, decided March 5, 1935, in which it was held that a statute fixing the minimum prices for the sale of milk was constitutional. Much said in that opinion has pertinency here. From pages 522 and 523 the following:

"Proprietors of milk gathering stations or processing plants are subject to regulation, (Sec. 54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices. . . . In addition there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are en-

gaged in the industry. *The challenged amendment of* 1933 *carried regulation much farther than the prior enactments.*"

Thus, although the United States Supreme Court has stated that a law fixing prices goes much farther than a regulatory law providing for a bond, it held the price fixing law constitutional. A fortiori, one would believe, the same Court would hold this statute providing for the bond constitutional, did facts attend the case, showing the necessity for such legislation for the public welfare.

Justice Roberts further stated in the Nebbia case, on page 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. . . . Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. . . . If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the

> supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. . . . The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia* v. *New York*, 291 U. S., 502, 537, 538, 539.

It may be urged that the statute in the Nebbia case had a time limit of one year as the period for price fixing and so the decision rests upon the fact of emergency as justification for the exercise of the police power, but it is to be observed that Justice Roberts made no reference whatever to the fact of the time limit as a reason for the decision.

In connection with the argument of emergency and its effect on the constitutionality of the legislation, we give the language of Chief Justice Hughes in the recent cases of *Schechter Poultry Corporation et al.* v. *United States of America* and the *United States of America* v. *Schechter Poultry Corporation et als.*, decided May 27, 1935, 55 Sup. Ct. Rep., 837.

> "We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."

From this it would seem to follow that, if in the Nebbia case there was an emergency, that fact alone did not save the constitutionality of the statute and, to paraphrase Chief Justice Hughes' language, it may be said that the extraordinary condition of an emergency did not create or enlarge constitutionally the police power.

The opinion in the instant case in stating "that these two cases, however, go only to fixing prices" and later that "not price fixing; but the requirement of bond to pay the price, is now the test" gives the impression that our Court regards it necessary that there be more compelling evidence for the exercise of the police power to permit the giving of a bond than the fixing of prices. As I understant the decision in the Nebbia case, that is directly contrary to Justice Roberts' statement that price fixing goes "much farther than the prior enactments" which included a statutory enactment requiring the giving of such a bond by a milk gatherer to the milk producer.

If the decision in the Nebbia case rests upon the ground, as I understand it does, that the statute therein considered was in the interest of and for the common welfare of the public in making it possible for the producer to receive enough for his milk so that he might produce the necessary supply for the public, then why does it not follow that this statute providing for the making of a deposit or the giving of a bond to accomplish the same result is likewise constitutional as a proper exercise of the police power? So far as the milk gatherer himself is concerned, no doubt it is a less objectionable provision than that of a statute by which the state so dominates his business as to fix and regulate prices.

In conclusion, it is my judgment that the burden resting on the respondent to prove the unconstitutionality of this statute has not been sustained and that the entry should be, as stipulated in the Report,

"The Case to Stand for Trial."

THAXTER, J. I concur in this opinion.

ANNIE LAURA ROSE, ADMX. ESTATE OF JACOB W. SILLIKER

vs.

GEORGE OSBORNE, JR.

Androscoggin. Opinion, July 26, 1935.

EQUITY. TRUSTS. GIFTS INTER VIVOS. CONFLICT OF LAWS.

BANKS AND BANKING. JOINT TENANCY.

In equity proceedings facts stated in an answer under oath, when responsive to the bill, are evidence, yet they do not control the decision, if other facts and circumstances, appearing either orally or as written evidence, or as reasonable inferences from facts proven, outweigh the facts stated in the answer.

To constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given.

Delivery to the donee is not enough to constitute a valid gift inter vivos unless accompanied with an intent to surrender all present and future dominion over the property.

The burden to prove the gift is on the donee.

When one's intention is to retain the right to use so much of a bank account as he desires during his life, and that the balance upon his decease shall become the property of the donee (although there may be a delivery of the bank book to the donee), no valid gift inter vivos is made.

In a gift by voluntary trust there is in such a gift of the equitable rather than of the legal interest therein.

A voluntary trust in personal property may be created by parol.

The passing of the complete equitable title need not be proven by an express statement by the settlor that he declares himself trustee but he must at least do something equivalent to it and use expressions which have that meaning. There must be convincing proof that the fiduciary relation is completely established.

The entry on a deposit book is not conclusive evidence of an absolute gift of an equitable interest and evidence is admissible to show the intention of the donor and to control the effect of the entry.

Where the word "trustee" appears on a bank book, indicating that it is a trust fund, there is raised the presumption that an irrevocable trust was intended and is sufficient proof of it in the absence of other controlling proof.

The common law of another state or country is presumed to be the same as that of the forum.

A distinct statement in a memorandum signed by the donor and donee that either might draw on the bank account is inconsistent with the creation of a gift inter vivos.

In the enactment of Sec. 25, Chap. 144, P. L. 1923, (since repealed in part) the Legislature did not intend to enact a law that as between the depositors themselves should in and of itself determine their ownership in the account.

The act of a donor in whose name a bank book was issued, in adding the name of a donee and the words "payable to either or the survivor" did not under said Sec. 25, Chap. 144, P. L. 1923, as a matter of law, create "a joint estate in such deposit which passed to the survivor."

The essential elements of a joint tenancy are unity of time, unity of title, unity of interest, and unity of possession.

In the case at bar, the defendant failed to prove a valid gift inter vivos of the account in the Androscoggin County Savings Bank. A voluntary trust in favor of the defendant was created in the savings bank of New London, Connecticut. As to the third account in the Mariners Savings Bank of New London, Connecticut, the evidence produced no proof of a gift inter vivos to the defendant. The plaintiff was therefore entitled to receive the accounts in the Androscoggin County Savings Bank and in the Mariners Savings Bank of New London, Connecticut.

On exceptions by defendant and appeal by plaintiff. A bill in equity brought by the administratrix of the estate of one Jacob W. Silliker to recover the aggregate of several bank deposits originally made by Mr. Silliker. The issue involved the validity of gifts inter vivos and of gift by voluntary trust. Plaintiff's appeal sustained as to account in Mariners Savings Bank, and defendant's exceptions overruled. The case fully appears in the opinion.

Benjamin L. Berman,
David V. Berman, for plaintiff.
Ralph W. Crockett, for defendant.

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

HUDSON, J. On appeal by plaintiff from decision of Justice of the Superior Court in equity and on exceptions by defendant to holdings of law in his final decree.

The plaintiff seeks to recover the proceeds of three savings accounts opened by Jacob W. Silliker, now deceased, in three different banks, to wit: (1) Account No. 56623 in the Androscoggin County Savings Bank of Lewiston, Maine, amount $5,481.18; (2) Account No. 122933 in Savings Bank of New London, Connecticut, amount $5,370.72; and (3) Account No. 25798 in Mariners Savings Bank, also of New London, amount $7,301.72, aggregating $18,153.62. The Justice found for the plaintiff as to the first account but for the defendant as to the other two.

A matter of equity practice requires first consideration. An answer under oath having been called for and given, the defense contends it is evidence of the facts therein stated and must be taken as true unless outweighed by a preponderance of evidence.

Whitehouse's Equity Practice, Sec. 390, page 418, is quoted as follows:

> "When a cause goes to hearing on bill, answer and replication, it is a rule in general chancery practice, when the answer is under oath, that such parts of the answer as are responsive to the bill are evidence equal to the testimony of one credible witness and are therefore to be taken as true unless outweighed by a preponderance of evidence. . . ."

The quotation thus stops, but Mr. Whitehouse also stated:

> ". . . The preponderance of evidence required by the rule is a preponderance of any kind of legal evidence such as two credible witnesses or one witness and corroborating circumstances or even circumstances or documents alone. Any evidence, no matter what it may be, is sufficient if it outweighs the answer and in determining the weight of such evidence any fact may be taken into consideration which has a bearing upon the question. Thus an answer may so contradict itself as to deprive it of all weight."

In *Gould* v. *Williamson,* 21 Me., 273, the Court stated:

"The evidence, however, may in this, as in other cases, be by way of inference from circumstances, which are sometimes more convincing than direct testimony."

The correct rule is that while facts stated in an answer under oath, when responsive to the bill, are evidence, yet they do not control the decision, if other facts and circumstances, appearing either orally or as written evidence, or as reasonable inferences from facts proven, outweigh the facts stated in the answer.

The determination of the ownership of these bank accounts involves law many times by this Court considered and declared as to what constitutes valid gifts inter vivos and by a voluntary trust. It is claimed that there were gifts inter vivos of the accounts in the Androscoggin County Savings Bank and the Mariners Savings Bank and a voluntary trust of that in the Savings Bank of New London.

The law as to gifts inter vivos is well established in this State. *Allen, Admr.* v. *Polereczky*, 31 Me., 338; *Dole* v. *Lincoln*, 31 Me., 422; *Northrop* v. *Hale*, 73 Me., 66; *Drew* v. *Hagerty*, 81 Me., 231; *Augusta Savings Bank* v. *Fogg, Exr. et al.*, 82 Me., 538; *Norway Savings Bank* v. *Merriam, et als.*, 88 Me., 146; *Fairfield Savings Bank* v. *Small*, 90 Me., 546; *Getchell* v. *Biddeford Savings Bank*, 94 Me., 452; *Hallowell Savings Institution* v. *Titcomb, Exr. et al.*, 96 Me., 62; *Brown* v. *Crafts*, 98 Me., 40; *Staples* v. *Berry*, 110 Me., 32; *Barstow, et als.* v. *Tetlow, Aplt.*, 115 Me., 96; *Maine Savings Bank, In Equity* v. *Welch, et al.*, 121 Me., 49; *Howard, Admr.* v. *Dingley, et als.*, 122 Me., 5; *Garland, Appellant*, 126 Me., 84; *Portland National Bank* v. *Brooks, et al.*, 126 Me., 251; *Saco & Biddeford Savings Institution* v. *Johnston, Admr. et al.*, 133 Me., —. Likewise as to gifts by declaration in trust. *Northwestern Mutual Life Ins. Co.* v. *Collamore et al.*, 100 Me., 578; *Bath Savings Bank* v. *Fogg, et al.*, 101 Me., 188; *Cazallis* v. *Ingraham*, 119 Me., 240; *Springvale National Bank* v. *Ward, et als.*, 122 Me., 227.

An epitome of these decisions as to gifts inter vivos is:

"To constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given.

He can not give it and at the same time retain ownership of it. There must be a delivery to the donee or to someone for the donee and the gift must be absolute and irrevocable without any reference to its taking effect at some future period." *Norway Savings Bank* v. *Merriam, et als.*, supra, on page 149.

Delivery to the donee is not enough unless accompanied with an intent to surrender all present and future dominion over the property. The burden to prove the gift is on the donee. When one's intention is to retain the right to use so much of a bank account as he desires during his life, and that the balance upon his decease shall become the property of the donee (although there may be a delivery of the bank book to the donee), no valid gift inter vivos is made. Such is in the nature of a testamentary disposition of property and is legally inoperative because contrary to the Statute of Wills.

With relation to a voluntary trust, there is in such, a gift of the equitable rather than of the legal interest therein. While delivery is a sine qua non in a gift inter vivos, yet not so in a voluntary trust where the property already is in the possession of the cestui que trust.

"The only important difference between a gift and a voluntary trust is, that in the one case the whole title, legal as well as equitable, the thing itself, passes to the donee, while in the other, the actual, beneficial or equitable title passes to the cestui que trust, while the legal title is transferred to a third person or is retained by the person creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust, as is the gift of the thing itself in a gift inter vivos. 'It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift inter vivos.' *Bath Savings Institution* v. *Hathorn*, 88 Me., page 122." *Norway Savings Bank* v. *Merriam, et als.*, supra, on page 150.

A voluntary trust in personal property may be created by parol. To constitute such a trust it must be perfected and completed; executed, not executory. The passing of the complete equitable title need not be proven by an express statement by the settlor that he declares himself trustee but he must at least do something equivalent to it and use expressions which have that meaning. There must be convincing proof that the fiduciary relation is completely established. *Norway Savings Bank* v. *Merriam*, supra. The entry on a deposit book is not conclusive evidence of an absolute gift of an equitable interest and evidence is admissible to show the intention of the donor and to control the effect of the entry. The material inquiry is as to the donor's actual intention. *Springvale National Bank* v. *Ward, et als.*, 122 Me., 227. Where the word "trustee" appears on a bank book, indicating that it is a trust fund, there is raised the presumption that an irrevocable trust was intended and is sufficient proof of it in the absence of other controlling proof. *Springvale National Bank* v. *Ward, et als.*, supra, on page 229.

> "The crucial question where a voluntary trust in the settlor is sought to be established is whether the declaration on which such a trust is sought to be predicated is sufficient. There is no prescribed form for the declaration of a trust; whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient. The intention must be plainly manifest, and not derived from loose and equivocal expressions of parties, made at different times and upon different occasions; but any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing." 26 R. C. L., Sec. 19, pages 1182 and 1183.

While the law seems to be well settled in this State difficulty often arises in its application to the facts in a given case. So now, because of differing facts, we are constrained to deal separately with these accounts.

Account No. 56623 *in Androscoggin County Savings Bank*

This account, opened by the deceased in his own name on December 23, 1924, so remained until April 23, 1925, when he signed this memorandum, to wit:

> "I, Jacob W. Silliker, having opened with the Androscoggin County Savings Bank an Account No. 56623, now request said Bank to add the name of George H. Osborne, Jr., to my bank book No. 56623, making my said account as follows: a joint deposit account No. 56623 in the names of Jacob W. Silliker and George H. Osborne, Jr. payable to either or the survivor, and I hereby certify that each of the above named persons has a present bona fide legal interest in such account and that such account is not made a joint account for the purpose of transferring title to the same or any part thereof after the decease of either of such persons, nor for the purpose of evading the inheritance tax laws of the State of Maine."

At the same time, the words and figures, "Also George H. Osborne, Jr. 4/23/25" were added to this account. Mr. Silliker then was seventy-six years of age. Seven years later, on December 2, 1932, he died intestate, without issue, but with collateral heirs. These three savings accounts constituted all of his property save note indebtedness against one White of $1,500.00, which in the inventory of his estate was valued $500.00. At the time of his death, he had lived in the home of the defendant, his nephew, approximately eight years, except for short periods when he had visited elsewhere. The evidence shows he had the kindliest of feelings toward the defendant and his home was with him. No doubt he desired that the defendant sometime should receive title to all of his property, including these bank accounts, but the vital question is, when. He delivered this bank book into the possession of the defendant and it remained with him most of the time until Mr. Silliker's death. It was usually kept with other bank books in a wooden box under the bed of the defendant in the house occupied by both, where Mr. Silliker had as much access to it as the defendant. On one occasion, without his knowledge, Mr. Silliker obtained it, by hand of the defendant's daughter, as she testified, for the purpose of identifying him when crossing the boundary line on a trip to

Canada. Upon his return, he left it at the Bank, told her what he had done with it, and said that her father should get it "the minute his breath left his body." This incident sheds light on Mr. Silliker's intent and his understanding as to the then ownership of the account. If he had previously parted wholly with dominion over and right of control of this book and it was the sole property of the defendant, it would have been proper and the natural thing for him to have gotten the consent of the defendant before he took it, even if he wanted it for identification purposes only; and then, upon coming home, to have returned it to the place from which he had taken it, or at least to have delivered it back into the possession of Mr. Osborne rather than have left it at the Bank. That he did otherwise, (no doubt expecting it to remain at the Bank for the rest of his life) not only demonstrated his claimed right to take it for identification purposes but as well a believed right, retained by him, to control the book and have dominion over it during his life.

Furthermore, subsequently to the addition of the defendant's name to the account and the signing of the above memorandum, he made two withdrawals from it on his own acount, viz.: $1,001.39 on November 1, 1930, and $500.00 on June 1, 1931. It does not appear that these withdrawals were known to the defendant, or their purposes, which were to make loans to one White. Notes for these loans were made payable to Mr. Silliker alone and constituted the indebtedness above referred to as a part of the inventory of his estate. Unless this old gentleman were dishonestly inclined, would he have withdrawn money belonging to another without the consent or even knowledge of the owner? His acts militate strongly against a valid gift inter vivos.

True, there was evidence from witnesses that Mr. Silliker said from time to time that he had given this book, as well as others, to the defendant, and they testified that he said he had made "a present" of them to the defendant. The words themselves, while important (if the witnesses remember accurately the actual words spoken), do not necessarily indicate gifts inter vivos. One may be said to give, whether the "gift" is to take effect in presenti or in futuro. Likewise of "a present." But to constitute a valid gift inter vivos the "giver must part with all present and future dominion over the property given."

In an independent proceeding before the Probate Court, this defendant testified: "I kept the bank books for him." Later, when questioned by his attorney, he sought to correct himself. To us it appears that while the defendant had possession of the books most of the time, he kept them for both Mr. Silliker and himself.

Also before the Probate Court, (with reference to the leaving of this book in the Bank upon Mr. Silliker's return from Canada) the defendant testified that Mr. Silliker "said at the time of his death for me to go there and draw that money when he died."

Thus, we discern quite clearly from the evidence of the defendant himself proof of the right of Mr. Silliker to have dominion over this account as long as he lived.

If one would arrive at the truth herein by the test of probability, it would seem most improbable, that this man, advanced in years and beyond labor, would divest himself of all of his property, reduce himself from comparative affluence to poverty, without retention of any of it for his future needs. It is not impossible but extremely improbable. It is not claimed the defendant in any way obligated himself to support and maintain the old gentleman.

The defendant has failed to prove a valid gift inter vivos of this account. The decision of the Justice below that the plaintiff was entitled to this account was well founded in law and fact.

Account No. 122933, *Savings Bank of New London, Connecticut*

This account, opened by Mr. Silliker in his own name on July 14, 1919, so remained until June 21, 1929, when he and the defendant were on a trip from Maine to Connecticut, no doubt for the purpose of giving attention to this bank account as well as to one in the Mariners Savings Bank of New London.

The transactions with relation to these Connecticut bank accounts had origin and perfection in the State of Connecticut and so their effect is governed by Connecticut law. However, inasmuch as the record does not disclose that the law there as to voluntary trusts and gifts inter vivos is different from that in Maine, the presumption is that it is the same. The common law of another state or country is presumed to be the same as that of the forum. *Winslow* v. *Troy*, 97 Me., 130; *Emerson Company* v. *Proctor*, 97

Me., 360; *Peabody* v. *Maguire*, 79 Me., 572, 589; *Carpenter* v. *Grand Trunk R. R. Co.*, 72 Me., 388, 390; *McKenzie* v. *Wardwell*, 61 Me., 136, 139; *Whidden* v. *Seelye*, 40 Me., 247, 253; *Tllexan* v. *Winslow*, 43 Me., 186; *Boothby* v. *Hathaway*, 20 Me., 251, 254.

On the said 21st day of June, 1929, Mr. Silliker transferred Account No. 122933 in the Savings Bank of New London to "Jacob Silliker, Tr. George H. Osborne Jr." He designated it "a voluntary trust."

Subsequently nothing was withdrawn from said account.

> "In order for such a trust" (meaning a voluntary trust) "to be valid and enforceable, it must always appear from the written or oral declaration, from the nature of the transaction, the relation of the parties and the purposes of the gift, that the fiduciary relation is completely established." *Norway Savings Bank* v. *Merriam, et als.*, supra, on page 151.

In the absence of other satisfying evidence, we must rely in the main on the writing itself. Over his signature he called it "a voluntary trust." He designated himself alone as trustee. Although he did not declare the defendant the cestui que trust, he can not be said to have any other status. Enough appears completely to establish the fiduciary relation. Consideration of the nature of the transaction, the relation of the parties, the intended purposes of the gift in trust, and the reasons therefor all accords with and substantiates the claim that Mr. Silliker intended to and did establish a voluntary trust. No provision was made for the withdrawal of the funds by either, nor for survivorship. The settlor sufficiently indicated his intention to transfer immediately the whole of the actual, beneficial and equitable title without retention of any right in himself save the trusteeship. The Justice below erred not in finding as a matter of law and fact creation of a legal voluntary trust.

Account No. 25798 *in Mariners Savings Bank of New London*

This account, opened by Mr. Silliker in his own name on August 19, 1912, was not changed until June, 1929, when, as above stated, he and the defendant were in New London. Then this undated memorandum was signed:

"Acct. No. 25798

"Whereas, at our request, the Mariners Savings Bank of New London, will open an account with

Jacob Silliker

George H. Osborne, Jr.

and the survivor of them, it is hereby agreed by all parties that the survivor shall have the right to draw the balance, and that during the life of both, either may draw on such account.

Jacob Silliker

George H. Osborne, Jr."

It is claimed that a gift inter vivos was made of this account and the Court below so held. With this conclusion we do not agree. Both Mr. Silliker and the defendant signed the memorandum in which it was distinctly stated that either might draw on the account. That is inconsistent with the creation of a gift inter vivos. Mr. Silliker retained the dominion and control and by his signature the defendant acknowledged that right, even to the withdrawal of the whole account. It would seem that no language could be plainer to indicate that Mr. Silliker had not parted "with all present and future dominion over the property." The evidence produces no proof of a gift inter vivos of this account.

Exceptions

The first exception was to the holding that the memorandum dated April 23, 1925, and the addition of the defendant's name and the words "payable to either or the survivor," (referring to the account in the Androscoggin County Savings Bank) did not as a matter of law create "a joint estate in said deposit which passed to the survivor. . . ." At the time this memorandum was made, by statute, to wit, Chapter 144, Sec. 25, P. L. 1923 (repealed as to the written statement in 1929), it was provided that:

"No deposit account payable to two or more persons or the survivor or survivors shall hereafter be opened in any bank, savings bank or trust company, . . . unless and until the person opening such account . . . shall file with such bank or as-

sociation a written statement that each of such depositors . . . has a present bona fide legal interest therein, and that such account is not opened . . . for the purpose of transferring title to the same or any part thereof after the decease of any of the joint depositors . . . nor for the purpose of evading the inheritance tax laws of this State."

This provision appears in an Act revising and consolidating the banking laws of the State. This particular section was enacted for the benefit of the savings institutions to the end that an institution might safely pay "to either of said persons whether the other be living or not, or to the legal representative of the survivor of said persons." The amount in said institution "and the receipt or acquitance of the person to whom said payment . . . be made . . . be a valid and sufficient release and discharge . . . for any payment so made." The statute first furnished protection to the bank, and then as a help to that end made the filing of the written statement compulsory. The Legislature, in our judgment, did not intend to enact a law that as between the depositors themselves should in and of itself determine their ownership in an account.

While the decision in *Garland, Appellant*, supra, 126 Me., 84, dealt not with facts that arose while this statute was in effect, yet, on pages 97 and 98, it contains this significant statement:

"If the creation of a joint interest in bank deposits with the right of survivorship is desirable, the Legislature has power by its fiat to authorize it. The amendment to sec. 25, chap. 52, under chap. 144, P. L. 1923, however, indicates that the revisers of our banking laws were of the opinion that the adoption of such a rule would not only open wide the door to fraudulent claims, but also encourage the evasion of our tax laws and the circumvention of the Statute of Wills."

Chief Justice Wilson in his opinion in the Garland case also said:

". . . Nor can we adopt the view that by a mere agreement between the parties . . . property owned severally in common can be changed to a joint tenancy, or where the right to the full use during life is reserved, a right of survivorship can be created without contravening the Statute of Wills."

The essential elements of a joint tenancy, viz.: unity of time, unity of title, unity of interest, and unity of possession, are not here present.

> "The reservation of the right of absolute control during his lifetime, and the exercise of that right by withdrawals for his own uses, not only contravenes any gift inter vivos, but without other evidence than the bank's record, is inconsistent with an intent to create a joint tenancy. . . . Without evidence of other intent, it is more consistent with a convenient arrangement for withdrawals during the joint lives of the parties and an intention to make a testamentary disposition of the balance, which being in violation of the Statute of Wills can not be upheld. *Staples* v. *Berry*, 110 Me., 36." *Garland, Appellant*, 126 Me., 84, 94.

The second exception is to the finding of the presiding Justice, "that the adding of the name of George H. Osborne, Jr., and the words 'payable to either or the survivor' to the Androscoggin County Savings Bank deposit book, the signing and delivery of said statement dated April 23, 1925, and the delivery of said deposit book by the said Jacob W. Silliker into the possession of said George H. Osborne, Jr., thereafter, did not in and of itself constitute a gift inter vivos from said Silliker to said Osborne." In this there is no exceptionable error for reasons already stated in this opinion. Whether or not there was a valid gift inter vivos depended upon all of the material evidence in the case, oral as well as written. If that evidence had shown that Mr. Silliker had given the account in the Androscoggin County Savings Bank to the defendant absolutely and irrevocably and had parted with all present and future dominion over it, then there would have been a valid gift inter vivos; otherwise, not.

The plaintiff's appeal is sustained only as to Account No. 25798 in the Mariners Savings Bank, and the defendant's exceptions are overruled.

Decree in accordance with this opinion.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

EVERETT C. STETSON *vs.* FRED PARKS ET UXOR.

Androscoggin County. Decided July 16, 1934. The present bill can not be maintained; if for no other reason, for want of equity. The plaintiff, who alleged himself a creditor at large, and, in the compass of a single suit, sought to reach and apply property in payment of his due, conceded on oral argument, and states in his brief, that the transfer of title or interest, which he would challenge, was not a fraud when made, and did not become fraudulent by retroaction.

A creditor may not of right seek the aid of equity to establish his debt. Assuming, for the time being, a chose in action, nothing tends to indicate occasion for favor. The remedy at law, for determining and enforcing the rights of the parties, seems plain, adequate, and complete.

The appeal is dismissed. The decree from which the appeal was made, is, so far as relates to the defendant, Linnie B. Parks, affirmed; additional costs are awarded her. As to Fred Parks, such decree is reversed. This remits the case to permit the court below to exercise jurisdiction, conferred by statute, to order that the pleadings in equity be stricken out, and to require pleadings at law. R. S., Chap. 96, Sec. 16. So ordered. *Franklin Fisher*, for plaintiff. *Fred H. Lancaster*, for defendants.

SAMUEL OSHER *vs.* LEON FRANGEDAKIS.

York County. Decided August 13, 1934. The facts bearing upon this case were briefly these: A leasehold estate, thirteen years of the term of which were unexpired, was assigned, on June 20, 1931, for the three years next to ensue. A later stipulation, that the discharge, before the expiration of that time, of the promissory note, to secure which the assignment had been given, would operate to cancel the latter, is not now of importance. The assignor (primary lessee) continued to live in rooms over a store building on the premises. He sublet one of the stores to the defendant, for one year from May 27, 1932, in consideration of a return of rent of eight hundred and fifty dollars, in four instalments. For the recovery of the last successive portion, when it became due and payable, the assignee of the three-year term brought against the subtenant an action of assumpsit. The declaration alleged, in effect, that though in creating the defendant's estate, an agent had subscribed the sublease in his own name, and under his own seal, plaintiff was principal, and sole granting party in interest. Defendant pleaded the general issue. There was joinder in issue. In the course of the trial, at which plaintiff gained the verdict, defendant noted four exceptions.

The exceptions do not raise any question of a distinction between sealed and unsealed instruments, or if the principal can sue on a contract under seal to which he is not a party, or if action thereon should be in the name of the agent. Exceptions go only, in their order, to the admission into the evidence of: (a) a carbon copy of a writing, testified, on proof of the loss of the original, true and correct, except for the absence of signature, an omission which could have been found to have been cured by testimony; (b) a written agreement, entered into between assignor and assignee, subsequent to the date of the assignment, defining that, should the assignor fail to perform specified duties or obligations, any nonperformance would accelerate the time for the payment of the note, and make the assignment "permanent"; (c) of the record of a judgment against the demised property, as for lien, and the transfer thereof to the plaintiff; (d) of the assignment itself. Objection to the latter was that of a mere personal right, not recover-

able by a suit at law unless on filing the document, or a copy, with the writ. R. S., Chap. 96, Sec. 154.

The case presents ordinary questions of law, respecting which decision travels with confidence and ease upon a highway of familiar precedent.

On the theory of the trial, the evidence offered and admitted either had to do with the issues, or was not vitally harmful to the exceptor. Exceptions overruled. *Wesley Mewer*, for plaintiff. *Nicholas Harithas*, for defendant.

ARTHUR C. WENTWORTH *vs.* RALPH M. WHITNEY.

Cumberland County. Decided September 20, 1934. Plaintiff claims that defendant, a dentist, while extracting a tooth, negligently allowed the crown of the tooth to pass into the right bronchial tube, causing pain and suffering, and necessitating the services of a specialist to remove the same from his lung.

The case was submitted to two referees, with right of exceptions reserved.

To the acceptance of a finding of the referees that damages should be paid, the defendant excepted.

The exceptions present the contention that findings of fact on the part of the referees are not to be sustained.

In our practice the findings of referees are upheld, on questions of fact, when supported by any credible evidence. *Staples* v. *Littlefield*, 132 Me., 91; *Throumoulos* v. *Bank of Biddeford*, 132 Me., 232.

We find in the record evidence to justify the report. Exceptions overruled. *Max L. Pinansky*, for plaintiff. *Fred H. Lancaster*, for defendant.

FRANK CUMMINGS *vs.* PEARL MASON.

Oxford County. Decided February 11, 1935. None but issues of fact presented by the record in this case. The evidence is con-

flicting and that which apparently impressed the jury does not particularly appeal to us. But we can not say that the position of the defense is inherently improbable or necessarily inconsistent with truth. Were the case here on report the result might be different. Coming to use on general motion the mandate must be: Motion overruled. *Albert Beliveau*, for plaintiff. *George A. Hutchins, Peter M. MacDonald*, for defendant.

GENIEVA NORMA WAKLEY, PRO AMI

vs.

ANDROSCOGGIN AND KENNEBEC RAILWAY COMPANY

and

DONOGHUE'S EXPRESS COMPANY.

CHARLES NORMAN WAKLEY, PRO AMI *vs.* SAME.

WILLIAM SCHOFIELD ROGERS, PRO AMI *vs.* SAME.

CHARLES J. WAKLEY *vs.* SAME.

CHARLES J. WAKLEY, ADMINISTRATOR *vs.* SAME.

HARRISON JACK WAKLEY, PRO AMI *vs.* SAME.

ARLENE ROGERS *vs.* SAME.

Sagadahoc County. Decided March 4, 1935. Seven suits, tried together, with verdicts for each plaintiff, come up on defendant's motions for new trials.

They arose from personal injuries inflicted on five children of primary school age, when a motor truck owned by Donoghue's Express Company crashed into and through a small waiting room owned and operated by the defendant electric railway company.

The waiting room stood at the left of the tracks of defendant company, and but very few feet to the left of the highway, as an electric train and the motor truck approached a grade crossing.

Before the submission of evidence was completed, actions against the express company were discontinued, and the trial proceeded

against the railway company for damages consequent upon its negligence, whether alone or jointly with the express company.

On sharply contested issues the jury found the railway company liable. The issues were in the main on questions of fact. In the evidence we find much to prove that the motorman of the electric train approached the highway and crossed it without the giving of warning and without the degree of control of his train that would be required of him, if he could see, as he was bound to see, a motor truck speeding up the highway toward inevitable collision; that the motor car of the electric train and the truck came to collision near the left margin of the highway; that either locked together or in mere contact, train and truck rushed past the waiting room, the truck demolishing the building in passing, and the injuries were inflicted while the moving vehicles swept by and ran several rods beyond the site of the building.

On the whole evidence the negligence of the express company is established beyond question, and this court is to say whether the evidence as to the conduct of the agents of the railway company should justify a jury in finding it negligent.

If the jury believed the evidence for the plaintiffs, there is enough therein to support the verdicts, and painstaking study of the record fails to reveal motive other than the logical process of well ordered minds in arriving at the result reached. In view of what this court has held in the recent opinion in *Bedell* v. *Androscoggin & Kennebec Railway Company* nothing further need be said. The mandate is, Motions overruled. *Locke, Perkins & Williamson, Louis A. Jack,* for plaintiffs. *Skelton & Mahon, John P. Carey,* for Androscoggin and Kennebec Railway Company. *Robinson & Richardson,* for Donoghue's Express Company.

STATE OF MAINE *vs.* DONALD F. SNOW.

Penobscot County. Decided April 8, 1935. An indictment alleging that respondent embezzled property of which he had possession as executor of the last will of a decedent was held good against general demurrer. *State* v. *Snow,* 132 Me., 321.

On pleading anew, under leave reserved to him so to do, he was tried by jury and convicted.

There was no prejudicial error in any ruling on the trial. Exceptions overruled. *James D. Maxwell*, County Attorney, for State. *James M. Gillen*, for respondent.

J. BURTON STRIDE *vs.* PORTLAND WATER DISTRICT.

York County. Decided April 8, 1953. Action of tort. Verdict for the plaintiff with reasonable assessment of damages. General motion for a new trial on the usual grounds.

As the plaintiff, accompanied by his wife, drove his automobile along St. John Street in Portland in the late evening of December 9, 1933, he suddenly came upon a strip of slush and ice several hundred feet long, lost control of his car, skidded and crashed through a fence across the sidewalk. Both he and his wife suffered personal injuries and his automobile was badly damaged.

It is admitted that the icy condition of the street was due to a break in a lead connection in the mains of the defendant Corporation. The negligence charged is a failure to properly guard the break and ice and give travellers lawfully on the highway due warning of its dangerous condition. The contributory negligence of the plaintiff is directly in issue.

The case presents simple questions of fact and the record discloses sufficient apparently credible evidence to justify the jury in finding negligence on the part of the defendant and the exercise of ordinary care by the plaintiff. The verdict is not so manifestly wrong as to warrant setting it aside. Motion overruled. *Waterhouse, Titcomb & Siddall*, for plaintiff. *David E. Moulton*, for defendant.

CHARLES F. ADAMS *vs.* ANNIE P. FOLEY.

Androscoggin County. Decided June 5, 1935. The sole issue in this case was whether or not plaintiff's intestate had, during her lifetime, made a gift to defendant of a certain bank book and the

account evidenced by it. Two witnesses testified to the fact of the gift. They were not contradicted. Their evidence was not inherently improbable. The jury believed them. We see no reason for disturbing the decision thus rendered. Motion overruled. *Charles F. Adams*, pro se. *Ralph W. Crockett*, for defendant.

FORT FAIRFIELD NASH COMPANY

GEORGE S. SOLOMON AND ALBERT B. WACHLIN

vs.

WILLIAM NOLTEMIER.

Aroostook County. Decided June 6, 1935. This bill in equity was brought to enjoin the enforcement of judgments recovered in actions at law by the present defendant against these plaintiffs.

In the instant equity suit, defendant both demurred and answered, the demurrer being inserted in the answer; plaintiff filed replication.

Hearing on bill and demurrer went only to technical sufficiency of pleadings, and not to the merits of the controversy.

On overruling the demurrer, the Justice below signed and entered a final, rather than an interlocutory decree. The final decree, besides disposing of the demurrer, sustained the bill.

Defendant appealed.

The appeal must be sustained.

The cause is remanded for the entry of an interlocutory decree overruling the demurrer; appeal from such decree should await decision of the case on bill, answer, and evidence. Appeal sustained. Decree reversed. New decree as this rescript indicates. *Albert F. Cook*, for plaintiffs. *Ralph K. Wood*, for defendant.

LILLIAN BUMPUS *vs.* WILLIAM P. LYNN.

Oxford County. Decided July 3, 1935. After collision between a Ford truck, which she was driving, and a coupe, driven by de-

fendant, plaintiff recovered a verdict, and the case comes up on motion for new trial, in the usual form. Plaintiff was driving easterly, defendant westerly, on a comparatively straight stretch of main highway, eighteen feet tarvia, three feet gravel margins. The truck, by the impact was upturned, on its right side, off the right, or southerly edge of the tarvia, on the gravel and adjoining land.

The coupe remained on the tarvia, pointing southwesterly. The time was between six and "six-thirty," on the afternoon of November two.

Two occupied each vehicle. The attendant at a filling station, within a few feet of the place of collision, and others who came to the scene in cars, before truck or coupe were moved, testified.

The contention of plaintiff is that as she approached the filling station, driving at thirty miles per hour or less, she saw the headlights of defendant's car approaching in the distance and "zigzagging" over the roadway; that she slowed down, drove to her extreme right side past the station, coming to a stop, with her right wheels on the gravel margin; was about at a standstill when hit.

The record is voluminous. Both cars lost their left forward wheels.

The left mudguard of the truck was an exhibit, testimony and argument being that the coupe hit the truck on mudguard, behind left front wheel.

The case presents issues peculiarly for settlement by a jury as to defendant's negligence. In accordance with law as repeatedly stated by this Court, in this case the decision of the jury is final. Motion denied. *Arthur J. Henry, George A. Hutchins,* for plaintiff. *Albert Beliveau,* for defendant.

ANNA FONTAINE *vs.* MAINELAND STAGES, INC.

DENIS FONTAINE *vs.* MAINELAND STAGES, INC.

York County. Decided July 17, 1935. On defendant's motion. The majority of the Court failing to agree, verdict for plaintiff must stand. Motion overruled. *Louis B. Lausier, William P.*

Donahue, for plaintiff. *John J. Connor, Jr., Waterhouse, Titcomb & Siddall*, for defendant.

ABBIE KERSHMER *vs.* F. W. WOOLWORTH COMPANY.

Androscoggin County. Decided July 31, 1935. Plaintiff was detained in a store of the defendant by the assistant manager, on suspicion that she had stolen a "greeting card," arrested and taken to the police station, on orders of the manager of the store, and, after detention there through the middle of the day, locked in a cell at noon, was tried for larceny of a feather, price ten cents, for which she insisted she had paid.

She was acquitted, and later brought suit for malicious prosecution.

The jury heard evidence of intemperate haste in detaining plaintiff, force used in directing her course through the store, holding her in a basement room while awaiting the arrival of the police, lack of investigation of the act for which she was detained, and the order of the manager to the police as they inquired what he wished done with the plaintiff, to "shove her," which, if believed, would indicate a depraved inclination on the part of the manager to disregard the plaintiff's rights, an intent manifested by their injurious acts, which is held to prove legal malice.

Some of the charges of the plaintiff were disputed; evidence of a prior act of theft was given by an employer, and stoutly denied by the plaintiff. With the verdict of the jury, on the record before us, it is not in our province to interfere. And since, in such a case, the jury may rightfully award punitive damages, we cannot say the verdict is excessive. Motion denied. *Clifford & Clifford*, for plaintiff. *Skelton & Mahon, Arthur S. Phillips*, for defendant.

BINGHAM LAND COMPANY *vs.* CENTRAL MAINE POWER COMPANY.

Somerset County. Decided August 13, 1935. Complainant is the owner, not of an existing or developed mill site, but only an

unimproved potential one, on the Kennebec River. Farther down river, on its own land, respondent built, under the Mill Act, (R. S., Chap. 106, Secs. 1, 2, 4, 9) a dam which changed the flow of the river on complainant's land, boundary whereof is the thread of the stream, from swift current to pond water. In relation to assessing damages, commissioners struck out the evidence introduced by complainant of destruction of possible water power development, on the ground that any such loss was without violation of a legal right,—meaning an injury to property for which the law furnishes no redress; and returned an award excluding this claim of damage.

Complainant contends that such exclusion is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The contention can not be sustained. *Bingham Land Company* v. *Central Maine Power Company*, 133 Me., 9. Exception overruled. *Locke, Perkins & Williamson*, for plaintiff. *Merrill & Merrill, Perkins & Weeks, W. B. Skelton*, for defendant.

QUESTIONS AND ANSWERS.

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, FEBRUARY 23, 1935, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, February 23, 1935.

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, I, Louis J. Brann, 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 the emergency period that followed the so-called bank holidays of 1933, many of the banks of this State found it necessary to issue preferred stock in order to preserve the proper ratio between assets and liability to depositors. This was accomplished through reorganization of existing institutions or through creation of new banking institutions succeeding the old. In some instances the preferred stock was purchased by private individuals, private firms and private corporations, and in some instances the preferred stock was purchased by the Reconstruction Finance Corporation, a federal agency created by the Reconstruction

Finance Corporation Act as passed by the Congress of the United States, January 22, 1932.

Under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine, it becomes the duty of the State through its proper authority to assess an annual tax on the value of shares of trust companies formed under the laws of this State and on the value of shares of banks formed under the laws of the United States and doing business in this State. When this act was passed by our Legislature, there did not exist such a thing as preferred stock in banking institutions within the borders of the State of Maine.

The Reconstruction Finance Corporation as an instrumentality of the United States has purchased and now holds the preferred stock of some of our banking institutions. The law under which the Reconstruction Finance Corporation is created provides that, "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

The question involved directly affects the right of the State of Maine to tax and any question arising in the field of taxation in these days is of serious moment.

Under all the circumstances it is a matter of first importance to determine the duty of State officials under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine, as related to shares of various kinds of preferred stock issued by the banking institutions in the State of Maine.

Questions.

1. Is it the duty of the State Tax Assessor under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine, to determine the value of and assess an annual tax against shares of preferred stock issued by trust companies organized under the laws of this State and banking institutions organized under the

laws of the United States and doing business in this State, when such stock is held by the Reconstruction Finance Corporation, a federal agency, existing under the Reconstruction Finance Corporation Act as passed by the Congress of the United States, January 22, 1932, and subsequently amended?

2. Is it the duty of the State Tax Assessor under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine, to determine the value of and assess an annual tax against shares of preferred stock issued by trust companies organized under the laws of this State and banking institutions organized under the laws of the United States and doing business in this State, when such stock is held by private individuals, private firms and private corporations?

Respectfully submitted,

LOUIS J. BRANN,

Governor of Maine.

By the Governor

LEWIS O. BARROWS

Secretary of State.

TO HIS EXCELLENCY, LOUIS J. BRANN, GOVERNOR 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 February 23, 1935, relative to the duty of the State Tax Assessor under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine, to determine the value of and to assess an annual tax against shares of preferred stock issued by trust companies organized under the laws of this State and banking institutions organized under the laws of the United States and doing business in this State when such stock is held by the Reconstruction Finance Corporation or private individuals, private firms and private corporations.

QUESTION:

1. Is it the duty of the State Tax Assessor under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine,

to determine the value of and assess an annual tax against shares of preferred stock issued by trust companies organized under the laws of this State and banking institutions organized under the laws of the United States and doing business in this State, when such stock is held by the Reconstruction Finance Corporation, a federal agency, existing under the Reconstruction Finance Corporation Act as passed by the Congress of the United States, January 22, 1932, and subsequently amended?

ANSWER:

1. This question we answer in the negative.

QUESTION:

2. Is it the duty of the State Tax Assessor under the provisions of Sections 76 and 77 of Chapter 12, Revised Statutes of Maine, to determine the value of and assess an annual tax against shares of preferred stock issued by trust companies organized under the laws of this State and banking institutions organized under the laws of the United States and doing business in this State, when such stock is held by private individuals, private firms and private corporations?

ANSWER:

2. As this question is presented, we are of opinion that it is the duty of the State Tax Assessor to determine the value of and assess an annual tax against such shares of preferred stock when the same is held by private individuals, private firms and private corporations not exempt from taxation thereon.

Very respectfully,

W. R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

Dated February 26, 1935.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 8, 1935, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

In House — March 8, 1935.

WHEREAS, it appears to the House of the Eighty-seventh Legislature that the following are important questions of law, and the occasion a solemn one; and

WHEREAS, there is now pending before the Legislature of the State of Maine:

Bill "An Act Relating to Taxation" (H. P. 1361) (L. D. 471)

Bill "An Act Imposing an Income Tax" (H. P. 1359) (L. D. 472) document copies of which are hereby enclosed and made a part hereof; and

WHEREAS, the constitutionality of these measures has been questioned; and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed measures; now therefore, be it

ORDERED: That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

Question No. 1.

Has the Legislature the right and power to enact an income tax law providing for a graduated tax as proposed by said bills?

Question No. 2.

Has the Legislature the right and power to enact an income tax law with a single fixed rate of tax upon all incomes regardless of the amount thereof?

Question No. 3.

If a provision was inserted in the aforesaid L. D. 471 or L. D. 472, exempting income from real estate from the provisions of said acts, would the said acts be constitutional?

HOUSE OF REPRESENTATIVES
Read and Passed
Under Suspension of Rules
March 8, 1935
HARVEY R. PEASE,
Clerk.

A true copy,
Attest:
HARVEY R. PEASE,
Clerk.

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by House Order of March 8, 1935, respectfully submit the following answers.

QUESTION 1.

Has the Legislature the right and power to enact an income tax law providing for a graduated tax as proposed by said bills?

QUESTION 2.

Has the Legislature the right and power to enact an income tax law with a single fixed rate of tax upon all incomes regardless of the amount thereof?

QUESTION 3.

If a provision was inserted in the aforesaid L. D. 471 or L. D. 472, exempting income from real estate from the provisions of said acts, would the said acts be constitutional?

ANSWER:

These questions are so closely interrelated that we find it feasible to answer them collectively. In doing so, we shall confine ourselves to the general problem whether or not the income tax proposed is constitutional and shall not attempt to pass upon the effect of the various provisions of the bills.

Has the Legislature the constitutional right to enact an income tax law, if it provide for a graduated tax or a single fixed rate or contain an exemption of income from real estate? Whether the Legislature has such a right is dependent upon the true nature of the proposed tax. If it be a tax upon real or personal estate, then it would be unconstitutional because it lacks equal apportionment and assessment required by Section 8 of Article IX of the Constitution as it now appears in Amendment XXXVI, which reads as follows:

> "Sec. 8. All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property."

Unless the income tax be direct on property, the right of the Legislature to levy it is clear.

> "The full power of taxation is vested in the Legislature and is measured not by grant but by limitation." *Opinions of Justices*, 123 Me., 576, 577.

We must, then, determine its nature.

Said Section 8 "simply requires that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally, etc. *Portland* v. *Water Company*, 67 Me., 135. It does not require the Legislature to impose taxes upon all the real and personal property within this State of whatever kind and to whatever use applied. The Legislature may, nevertheless, determine what kinds and classes of property shall be taxed and what kinds and classes

shall be exempt from taxation." *Opinions of Justices*, 102 Me., 528.

This Section does not "prohibit the Legislature from imposing other taxes than those on real and personal property. The Legislature is left free to impose other taxes, such as poll taxes, excise taxes, license taxes, etc. It can impose such taxes in addition to, or instead of, taxes on property. It can subject persons and corporations to both or either kinds of taxation, or exempt them from either kind. Further, the Legislature can adopt such mode, or measure, or rule as it deems best for determining the amount of an excise or license tax to be imposed, so that it applies equally to all persons and corporations subject to the tax. It may make the amount depend on the capital employed, or the gross earnings, or the net earnings, or upon some other element." *Opinions of the Justices*, 102 Me., 528, 529.

Then is this proposed income tax a property tax? Its nature in both bills, No. 471 and No. 472, apparently finds expression in Section 1, in which (the section being identical in each bill) is this language:

> "A tax is hereby imposed upon every person a resident of the State, which tax shall be levied, collected and paid annually upon and with respect to his entire net income at the following rates:"

This language indicates a purpose to lay the tax upon the person, not upon property.

In both bills, the remedy for failure to pay the tax is that of the collection of "a personal debt from the person liable to pay the same to the State of Maine." (See Section 17 in both bills.) True, the bills provide for a lien, but the lien is general on all of the real and personal property of the person, and not specific against the particular property from which the particular income is derived. (See Section 35 of each bill.) Thus it would appear reasonably clear that these bills do not contemplate taxation upon property. The proposal is to tax the privilege of receiving income. To be sure, "an income tax is to be distinguished from an inheritance, legacy, or estate tax, . . ." 61 C. J., page 1560. None the less, there are elements of marked similarity.

In *State* v. *Hamlin*, 86 Me., 495, the Court held that a graduated tax on inheritances was constitutionally valid because it was not a property tax. The opinion in that case is pertinent here. The Court held that Sections 7 and 8 of Article IX of the Constitution, read together, manifested that the inheritance tax was not a property tax.

> "It is clear that these sections contemplate only the general, constantly recurring assessment upon the same property, and do not include occasional, exceptional and special subjects and modes of taxation. . . . It is not laid according to any rule of proportion, but is laid upon the interests specified in the Act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the State liable to be assessed for public purposes. . . . The tax under this statute, is once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the State. It is uniform in its rate as to the entire class of collaterals and strangers, which satisfies the constitutional requirement of uniformity." *State* v. *Hamlin*, supra.

We find this language in the advisory opinion of Mr. Justice Peaslee in 77 N. H., 618:

> "It is important that at the outset the fundamental difference between income and property be stated; and then as we go on, it will be more plainly seen how and why the attempt to treat the two things as one must necessarily fail. A man's property is the amount of wealth he possesses at a particular moment, while his income is the amount of wealth obtained during some specified period. The two are measured by different standards. One is measured by amount and present possession. The other is determined by receipts, and quantity and time are necessary elements of the measure employed. In the measure of property, present ownership is an essential element, and lapse of time can have no place. In the measure of income, lapse of time is an essential element, and present possession can have no place. Each is measureable, but a common

measure cannot be applied to both. The two are as incommensurate as a line and an angle."

That in a general sense income is property is conceded. It is not, however, property as used in the Constitutional provisions already mentioned.

The distinction between property and income is made in a recent United States case, *Lawrence* v. *State Tax Commission*, 286 U. S., 276, 281 (May 16, 1932), and also in *Featherstone* v. *Norman*, 153 S. E., 58, 170 Ga., 370.

These cases hold that a tax on income is not a tax upon the property from which that income was derived; the weight of judicial authority is to this effect. *State* v. *Frear*, 148 Wis., 456, 134 N. W., 673; *State* v. *Wisconsin Tax Commission*, 161 Wis., 111, 152 N. W., 848; *Diefendorf* v. *Gallet*, 51 Idaho, 619; *Stanley* v. *Gates*, 179 Ark., 886, 19 S. W. (2d), 1000; *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss., 34, 88 So., 4; *Featherstone* v. *Norman*, supra; *O'Connell* v. *State Board of Equalization*, 95 Mont., 91, 25 Pac. (2d), 114; *Ludlow-Saylor Wire Co.* v. *Wollbrinck*, 275 Mo., 339, 205 S. W., 196.

"Income in common parlance and in the law is used in contradistinction to property." 31 C. J., 397, Sec. 2-B.

Income is defined as: "Something derived from property, skill, ingenuity or sound judgment, or from two or more in combination." *Stony Brook R. R.* v. *Boston & Maine R. R. Co.*, 260 Mass., 379, 384; "That gain or recurrent benefit (usually measured in money) which proceeds from labor, business, or property." *Webster's New International Dictionary*, 2nd Ed.

"The term 'property,' as used in reference to taxation, means the corpus of an estate or investment, as distinguished from the annual gain or revenue from it. Hence a man's income is not 'property' within the meaning of a constitutional requirement that taxes shall be laid equally and uniformly upon all property within the State. *Black on Income and other Federal Taxes* (3d Ed.), sec. 44. . . . 'The better rule seems to be that an income tax is not a tax on property within a con-

stitutional requirement that taxation on property shall be in proportion to its value.' *Cooley on Taxation* (4th Ed.), sec. 1751. . . ." *Featherstone* v. *Norman*, supra.

The bills submitted contemplate the taxation of persons upon and with respect to their net incomes. The word "person" is not defined in either bill, and, in the absence of definition, it would include a corporation. Rules of Construction, R. S. 1930, Chap. 1, Sec. 6, Paragraph XIV.

Both of the bills provide in Paragraph 2 of Section 1 for taxation on the income of intangible personal property at a higher rate than the tax on income derived from other sources. Such a discrimination would be invalid.

CONCLUSION.

In conclusion, then, we answer Questions 1, 2 and 3 in the affirmative, excepting as herein qualified.

Very respectfully,

W. R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

March 16, 1935.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 5, 1935, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

In House — March 5, 1935.

WHEREAS, there is now pending in the Legislature of the State of Maine a bill providing for a representative town meeting in the town of Sanford; and

WHEREAS, said bill provides for the division of said town by the selectmen into not less than five nor more than ten districts; and

WHEREAS, said bill further provides that each district shall elect a certain number of representatives known as town meeting members, to wit, one town meeting member for a designated number of registered voters therein or a fractional part thereof, the elective town meeting membership, however, to be in no case less than one hundred fifty members nor more than two hundred members, with the further provision for membership of certain town officials ex officio; and

WHEREAS, said act further provides that the town shall have the capacity to act through and to be bound by its town meeting members who shall, when convened from time to time, constitute representative town meeting; and the representative town meetings shall exercise all powers vested in the municipal corporation. Action in conformity with all provisions of law now or hereafter applicable to the transaction of town affairs in town meetings shall, when taken by any representative town meeting in accordance with the provisions of this Act, have the same force and effect as if such action had been taken in a town meeting open to all of the voters of the town as organized and conducted before the establishment in the town of representative town meeting government; and

WHEREAS, said act provides that the town officers, other than

town meeting members, shall be balloted upon by all of the voters of the town, but that each district shall elect the number of town meeting members to which it is entitled, based upon the number of registered voters therein as above set forth; and

WHEREAS, said bill further provides that each district shall vote at such voting place as the selectmen in the warrant shall designate; and

WHEREAS, said bill further provides that such voting place may or may not be within the territory of the district, and the only difference in the ballot of the respective districts being that the names of the town meeting members to be elected from any district appear on the ballot of that district only;

And it appearing to the House of Representatives that important questions of law have arisen in the determination of the constitutionality of said bill and that the occasion is a solemn one;

IT IS ORDERED that the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House of Rrepresentatives of the State of Maine, according to the provisions of the Constitution in this behalf, their opinion of the following questions, viz.:

Question No. 1.

Has the Legislature authority under the Constitution to authorize the establishment of a town government wherein authority to vote upon any business transacted at a town meeting is given to a limited number of representatives elected by the voters of the town and to such ex officio members as the town may designate?

Question No. 2.

Is it necessary under the Constitution of the State of Maine that the voters of the whole town have an opportunity to vote for each representative or town meeting member, or may the Legislature authorize a division of the town into districts, each district being entitled to elect one representative or town meeting member for a designated number of registered voters therein or fractional part thereof, with authority in such town meeting members and such ex officio members as the town may designate, to bind the town

at any town meeting in the same manner as if the meeting had been open to all of the voters of the town?

HOUSE OF REPRESENTATIVES
March 5, 1935
Read and laid on the table in compliance with House Rule 46.
HARVEY R. PEASE,
Clerk.

HOUSE OF REPRESENTATIVES
March 6, 1935
Under suspension of the rules, out of order.
On motion of Mr. Demers of Sanford taken from the table and on further motion of same gentlemen
Passed.
HARVEY R. PEASE,
Clerk.

A true copy,
Attest:
HARVEY R. PEASE,
Clerk.

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by House Order of March 5, 1935, respectfully submit the following answers.

QUESTION 1.

Has the Legislature authority under the Constitution to authorize the establishment of a town government wherein authority to vote upon any business transacted at a town meeting is given to a limited number of representatives elected by the voters of the town and to such ex officio members as the town may designate?

QUESTION 2.

Is it necessary under the Constitution of the State of Maine that the voters of the whole town have an opportunity to vote for each representative or town meeting member, or may the Legislature authorize a division of the town into districts, each district being entitled to elect one representative or town meeting member for a designated number of registered voters therein or fractional part thereof, with authority in such town meeting members and such ex officio members as the town may designate, to bind the town at any town meeting in the same manner as if the meeting had been open to all of the voters of the town?

ANSWER.

One answer may suffice for both questions.

Towns are mere agencies of the State. They are purely creatures of the Legislature and their powers and duties are within its control. The wisdom, reasonableness and expediency of statutes, and whether they are required by the public welfare, are subject to exclusive and final determination by the law-making power, which is measured not by grant but by limitation. It is absolute and all embracing except as expressly or by necessary implication limited by the Constitution. The Court will only pronounce invalid those statutes that are clearly and conclusively shown to be in conflict with the organic law. Municipal corporations are but instruments of government, created for political purposes and subject to legislative control.

Legislative authority to create and incorporate political subdivisions of the State clearly embraces the right to alter or amend the original charter or act of incorporation as the public welfare demands and the wisdom of the law-making power dictates. The Legislature for more than a hundred years has exercised the power to convert plantations into towns, to incorporate the inhabitants of towns as cities and, in recent years, as in the cases of Presque Isle and Washburn and in a lesser degree Bar Harbor and other towns, to materially modify the usual form of town government. In the absence of a constitutional limitation in this regard, the right to exercise this authority cannot be questioned.

Legislative authority to grant to a city a charter embracing the

features contained in this bill is obvious. Whether a municipal corporation is denominated "city" or "town" is not of essential importance. Much as it offends against the use of terms, regardless of historic significance and accepted meaning, to entitle as a town a political subdivision of the state in which the entire electorate is not permitted to assemble in annual town meeting and individual voters play no more important part in local government than do those who reside in cities, it is not beyond legislative authority to so enact, within the limits of reason, especially when safeguarded, as in the present Act, by conditioning its effectiveness on the approval of the interested community.

Whether the inhabitants of incorporated towns should, instead of legislating directly by participation of qualified electors at town meetings duly held, be invested with authority to act with respect to corporate affairs through the intervention of chosen representatives, is a matter of legislative and not judicial concern so long as constitutional limitations are observed.

Sanford has a population of more than thirteen thousand, its registered vote exceeds fifty-two hundred, and the ordinary method of conducting town business may have become impracticable. We assume that certain of its citizens prefer the proposed arrangement to a city charter. If the Legislature believes it wise to grant the request, we find nothing in the Constitution forbidding it.

In view of the fact that the proposed Act involves a system of government differing so markedly from any yet adopted by any town, it might not be unwise to incorporate an express provision that the change in form does not affect the legal responsibilities or privileges of the town nor the application of general statutes to its affairs. The proposed Act does not offend the Constitution.

Very respectfully,

W. R. Pattangall
Charles J. Dunn
Guy H. Sturgis
Charles P. Barnes
Sidney St. F. Thaxter
James H. Hudson

Dated March 16th, 1935.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 30, 1935, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

In House of Represetatives

March 30, 1935.

WHEREAS there is now pending before the House of Representatives a bill providing for an increase in resident hunting and fishing license fees, such bill being bill "An Act Relative to Resident Fishing and Hunting Licenses" (S. P. 132) (L. D. 79);

AND WHEREAS said bill originated in the Senate and not in the House of Representatives;

AND WHEREAS the constitutionality of said measure has been questioned, and it is important that the Legislature be informed as to the constitutionality of the proposed measure;

NOW THEREFORE BE IT ORDERED that the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House, according to the provisions of the Constitution on this behalf, their opinion on the following question, to wit:

Is the proposed legislation a measure to raise revenue within the meaning of Section 9 of Article IV of the Constitution, which required that revenue bills shall originate in the House of Representatives?

HOUSE OF REPRESENTATIVES
Read and tabled
Pursuant to House Rule 46.
March 30, 1935.
HARVEY R. PEASE,
Clerk.

HOUSE OF REPRESENTATIVES

On motion of Mr. Clarke of Cooper taken from the table and on further motion same gentleman

April 1, 1935

Passed.

HARVEY R. PEASE,
Clerk.

A true copy,
Attest:
HARVEY R. PEASE,
Clerk.

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the question upon which their advisory opinion was requested by House Order of March 30, 1935, respectfully submit the following answer.

QUESTION 1.

Is the proposed legislation a measure to raise revenue within the meaning of Section 9 of Article IV of the Constitution, which required that revenue bills shall originate in the House of Representatives?

ANSWER.

The Constitution of the State of Maine provides that the Justices of the Supreme Judicial Court "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate, or House of Representatives." Article IV, Sec. 3, Constitution.

Because of the great respect which the Justices have entertained for the Executive and Legislative branches of government, they have, from the beginning, followed the general policy of answering questions so submitted, without much regard to the importance thereof or to the solemnity of the occasion. This has resulted in many opinions having been given on matters of no great moment and not infrequently involving well settled questions of law.

It might reasonably be urged that the instant inquiry is typical of that class.

There can be no serious doubt concerning the point of constitutional law presented. It has been passed on by Federal and State Courts in many cases and with nearly complete unanimity of decision. We might, therefore, be justly excused from answering, but, not wishing to appear discourteous, advise that the primary object of the bill submitted to us being regulatory, it is not, within the meaning of the Constitution, one for "revenue" which should have originated in the House of Representatives.

A "Bill for raising revenue" is one for levying taxes in the strict sense of the word, and not a regulatory measure which incidentally creates revenue.

Very respectfully,

W. R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

RULES OF COURT.

STATE OF MAINE

SUPERIOR COURT August 18, 1934.

All of the Justices of the Superior Court concurring, the following Rule of Court is established.

Rule 43 of the Revised Rules of the Supreme Judicial and Superior Courts, 129 Maine, 519, as amended under date of February 26, 1934, 132 Maine, 526, is amended so as to read as follows:

The second day of each term of the court for any county is fixed as the stated day on which final action may be had on petitions for naturalization as provided by Federal Law.

W. R. PATTANGALL,
Chief Justice, Supreme Judicial Court.

INDEX

ACCORD AND SATISFACTION.

In order to avail himself of recoupment, namely, show that the plaintiff had not performed the same contract on his part, and abate or reduce the damages for such breach in one action, the defendant must plead it. This may be done by brief statement under the general issue.

The rule of law respecting accord and satisfaction, which applies to demands undisputed as well as to demands disputed, has been stated by our court as follows: "It must be shown that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such."

Fogg v. *Hall et al,* 322.

ACCOUNT STATED.

A stated account is one which has been examined by the parties and from which a balance, due from one to the other, has been ascertained and agreed upon as correct.

Pride v. *King,* 378.

ACTIONS.

The issue in trespass *quare clausum fregit,* is rightful possession.

If the plaintiff establishes a legal title to the land in controversy, in the absence of actual adverse possession by someone else, the law implies that he had constructive possession sufficient to maintain an action.

McCausland v. *York,* 115.

Promises of performance of future acts do not constitute actionable representation.

The fact that a promise for future performance relied on is accompanied by a misrepresentation as to existing or preexisting fact does not constitute a representation on which to base an action of deceit where the only damage proven is a consequence of the broken promise rather than of the misrepre-

In a will contest, technical rules of pleading, in reference to bringing the case to the Law Court, have never been permitted to prevent the exercise of revisory power. No rule of court changing or modifying "customary procedure" has ever been adopted.

Martin, Appellant, 422.

The law is liberal in permitting a suitor to amend an insufficient statement of his cause of action. An intended cause, defectively set forth, may be corrected and made perfect. Authority rests in statute and rule of court. Allowing an amendment which, in its nature, can be allowed, is within the sound judicial discretion of the trial judge.

Amendments are always limited by a due consideration of the rights of the opposite party; no amendment which is unfair to him will be allowed.

No new cause of action may be added or substituted by an amendment.

First National Bank of Lewiston v. *Conant,* 454.

ALIENATION OF AFFECTIONS.

To warrant a recovery of damages in an action by a wife against her husband's mother for alienation of affections the burden is upon the plaintiff to show that the mother's action was malicious.

Malice is not presumed but must be proved and may be by evidence of wrongdoing and unjustifiable conduct preceded by hostile, wicked or malicious intention.

A parent may use the proper and reasonable argument in counseling her child and if it later appears that the parent acted under mistake or that her advice or interference may have been unfortunate, unintentionally, if she acts in good faith for what she believes to be upon reasonable grounds for the good for her child, she is not liable.

Pierson v. *Pierson,* 367.

ASSAULT AND BATTERY.

See Criminal Law — *Pushard* v. *Cowan,* 317.

ATTORNEY AND CLIENT.

The negligence of an attorney is the negligence of the party he represents. And if an attorney permits a judgment to be entered against his client on default through inexcusable or unjustifiable neglect, it is not error to refuse to allow a review of the action.

AUTOMOBILES.

BAILMENTS.

BANKRUPTCY.

BANKS AND BANKING.

BASTARDY.

BILLS AND NOTES.

BONA FIDE PURCHASER.

To constitute one a bona fide purchaser for value without notice, within the meaning of the rule that such a purchaser takes the property free of the trust, he must pay some consideration and be without actual or constructive notice of the violation of the trust.

Hanscom v. *Bourne et al,* 304.

BOUNDARIES.

See Deeds.

BURDEN OF PROOF.

The burden of proving that conveyances were made in fraud of creditors is upon the party bringing the action.

Harmon v. *Perry,* 186.

To warrant a recovery of damages in an action by a wife against her husband's mother for alienation of affections the burden is upon the plaintiff to show that the mother's action was malicious.

Malice is not presumed but must be proved and may be by evidence of wrongdoing and unjustifiable conduct preceded by hostile, wicked or malicious intention.

Pierson v. *Pierson,* 367.

On the issue of competency to make a will, the burden of proof is upon the proponent. It is for him to substantiate soundness of mind, even though the contestants offer no evidence at all.

Martin, Appellant, 422.

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

Saco & Biddeford Savings Institution v. *Johnston, Admx. and Jose,* 445.

CARRIERS.

Streets belong to the public, and are primarily for use in the ordinary way. No one has any inherent right to use such thoroughfares as a place of business. Their utilization for the transportation of internal commerce for gain, is not common to all, but springs from sovereignty. Even official license so to use the ways is neither property nor franchise.

CHECKS.

CLAIMS.

COMPROMISE.

CONFLICT OF LAWS.

CONSTITUTIONAL LAW.

A law is *ex post facto* when (1) it makes a criminal offense of what was innocent when done; or (2) it aggravates a crime, making it greater than it was when committed; or (3) it inflicts a punishment more severe than was prescribed at the time that the crime was perpetrated; or (4) it alters the rules of evidence to the injury of the accused; or (5) it, in effect if not in purpose, deprives him of some protection to which he had become entitled. The expression relates solely to crimes and their punishment, and has no application to civil matters.

The terms "due process of law" and "law of the land" as constitutional terms, are of equivalent import, and interchangeable. Due process of law is another name for governmental fair play. Notice and opportunity for hearing are of the essence of due process of law.

Police power of the state is inherent and plenary; its proper exercise is the highest attribute of State government.

State police power is not affected by the Fourteenth Amendment to the Federal Constitution.

Police power is, in its broadest acceptation, power to promote the public welfare though at the expense of private rights.

In the exercise of the police powers, there may be limitations and conditions, and consequent difference between those to whom privilege is granted and refused, provided these are based on some reasonable classification in an existing situation for the public good.

Section 2, of Chapter 259, of the Public Laws of 1933, does not transcend any constitutional provision.

In re: John M. Stanley, Exceptant, 91.

The State may require a license, and the payment of a fee therefor from peddlers selling goods which are within the State, and of the mass of property therein, although brought from another state.

The State may, undoubtedly, impose taxes in the form of licenses, upon different occupations within its limits, but such power must be validly exercised.

The "privileges and immunities" provided by the Fourteenth Amendment to the Constitution of the United States are those that belong to citizens of the United States, as distinguished from citizens of the State—those that arise from the constitution and laws of the United States and not those that spring from other sources.

The language of the Fourteenth Amendment contains a necessary implication of a positive right—the right to an equality before every law, the right of the citizen to be free in any state, from unjust discrimination between him and other persons, as to legal rights or duties. The phraseology does not prevent reasonable classification so long as all within a class are treated alike. It does prohibit arbitrary discrimination between persons, or fixed classes of persons, such as that based on state citizenship.

A statute imposing a license fee on peddlers of commodities shipped from or produced at a place outside the jurisdiction imposing the fee, and requiring no license for the peddling of like goods originating within that jurisdiction, is discriminating and invalid.

The provisions of Revised Statutes, Chapter 46, entitled "Itinerant Vendors," but relating both to such and peddlers, is not a valid exercise of police power, but a positive discrimination in favor of Maine residents, intended also to apply, in reciprocal indulgence, to residents of other states.

The statute does not rest on actual differences. It does not define a new class on sound reasons for reclassification, but makes a distinction between members of a class. It is incompatible with the occupation under equal regulation clause of the Constitution of the State of Maine. It is at variance with the privileges and immunities clause of the Constitution of the United States. It is opposed to the equal protection clause.

Nullity pervades the entire enactment, exception being integral of, and affecting the whole.

State v. *Cohen,* 293.

Police power in its broadest acceptation, means the general power of a government to preserve and promote the public health, safety, morals, comfort or welfare, even at the expense of private rights. Speaking generally, police power is a power not granted in the Federal Constitution, but reserved to the States respectively. Such power should, however, observe its bounds; it cannot go beyond the State and Federal constitutions.

The Legislature cannot, under pretense of exercising the police power, enact a statute which does not concern the welfare of society. When, from perusal, there is no fair, just and reasonable connection between a statute and the common good, and it is manifest that such was not the object of the statute, it will not be sustained. What is called "class legislation" would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment.

The Fourteenth Amendment does not prevent reasonable classification as long as all within a class are treated alike. The liberty guaranteed is not freedom from all restraints, but from restrictions which are without reasonable relation to a proper purpose, and are unjustly arbitrary and discriminatory. What is reasonable depends upon a variety of considerations.

Subject to the limitation that the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the Constitution.

The Fourteenth Amendment was not designed to interfere with due exercise of the police power by the State.

The State, having authority to control foods, in intrastate aspects of the public health, may make rules on the subject. Statutes forbidding the sale of

unwholesome articles of food and drink exist in many of the States. Our own statutes are expressly regulatory of the production and sale of milk.

The rights of every person must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or modify personal rights, or does the same thing by restricting the privileges of certain classes, and not of others, where there is no public necessity therefor, is unconstitutional and void.

In the case at bar, without attempting to define the limits of the power of the Legislature of Maine to control the right to make contracts, the conclusion reached by the court is, that the Legislature had no right to require, as a condition precedent to obtaining a license, that a gathering station proprietor give bond, or deposit money or securities, to secure the payment of them from whom he might buy milk and cream. The legislation is not within the scope of the police power; it trenches upon the State and Federal constitutions.

State v. *Old Tavern Farm, Inc.*, 468.

CONTEMPT OF COURT.

Evasion equivalent to refusal may be punished as contempt.

Perjury may not be so punished. Perjury is an infamous crime, of which no man may be deemed guilty until indicted, tried by a jury and found guilty.

Our statutes provide that when a party or witness, in a court of record, so testifies as to raise a reasonable presumption that he is guilty of perjury, the presiding justice may order him committed to await the action of the Grand Jury. The Court holds this procedure as sufficient to satisfy the needs of such a situation.

In re: Holbrook, Petitioner, ~~270~~ 276

CONTRACTS.

As a general rule where an earth embankment is to be paid for at a certain rate per cubic yard, the contractor furnishing the material must stand for the natural waste and shrinkage.

Maine Sand & Gravel Co. v. *Green & Wilson, Inc.*, 313.

Regardless of the ruling in other jurisdictions, it is well settled in this state that a compromise of a claim which is honestly made and settled in good faith, and believed at the time by the parties to be doubtful, is a sufficient and valid consideration for a promise to pay money or its equivalent, even though it turns out that no valid claim ever existed.

CONTRIBUTORY NEGLIGENCE.

CORPORATIONS.

COURTS.

CRIMINAL LAW.

Evasion equivalent to refusal may be punished as contempt.

Perjury may not be so punished. Perjury is an infamous crime, of which no man may be deemed guilty until indicted, tried by a jury and found guilty.

Our statutes provide that when a party or witness, in a court of record, so testifies as to raise a reasonable presumption that he is guilty of perjury, the presiding justice may order him committed to await the action of the Grand Jury. The Court holds this procedure as sufficient to satisfy the needs of such a situation.

In re: Holbrook, Petitioner, 276.

See *State* v. *Cohen,* 293.

In an action for assault before the Law Court on a general motion for new trial after a verdict for the plaintiff.

HELD

The story of the plaintiff that she was assaulted and kicked by the defendant in his own home is in itself highly improbable in view of admitted facts. It is refuted by the testimony of other witnesses. Furthermore there was an attempt to bolster it by an offer of money to a witness to testify to a fictitious story with respect to the circumstances alleged to have taken place. The case seems to be without merit and to permit the verdict to stand would be to acknowledge the impotence of this court to redress an apparent wrong.

Pushard v. *Cowan,* 317.

Positive proof of a legal marriage is required upon the trial of persons indicted for adultery or indicted under Sec. 5, Chap. 135, R. S. 1930, for lewd and lascivious cohabitation.

The rule as to proof of marriage is that there must be evidence of a marriage in fact, by a person legally authorized, between parties legally competent to contract. Proof of such a marriage may be made by an official copy of the record, accompanied by such evidence as will satisfy the jury of the identity of the parties, or by the testimony of one who was present at the ceremony. The special or official character of the person by whom the rite was solemnized need not be proved by record evidence of his ordination or appointment if it is shown that he was one who usually, or appeared usually, to perform marriage ceremonies.

Evidence of lewdness and lascivious behavior in secret will not support an indictment for open, gross lewdness and lascivious behavior.

State v. *Mulhern and Leteure,* 351.

See *State* v. *Jones,* 387.

See *State* v. *Old Tavern Farm, Inc.,* 468.

CY PRES.

See Trusts.

DAMAGES.

At common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below could be recovered. Under the Mill Act a complaint can not be maintained to recover similar damages.

Bean and Land Co., v. *Power Co.*, 9.

The striking out of testimony of a witness, all of which relates to damages, is not harmful or prejudicial to a plaintiff who fails to establish liability of the defendant.

Stewart v. *Winter*, 136.

Beyond the penalty of a bond there can be no recovery against sureties so far as the principal of the claim is concerned, but interest may be allowed on the amount of the penalty from the date of the breach, when the claim upon the principal at that time exceeds or equals that amount, as the whole amount of the penalty is then a debt demandable of them.

Under this rule, when the bond is breached the penalty to the amount of the damages immediately becomes the debt of the surety and bears interest, the same as any other debt on contract, if the principal claim bears interest.

The rule, common to contracts generally, applies, that where money is due and there is a default in payment, interest is to be added as damages.

As to notice of breach, or demand of payment, none need be proved.

Foster v. *Kerr and Houston, Inc.*, 389.

In cases involving damage to motor mehicles, the rule long established in this jurisdiction is, that the plaintiff is entitled to recover the difference between the value of the car before and after the accident. The cost of repairs may be an important element in determining this figure, but it is not conclusive.

Collins v. *Kelley*, 410.

R. S., Chap. 27, Sec. 76, which authorizes the taking of land to secure a change of alignment of a highway and which directs the procedure, provides that parties aggrieved by the estimate of damages of the county commissioners shall have like remedy as provided by statute for appraisal of damages for land taken by towns for highway purposes.

Appellants from estimate of damages will be heard when the estimate is attacked as excessive or inadequate.

What the owner is entitled to, is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact.

Cassidy Case, 435.

DAMS.

DECEIT.

DEEDS.

Grantees in severalty of lots of land laid off on a particular plot, hold, in proportion to their respective conveyances, where actual measurements not controlled otherwise are variant in wide departure from those given in the deeds. Deficiency must be divided among the several lots proportionately to their respective content as shown by the plot. The same principle maintains where the real measurements are in excess of those specifically designated upon the plot.

Susi v. *Davis et al,* 354.

DEMURRER.

Sustaining a demurrer to a dilatory motion to dismiss a writ, in effect overrules it.

An exception taken to a ruling, whereby a demurrer is sustained overruling a dilatory motion to dismiss an action, should await conclusion of trial of the case on its merits, and if, before then, it is presented to the Law Court, should be dismissed as prematurely brought up.

When defendant's dilatory motion to dismiss is overruled, he has the right to answer over on the merits and, unless he refuses to do so or waives his right so to do, the case should proceed to trial and be concluded on its merits.

Neither the filing of exceptions to the sustaining of such a demurrer nor the erroneous certification of the case to the Law Court is a waiver of the right to plead anew.

An exception to a ruling on a preliminary motion for an order of new service being dilatory in its nature, unless the ruling is adverse to the proceedings, is prematurely before the Law Court, if presented before the conclusion of the trial of the case on its merits, and hence should be dismissed.

Augusta Trust Co. v. *Glidden,* 241.

A claim for services rendered can not be set forth with the same detail as is required in a count for goods sold and delivered, and an item in an account annexed stated to be for labor, with the date and the amount set forth, is sufficient against a demurrer.

Grant v. *Choate and Simmons,* 256.

DESCENT.

A widow waiving the provisions of a will made in her behalf, takes by virtue of the statutes of descents and distributions. One-third of the real estate of which her husband died seized and possessed, or to which he was entitled, descends to her, in fee, free from liability to sale, on special license, to pay debts and charges of administration.

Given, Adm'r c. t. a. v. *Curtis et alii,* 385.

DISCLOSURE.

EMBLEMENTS.

EMINENT DOMAIN.

EQUITY.

In an action in equity to reach and apply insurance money by virtue of the provisions of Secs. 177-180, Chap. 60, R. S., wherein the defense raised a single issue, namely, that the insurance was procured by fraud, and wherein the evidence disclosed that insurance was not sought until two days after the collision in which the plaintiffs were injured, and that the agent of the insured who procured the insurance was fully informed of that fact, and falsely misrepresented to the insurance agent and that within a reasonable time after learning the truth, defendants cancelled the policy and returned the premium.

HELD:

A decree dismissing the bills with costs must be the necessary result, and while cases involving questions of fact alone are not ordinarily considered on report, yet under the circumstances presented in the case at bar, the Law Court feels it its duty to finally dispose of the litigation without compelling the parties to incur further expense.

Lord, Berry, and Walker v. *Mass. Ins. Co.,* 335.

See *Skillin* v. *Skillin,* 347.

See *Estabrook* v. *Hughes,* 408.

By the common law as interpreted in this State, a mortgage deed conveys to the mortgagee legal title to the premises and, while payment of the mortgage debt before condition broken might *ipso facto* divest the mortgagee of his title without reconveyance or other discharge and revest the legal estate in the mortgagor, payment after condition broken does not have that effect, but leaves the legal estate in the mortgagee to be held in trust for the mortgagor until released on demand.

In equity, however, the deed is the substance and the mortgage securing it is a mere incident, the mortgagee having only a lien which retains that character until by proper foreclosure proceedings and the continued default of the mortgagor it is converted into a title. Payment of the mortgage debt at any time before foreclosure is perfected, extinguishes the debt, the lien and all interest of the mortgagee.

It is a familiar principle freely applied in proper cases both at law and in equity that if a party knowingly, though he does it passively by looking on, suffers another to purchase land under an erroneous opinion of title without making known his claim he will not afterwards be permitted to exercise his legal right against such person who has been prejudiced thereby.

This rule of equity must be applied with care and caution, however, lest it encourage and promote fraud instead of preventing and defeating it. When a party is to be deprived of his property or his right to maintain an action by an estoppel, the equity must be strong and the proof clear. The estoppel must be certain to every intent, and not to be taken by argument or inference.

Hooper v. *Bail,* 412.

Upon a bill to redeem from an equitable mortgage on real estate upon which, the amount due having been determined and stated, it is ordered that the mortgagor shall pay the sum with interest thereon within three months from the date of the decree, failure so to pay (no appeal being taken) works a strict foreclosure and bars later redemption.

Failure to fix a reasonable length of time for redemption is a grievance that may be taken advantage of on appeal.

Patterson v. *Adelman and Gallupe,* 441.

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

Saco & Biddeford Savings Institution v. *Johnston, Admx. and Jose,* 445.

In equity proceedings facts stated in an answer under oath, when responsive to the bill, are evidence, yet they do not control the decision, if other facts and circumstances, appearing either orally or as written evidence, or as reasonable inferences from facts proven, outweigh the facts stated in the answer.

Rose, Admx. v. *Osborne, Jr.,* 497.

ESTOPPEL.

It is a familiar principle freely applied in proper cases both at law and in equity that if a party knowingly, though he does it passively by looking on, suffers another to purchase land under an erroneous opinion of title without making known his claim he will not afterwards be permitted to exercise his legal right against such person who has been prejudiced thereby.

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Hooper v. *Bail,* 412.

EVIDENCE.

Where evidence, both direct and circumstantial, in a case is sharply conflicting, it is for the jury to determine where the truth lies, and the proper deductions from the facts as they find them.

Lynch v. *Morris et al,* 1.

EXCEPTIONS.

Exceptions will lie for impertinence in a bill, answer, or other pleadings.

Exceptions to the ruling of the single justice, sustaining exceptions in equity for impertinence, may be heard by the law court before the cause is carried to the stage of final disposition.

Bean and Land Co. v. *Power Co.*, 9.

In references of cases by rule of court under Rule XLII of the Supreme and Superior Courts, a finding of fact by a referee supported by any evidence of probative value, and his decision thereon, if sound in law, is not exceptionable.

McCausland v. *York*, 115.

An exception taken to a ruling, whereby a demurrer is sustained overruling a dilatory motion to dismiss an action, should await conclusion of trial of the case on its merits, and if, before then, it is presented to the Law Court, should be dismissed as prematurely brought up.

Neither the filing of exceptions to the sustaining of such a demurrer nor the erroneous certification of the case to the Law Court is a waiver of the right to plead anew.

An exception to a ruling on a preliminary motion for an order of new service being dilatory in its nature, unless the ruling is adverse to the proceedings, is prematurely before the Law Court, if presented before the conclusion of the trial of the case on its merits, and hence should be dismissed.

Augusta Trust Co. v. *Glidden*, 241.

Exceptions lie to the refusal of a discharge in habeas corpus proceedings.

In re: Holbrook, Petitioner, 276.

Findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. When the law invests him with the power to exercise discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his findings may be challenged by exceptions.

Chaplin, Appellant, 287.

R. S., Chap. 27, Sec. 76, which authorizes the taking of land to secure a change of alignment of a highway and which directs the procedure, provides that parties aggrieved by the estimate of damages of the county commissioners shall have like remedy as provided by statute for appraisal of damages for land taken by towns for highway purposes.

The case may be brought before the Law Court on motion or exception.

Cassidy Case, 435.

EXECUTORS AND ADMINISTRATORS.

An administrator, once duly appointed and qualified, unless he becomes permanently insane, has been discharged by due process or upon his petition, or has died, can, when property of his intestate comes to his possession or is known to him to exist, come to the proper court of probate and proceed to distribution.

As to whether one deceased, expected to pay his housekeeper and nurse and his knowledge of his ability to do so, the value of his estate is admissible in evidence.

Stetson, Admr. v. *Caverly, Executor,* 217.

The purpose of the notice of a claim against an estate required to be given to the executor or administrator is to give him, without the formality required in a pleading, such information of the nature and extent of the claim against the estate that he may investigate and determine whether the claimant should properly be paid or the demand rejected.

A claim for services rendered can not be set forth with the same detail as is required in a count for goods sold and delivered, and an item in an account annexed stated to be for labor, with the date and the amount set forth, is sufficient against a demurrer.

Grant v. *Choate and Simmons,* 256.

Personal estate, except that assigned by law, or granted by allowance, to a widow, must be expended, first, in paying liabilities and administrative expenses.

An executor or an administrator must pay such demands and charges promptly and within the statute period, though to do so defeats every dispositive clause in the will. If personalty proves insufficient, so much of the real estate as may be necessary should be so applied.

Given, Adm'r c. t. a. v. *Curtis et alii,* 385.

FINDINGS OF FACT.

Findings of fact upheld by any reasonable and substantial evidence, will seldom be disturbed by the Law Court.

Mitchell et alii, re: Will of Loomis, 81.

Findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. When the law invests him with the power to exercise discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his findings may be challenged by exceptions.

Chaplin, Appellant, 287.

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

Saco & Biddeford Savings Institution v. *Johnston, Admx. and Jose,* 445.

FIRE.

In an action for fire loss based on Section 63 of Chapter 65, R. S. 1930, providing "When a building is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury," and wherein plaintiff under written permit maintained a potato warehouse which was destroyed by fire communicated to it from defendant's locomotive, and wherein plaintiff in its permit expressly released the railroad from all risk of loss or damage to his buildings or potato warehouse occasioned by fire,

HELD:

That an assumption by the permittee of risk of loss or damage to such building . . . occasioned by fire, whether communicated directly or indirectly from locomotives, or in or by the operation of said railroad or otherwise . . . is not illegal and does not violate said statute, either expressly or impliedly.

Such an assumption of risk of loss from fire so communicated is not contrary to public policy and so illegal.

Even where fire is so communicated by the negligence of a railroad company, such assumption of risk releases it from liability if, as in this case, it enters into such a contract in its private capacity.

A railroad company, though a public carrier, in a contract not involving public carriage, can take a valid release of liability for destruction by fire of the leased property, whether the same be on its right of way or not, if it be along the route.

The words of the statute "along the route" describe buildings being near and adjacent to it as to be exposed to the danger of fire from engines but without limiting or defining the distance.

The fire release in this permit is lawful and constitutes a valid defense to this action.

Cleveland Co. v. *Bangor & Aroostook Railroad Co.,* 62.

FLOWAGE.

See Mill Act.

FRAUD.

See Bankruptcy — *Singer* v. *Dondis,* 374.

FRAUDULENT CONVEYANCES.

whether a particular transfer is or is not fraudulent as to creditors depends upon the laws of the state where the transfers were made.

The burden of proving that conveyances were made in fraud of creditors is upon the party bringing the action.

Fraud is never presumed. It must always be established by clear, full and convincing proof.

Surmise, suspicion or conjecture are not substitutes for proof.

A voluntary transfer or gift by a husband to a wife *prima facie* fraudulent if at the time he is indebted, and, if the transfer or gift embraces all of the property which the husband possesses, the probative force of the presumption is of the strongest. In such case, it is immaterial whether the grantee or donee is conversant of the fraud.

If a transfer or gift is made by a debtor for a valuable and adequate consideration, it is valid unless there is a fraudulent intent on the part of the transferee.

A valid prior indebtedness owed to the grantee by the grantor may be a sufficient consideration for a conveyance by an insolvent debtor.

It is not fraudulent as a matter of law for a debtor to pay one creditor for the purpose of giving him a preference over others. This is true as between husband and wife.

Supposition, conjecture, guess or mere theory is not proof of fraud.

Harmon v. *Perry*, 186.

GIFTS.

While the question as to what constitutes a gift is ordinarily one of law, the facts in a particular case may make the question one of law and fact, mixed.

In the case at bar, the evidence justified the finding that the savings-bank books and stock certificates were in the unqualified possession of the wife, subject to her exclusive control, and would support the finding that the testatrix in virtue of completed gifts, had legal power to dispose of the personalty to take effect at death. The promissory note and annuity certificate, however, belong to the plaintiff.

Holmes v. *Vigue et alii*, 50.

To constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given.

Delivery to the donee is not enough to constitute a valid gift inter vivos unless accompanied with an intent to surrender all present and future dominion over the property.

The burden to prove the gift is on the donee.

When one's intention is to retain the right to use so much of a bank account as he desires during his life, and that the balance upon his decease shall be-

HABEAS CORPUS.

HIGHWAYS.

is not common to all, but springs from sovereignty. Even official license so to use the ways is neither property nor franchise.

In re: John M. Stanley, Exceptant, 91.

HUSBAND AND WIFE.

That a woman assists her husband in his business, even in caring for money which is the product of their joint labor, does not make any part of the money her property.

The enabling statute does not absolve a wife from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station of life.

Holmes v. *Vigue et alii,* 50.

INDEPENDENT CONTRACTOR.

In an action wherein the plaintiff, a vaudeville actor, was injured while carrying on his act on the stage of Keith's Theatre in Portland which was controlled and operated by the defendant; and wherein his act consisted of an exhibition of marksmanship carried through with great rapidity and the accident was caused by his striking a damp spot on the stage while sliding across it in one feature of his act, his claim being that this dampness was the result of water not mopped up by the defendant, which had been spilled in a preceding act.

HELD:

The plaintiff was an independent contractor, and invitee of the defendant, and as such the defendant owed him the duty to have the stage on which he was to perform free from all hidden defects, which by the exercise of reasonable care could have been discovered and guarded against.

Franklin v. *Maine Amusement Co.,* 203.

INDICTMENT.

See Criminal Law.

INJUNCTION.

Injunction will lie to prevent construction of state aid highways by state authorities until the statutory requirements have been complied with and any

interested taxpayer may properly institute proceedings to secure relief by that means.

Rangeley Land Co. v. *Farnsworth et als,* 70.

INSURANCE.

There is no statute which requires a foreign insurance company to designate an agent in the state other than the insurance commissioner for the sole purpose of accepting service of process.

Ouellette & Cloutier v. *City of N. Y. Ins. Co.,* 149.

In an action in equity to reach and apply insurance money by virtue of the provisions of Secs. 177-180, Chap. 60, R. S., wherein the defense raised a single issue, namely, that the insurance was procured by fraud, and wherein the evidence disclosed that insurance was not sought until two days after the collision in which the plaintiffs were injured, and that the agent of the insured who procured the insurance was fully informed of that fact, and falsely misrepresented to the insurance agent and that within a reasonable time after learning the truth, defendants cancelled the policy and returned the premium.

HELD:

A decree dismissing the bills with costs must be the necessary result, and while cases involving questions of fact alone are not ordinarily considered on report, yet under the circumstances presented in the case at bar, the Law Court feels it its duty to finally dispose of the litigation without compelling the parties to incur further expense.

Lord, Berry, and Walker v. *Mass. Ins. Co.,* 335.

INTEREST.

Under this rule, when the bond is breached the penalty to the amount of the damages immediately becomes the debt of the surety and bears interest, the same as any other debt on contract, if the principal claim bears interest.

The rule, common to contracts generally, applies, that where money is due and there is a default in payment, interest is to be added as damages.

As to notice of breach, or demand of payment, none need be proved.

Foster v. *Kerr and Houston, Inc.,* 389.

ITINERANT VENDORS.

The State may require a license, and the payment of a fee therefor from peddlers selling goods which are within the State, and of the mass of property therein, although brought from another state.

The State may, undoubtedly, impose taxes in the form of licenses, upon different occupations within its limits, but such power must be validly exercised.

A statute imposing a license fee on peddlers of commodities shipped from or produced at a place outside the jurisdiction imposing the fee, and requiring no license for the peddling of like goods originating within that jurisdiction, is discriminating and invalid.

Sales by hawkers and peddlers to barbers and beauticians in larger quantities than ordinarily purchased by individual users are not at "wholesale" under Chapter 46, R. S.

The provisions of Revised Statutes, Chapter 46, entitled "Itinerant Vendors," but relating both to such and peddlers, is not a valid exercise of police power, but a positive discrimination in favor of Maine residents, intended also to apply, in reciprocal indulgence, to residents of other states.

The statute does not rest on actual differences. It does not define a new class on sound reasons for reclassification, but makes a distinction between members of a class. It is incompatible with the occupation under equal regulation clause of the Constitution of the State of Maine. It is at variance with the privileges and immunities clause of the Constitution of the United States. It is opposed to the equal protection clause.

Nullity pervades the entire enactment, exception being integral of, and affecting the whole.

State v. *Cohen,* 293.

JOINT ENTERPRISE.

When endorsers are engaged in a common enterprise and their endorsements are for the sole purpose of furthering that enterprise, it may be sufficient, without any express understanding on which to base a finding by a Court or jury, that the endorsements were joint and not successive.

Under such circumstances, payment by an endorser on account of such joint liability, unless explained, is sufficient to warrant such a conclusion, and in such a case the right to contribution exists.

Daggett v. *Smith,* 56.

JOINT TENANCY.

The act of a donor in whose name a bank book was issued, in adding the name of a donee and the words "payable to either or the survivor" did not under

JUDGMENTS.

JUDICIAL DISCRETION.

JURY FINDINGS.

JURY AND JURORS.

LANDLORD & TENANT.

LAST CLEAR CHANCE.

LAW COURT.

In a will contest, technical rules of pleading, in reference to bringing the case to the Law Court, have never been permitted to prevent the exercise of revisory power. No rule of court changing or modifying "customary procedure" has ever been adopted.

The Law Court in this state has held "whenever a jury trial is had, there may be a motion or exceptions for the correction of errors, whether of the court or jury."

Martin, Appellant, 422.

R. S., Chap. 27, Sec. 76, which authorizes the taking of land to secure a change of alignment of a highway and which directs the procedure, provides that parties aggrieved by the estimate of damages of the county commissioners shall have like remedy as provided by statute for appraisal of damages for land taken by towns for highway purposes.

The case may be brought before the Law Court on motion or exception.

Cassidy Case, 435.

MALICE.

See Alienation of Affections.

MARRIAGE.

Positive proof of a legal marriage is required upon the trial of persons indicted for adultery or indicted under Sec. 5, Chap. 135, R. S. 1930, for lewd and lascivious cohabitation.

The rule as to proof of marriage is that there must be evidence of a marriage in fact, by a person legally authorized, between parties legally competent to contract. Proof of such a marriage may be made by an official copy of the record, accompanied by such evidence as will satisfy the jury of the identity of the parties, or by the testimony of one who was present at the ceremony. The special or official character of the person by whom the rite was solemnized need not be proved by record evidence of his ordination or appointment if it is shown that he was one who usually, or appeared usually, to perform marriage ceremonies.

State v. *Mulhern and Leteure,* 351.

MASTER AND SERVANT.

It is the duty of a master to use reasonable care to furnish for his servant a reasonably safe place in which to do his work.

MILK.

MILL ACT.

The proprietor who first erects his dam for such purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use.

Flowing the lands of another for the purpose of working mills, is a right recognized in this jurisdiction, not as an exercise of the eminent domain, for our mills are not of public use, as the term is understood in law, and our constitution does not authorize taking for the benefit of the public.

At common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below could be recovered. Under the Mill Act a complaint can not be maintained to recover similar damages.

Maine holds that the owner of land flowed by a pond for a water mill is not a part owner in the developed lower privilege. He does not participate in the ownership of the dam and mill below. He is not entitled to share in the profits of the lower developments.

Bean and Land Co., v. *Power Co.*, 9.

MORTGAGES.

Flint v. *Land Co. et als*, 89 Me., 420, is not authority for resorting to equity for the purpose of procuring a deficiency judgment, in a case devoid of complications such as existed there.

Foreclosure of real estate mortgages by equity process is permissible only when foreclosure by legal methods is insufficient to give complete relief. In such cases the equity court may determine whether or not plaintiff is entitled to a deficiency judgment and fix the amount thereof.

Viles v. *Korty*, 154.

By the common law as interpreted in this State, a mortgage deed conveys to the mortgagee legal title to the premises and, while payment of the mortgage debt before condition broken might *ipso facto* divest the mortgagee of his title without reconveyance or other discharge and revest the legal estate in the mortgagor, payment after condition broken does not have that effect, but leaves the legal estate in the mortgagee to be held in trust for the mortgagor until released on demand.

In equity, however, the deed is the substance and the mortgage securing it is a mere incident, the mortgagee having only a lien which retains that character until by proper foreclosure proceedings and the continued default of the mortgagor it is converted into a title. Payment of the mortgage debt at any time before foreclosure is perfected, extinguishes the debt, the lien and all interest of the mortgagee.

Hooper v. *Bail*, 412.

MOTOR VEHICLES.

To be in the exercise of due care such a driver before starting his car so situated, must take such observations as a reasonably careful person would take to avoid injuring one on the sidewalk.

Young v. *Potter,* 104.

See *Bumpus* v. *Lynn,* 125.

Where it is reasonably necessary for one to change his tire with the automobile remaining on the highway, then for such length of time consistent with the reasonable use of the highway for that purpose the automobile is not parked within the meaning of Chapter 29, Section 75, R. S., 1930, which provides that: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any way, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such way; . . ."

The applicability of this statute depends upon the finding of fact as to the exigency of the occasion for stopping on the highway.

It can not be ruled as a matter of law that failure to drive one's car into a driveway or farther on into a gravel pit, there to change the tire, constitutes contributory negligence. It is a jury question.

The right to stop on the highway for a reasonable length of time to do reasonably necessary repair work on an automobile does not relieve one from the duty of exercising due care for his own safety while so engaged.

When one puts himself in a dangerous place, trusts his safety entirely to the driver of the approaching car, and for his own protection does not even once look to see if any car is approaching, he fails as a matter of law to exercise due care.

Tibbetts v. *Dunton,* 128.

The area common to one highway and another, entering the first at one side but not emerging therefrom, contains an intersection of ways, within the law of the road.

Any act of a driver of a vehicle upon a highway, when that act is in violation of a law of the road, and is also a proximate cause of injury to another, rightfully upon the road, is a negligent act.

The introduction in evidence of the commission of such act raises at once a presumption of negligence.

In the case at bar, plaintiff attempted to pass defendant's truck on its left. At about that moment the truck turned left to enter a lateral road which joined the main highway on that side, and at or in the junction of the roads the collision occurred.

The Court holds plaintiff's contention that a lateral road entering another highway, but not continuing by emergence from the other side of the highway, does not form an "intersection of ways," incorrect in law.

Rawson v. *Stiman,* 250.

The principle of law with relation to bailments as enunciated in *Robinson* v. *Warren,* 129 Me., 172, to wit; that in bailments other than for carriage the contributory negligence of the bailee is not imputable to the bailor when the subject of bailment is damaged by a third party, and the bailor under the ordinary contract of bailment may recover, despite the occurrence of contributory negligence on the part of the bailee, is reaffirmed.

While it is true that the operator of an electric car is not always bound to stop when he sees an approaching car, yet if he sees or should see an automobile approaching so closely to his car that it is or would be reasonable to believe that there will be a collision unless he stops, then an observance of due care requires him to stop.

In crossing a street from right to left, the motorman must have his car under such control that it may be stopped to avoid collision with the operator of an automobile who himself is in observance of due care.

Bedell v. *Androscoggin & Kennebec Railway Co.,* 268.

The doctrine of the "last clear chance" has no application where the negligence of the plaintiff progressively and actively continues up to the point of the collision.

Goudreau v. *Ouelette,* 365.

Contributory negligence exists where, but for the negligence or wrong of both parties, there would have been no injury.

The sufficiency of the evidence to maintain a given fact, such, as plaintiff's due care, is primarily for the trial court, but the triers must find facts, not from speculation or conjecture, but from evidence. If the evidence, on a point essential to sustain the verdict, is clearly against the verdict, a new trial should be granted. That the jury had a view presents no insuperable obstacle to granting a new trial, on the ground that the verdict does not accord with the evidence.

The driver of a motor vehicle, although he may have the technical right of way, when proceeding across an intersection, is not relieved of the duty of maintaining a lookout. The supreme rule of the road is the rule of mutual forbearance.

In the case at bar, the evidence leaves little or no room for doubt that, had plaintiff, after seeing the approaching automobile kept a proper lookout, and taken the movements of the car into consideration, opportunity for him, as the car turned into the avenue, to have avoided the accident, would have been ample.

His impulsive act in attempting to drive his motorcycle in front of the automobile, was without relation to the proper theory and practice of the control of motor vehicles in like situations.

Where, as in the case at bar, the testimony shows contributory negligence, the verdict cannot stand.

Eaton v. *Ambrose,* 458.

MUNICIPAL CORPORATIONS.

In an action on a contract between a water company and a town for supply of water to the town wherein the town agreed to pay a fixed sum per annum, and "such further sum each year as shall equal the amount of tax, if any, assessed against said company by the said town during said year," such rental sum having been several times changed by the Public Utilities Commission and wherein the company claimed a balance due on account of increased taxes not compensated for by increased rental:

HELD

The provisions of the contract between the town and the company remained binding and in force after the passage of the act establishing the Public Utilities Commission, but the commission had authority, if such rates were unjust or unreasonable, to modify them or, if necessary, to abrogate the contract altogether.

The commission by permitting the increase in the rates did modify the contract and all concerned regarded the contract as in this respect abandoned, and had submitted to the administrative commission set up by the statute the question of the rates to be charged the town for water.

The water company, if it considered the order of the commission entered October 26, 1928, was erroneous in law in not giving to it the revenue to which it was entitled, had its remedy by exception. Its right to recover under the contract was gone.

The fact that the order of the commission was not effective to reimburse the company for the taxes which it was obliged to pay for the period prior to the time when the order became effective is immaterial. Such decrees are intended to cover conditions as they are expected to be in the future and not to compensate for the past.

Milo Water Company v. *Inhabitants of Milo,* 4.

Individual taxpayers of a municipal corporation have not ordinarily the right to sue for remedial relief, where the wrong, for which they seek redress, is one which affects the entire community and not specifically those bringing the action. An individual taxpayer has only the right to apply for preventive relief.

There is no constitutional prohibition against municipal corporations adjusting differences which may arise between them.

Bayley et als, v. *Town of Wells,* 141.

Superintendents of schools, required by R. S., Chap. 19, Secs. 56 and 57 to annually return to the school committees of the towns under their supervision and to the State Commissioner of Education a certified list of the names of persons of school age in each of the towns, are authorized, whenever it is necessary, to employ other persons at the expense of the town to make the preliminary canvass for the census.

In the case at bar, it appearing that the superintendent's bill for expenses incurred in attending a superintendents' convention was approved by the school committee and paid from the treasury of the town of Farmington on the order of its municipal officers, in as much as the particular school appropriations from which the payment was made is not reported, it can not be held that the payment of these expenses was an illegal expenditure of public moneys.

The town of Farmington was not compelled by law to make an allowance to its superintendent of schools for travelling expenses incurred in connection with the supervision of its schools, but it had a right to do so if it saw fit.

In the absence of proof to the contrary, it must be presumed that the school committee and municipal officers of Farmington, in approving and ordering the payment of the superintendent's travelling expenses, used moneys lawfully appropriated for that purpose.

It appearing that the school committee formally authorized the superintendent of schools to hire a room in a private house for an office and pay a rent therefor of fifteen dollars a month, and approved the rent bills as they were presented, and the municipal officers, chargeable with notice, drew town orders therefor for more than six years, the town is bound and can not recover the moneys so paid out.

Inhabitants of Farmington v. *Miner,* 162.

The obligation of towns and plantations in reference to the support of paupers originates solely in statutory enactment and has none of the elements of a contract, express or implied.

There are no equitable considerations out of which presumptions in favor of either party will arise.

The pauper statutes can not be modified or enlarged by construction, and nothing is to be deemed within their spirit and meaning which is not clearly expressed in words.

There is no statutory authority for the employment of a pauper without compensation, by a town in which he has no pauper settlement.

NEGLIGENCE.

Where it is reasonably necessary for one to change his tire with the automobile remaining on the highway, then for such length of time consistent with the reasonable use of the highway for that purpose the automobile is not parked within the meaning of Chapter 29, Section 75, R. S., 1930, which provides that: "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any way, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such way; . . ."

The applicability of this statute depends upon the finding of fact as to the exigency of the occasion for stopping on the highway.

It can not be ruled as a matter of law that failure to drive one's car into a driveway or farther on into a gravel pit, there to change the tire, constitutes contributory negligence. It is a jury question.

The right to stop on the highway for a reasonable length of time to do reasonably necessary repair work on an automobile does not relieve one from the duty of exercising due care for his own safety while so engaged.

When one puts himself in a dangerous place, trusts his safety entirely to the driver of the approaching car, and for his own protection does not even once look to see if any car is approaching, he fails as a matter of law to exercise due care.

Tibbetts v. *Dunton,* 128.

In an action wherein the plaintiff, a vaudeville actor, was injured while carrying on his act on the stage of Keith's Theatre in Portland which was controlled and operated by the defendant; and wherein his act consisted of an exhibition of marksmanship carried through with great rapidity and the accident was caused by his striking a damp spot on the stage while sliding across it in one feature of his act, his claim being that this dampness was the result of water not mopped up by the defendant, which had been spilled in a preceding act:

HELD

The plaintiff was an independent contractor, and invitee of the defendant, and as such the defendant owed him the duty to have the stage on which he was to perform free from all hidden defects, which by the exercise of reasonable care could have been discovered and guarded against.

What may be apparent in the daytime may become a pitfall in the darkness or when the light is dim, and a condition obvious to one with an opportunity to investigate may be a trap to him who is precluded by the nature of his work from making a careful examination.

Whether a danger is obvious depends on the circumstances of each particular case and on the opportunities which each party had to observe the defect.

In this case the issues of the plaintiff's due care and the defendant's negligence were for the jury to determine.

Franklin v. *Maine Amusement Co.*, 203.

The proprietor of a public garage is bound to use reasonable care to keep his garage safe for all persons coming into it by invitation, express or implied, and if it is in any respect dangerous, he is bound to give such invitees warning of the danger. They are bound to exercise due care on their own part in their use of the garage.

A garage proprietor who permits gun powder to be brought in and deposited in his garage and used to load a cannon brings himself within this rule.

Shannon v. *Dow*, 235.

Any act of a driver of a vehicle upon a highway, when that act is in violation of a law of the road, and is also a proximate cause of injury to another, rightfully upon the road, is a negligent act.

The introduction in evidence of the commission of such act raises at once a presumption of negligence.

Rawson v. *Stiman*, 250.

It is the duty of a master to use reasonable care to furnish for his servant a reasonably safe place in which to do his work.

In the discharge of this duty, the law requires the master to give suitable warning to his employee of any and all special risks and dangers of the employment of which the master has knowledge, or by the exercise of reasonable care should know, and which are unknown to the employee and would not be known and appreciated by him in the exercise of reasonable care on his part.

While the servant assumes the ordinary apparent risks of his employment which are obvious and incident thereto and known and appreciated by him or should have been in the exercise of reasonable care, he does not assume the risk of defects not apparent, of which he has no knowledge, existing in the place in which the master has directed him to work and is bound to use due care to make and keep reasonably safe.

In the case at bar, under the rules above stated, the plaintiff's evidence, that his employer, with full knowledge of the existence of poison ivy and the dangers of contact with it, sent him, unaware of its presence and unable to recognize the plant when he saw it, in to cut the bushes where it grew, showed negligence on the part of the defendant. The proof offered in support of this claim was not manifestly outweighed by the evidence offered in defense.

Kimball v. *Clark*, 263.

The principle of law with relation to bailments as enunciated in *Robinson* v. *Warren*, 129 Me., 172, to wit; that in bailments other than for carriage the

contributory negligence of the bailee is not imputable to the bailor when the subject of bailment is damaged by a third party, and the bailor under the ordinary contract of bailment may recover, despite the occurrence of contributory negligence on the part of the bailee, is reaffirmed.

While it is true that the operator of an electric car is not always bound to stop when he sees an approaching car, yet if he sees or should see an automobile approaching so closely to his car that it is or would be reasonable to believe that there will be a collision unless he stops, then an observance of due care requires him to stop.

In crossing a street from right to left, the motorman must have his car under such control that it may be stopped to avoid collision with the operator of an automobile who himself is in observance of due care.

Bedell v. *Androscoggin & Kennebec Railway Co.*, 268.

Towns, which are merely sub-divisions of the State, are not in general liable for the defaults or negligence of their agents and servants in the performance of municipal or public duties which they perform as agents of the State, unless the liability is created by statute.

Section three of the Workmen's Compensation Act (Chap. 55, R. S. 1930) only deprives the non-assenting employer of certain named defenses and besides doing this not establish a statutory right of recovery based only on the fact that the employee sustained injuries by accident arising out of and in the course of his employment.

Said Section three neither expressly nor impliedly changes the common law, whereby a town is not liable for negligence of its agents and servants in the performance of public duties, performed as agents and servants of the State.

Palmer v. *Inhabitants of Sumner*, 337.

The doctrine of the "last clear chance" has no application where the negligence of the plaintiff progressively and actively continues up to the point of the collision.

Goudreau v. *Ouelette*, 365.

It is settled law in this State that when the employees of a municipal corporation are engaged in what might be called a governmental function, or public duty, the municipal corporation is not liable for their acts of negligence.

Municipalities are oblige to keep their streets safe and convenient for travel.

A rotten limb, overhanging a sidewalk presents a danger which it is the duty of a municipality to remove.

Negligence of employees of a municipality in removing such a limb creates no liability against the municipality.

Bouchard v. *City of Auburn*, 439.

NEW TRIAL

In a criminal case, a motion filed for a new trial should be submitted to the presiding Justice and, if denied, appeal taken. Practice differs in civil cases. Evidence that is merely impeaching and having no probative force as to substantive facts does not warrant a new trial even though such evidence satisfies other rules governing newly discovered evidence.

State v. *Mosley*, 168.

A motion to recommit the report is similar to a motion for a new trial at common law and should conform substantially in form and substance and be supported by the kind and degree of proof required on motions for new trials addressed to the trial or appellate courts. The established rules of practice and procedure applicable thereto should be followed.

Under the settled rule of practice, a motion for a new trial on the ground of newly-discovered evidence will not be entertained unless accompanied by a statement under oath comprising the names of the witnesses whose testimony is desired and the particular facts they are expected to prove, with the grounds of such expectation.

Evidence taken without such reasonable notice and information to the opposing party will not be received in support of such a motion for a new trial.

When newly-discovered evidence is the ground relied upon in a motion for a new trial, the evidence must be of such character, weight and value as to make it appear to the Court that it is probable that a different verdict would be arrived at were the case to be tried anew.

In order for the Court to determine whether the alleged newly-discovered evidence is in fact new evidence, and if admitted in connection with that before in the case a different result would probably be produced, it is necessary that a full report of the evidence produced on the former trial or hearing be presented.

Bourisk v. *Mohican Co.*, 207.

The law holds parties to the exercise of due diligence in the preparation of their cases, and public welfare as well as the interest of litigants requires that suitors should prepare their cases with reference to all the probable contingencies of the trial.

Unless on all the evidence it is apparent that an injustice has been done, a new trial will not be granted on the ground of newly discovered evidence when the moving party, by proper diligence, might have discovered such evidence in season for the trial.

Kimball v. *Clark*, 263.

On motion to grant a new trial, the reviewing court will not reverse upon a question of fact if there is sufficient evidence to support the verdict, especially if it is against the party having the burden of proof, and such proof depends appreciably upon the testimony of witnesses whom the jury saw and heard.

Susi v. *Davis et al*, 354.

PARENT AND CHILD.

A parent may use the proper and reasonable argument in counseling her child and if it later appears that the parent acted under mistake or that her advice or interference may have been unfortunate, unintentionally, if she acts in good faith for what she believes to be upon reasonable grounds for the good for her child, she is not liable.

Pierson v. *Pierson,* 367.

PARTNERSHIP.

By the great weight of authority a partnership inter sese may be determined from the declarations, acts, conduct and dealings of the parties, and from the circumstances which may interpret the agreement between them.

Estabrook v. *Hughes,* 408.

PAUPERS AND PAUPER SETTLEMENT.

The obligation of towns and plantations in reference to the support of paupers originates solely in statutory enactment and has none of the elements of a contract, express or implied.

There are no equitable considerations out of which presumptions in favor of either party will arise.

The pauper statutes can not be modified or enlarged by construction, and nothing is to be deemed within their spirit and meaning which is not clearly expressed in words.

There is no statutory authority for the employment of a pauper without compensation, by a town in which he has no pauper settlement.

Sec. 10 and Sec. 20 of Chap. 33, R. S., authorizing overseers of the poor to cause paupers to be employed and the town to direct their employment, and to set them to work or by deed bind them to service for a time not exceeding one year, apply only to towns chargeable for the pauper's support and in which he has a settlement.

R. S. Chap. 33, Sec. 39, giving a town which incurs expense for the support of a pauper a right of recovery from him, his executors or administrators, whether he has a settlement there or not, creates an implied promise on the part of the pauper to make reimbursement.

Reimbursement in money or other approved medium by the pauper extinguishes the debt as against him and the town of his settlement.

City of Auburn v. *Inhabitants of Farmington,* 213.

A person can not be pauperized except by applying for supplies himself or by receiving them with full knowledge of their character. A promise to pay, however, or a disavowal of intent to apply for relief as a pauper does not change the character of the relief and thereby affect the obligation of the Town of residence to furnish supplies in the first instance, or of the Town of settlement to pay for them subsequently.

Inhabitants of Bar Harbor v. *Inhabitants of Jonesport,* 345.

PAYMENT.

A payment not by way of compromise or settlement of a claim is no bar to a recovery of any balance actually due the creditor.

A check is, for the most, a receipt in full, open to qualification and explanation.

Fogg v. *Hall et al,* 322.

PEDESTRIANS.

One on a sidewalk who himself is in the exercise of due care has a right to expect that the driver of an automobile will so operate his car as not to endanger his safety.

The fact that an automobile is wrongfully upon a sidewalk does not permit a pedestrian, although rightfully thereon, to be run over as a result of a combination of his own negligent act and that of the car driver and then to recover in an action of negligence in which the plaintiff must prove not only negligence upon the part of the defendant as the proximate cause of the accident, but lack of his own contributory negligence.

Whether or not one is in the exercise of due care is a question of fact for the jury, and if the jury determines, considering all of the material facts attending the accident, that one does that which the ordinarily careful and prudent person would do in the same situation, then there is observance of due care; otherwise, not.

Whether or not an open door of a car extending over a sidewalk calls for caution upon the part of the sidewalk pedestrian depends upon the particular facts attending the situation.

While a pedestrian upon the sidewalk may have a superior right thereon to that of a motor vehicle, yet there is no difference in the degree of care required of each, for each must be in the exercise of due care under the circumstances.

On the civil side, this Court recognizes no difference of degrees of due care.

One whose car door is extending over a portion of the sidewalk may be found negligent if he starts his car in motion either knowing that a pedestrian on the sidewalk will be hit by the door or observing such pedestrian to be in such a position on the sidewalk that it is reasonable to expect that such a person will be hit.

PERJURY.

PLEADING & PRACTICE.

POLICE POWER.

POOR DEBTORS.

PRESUMPTION.

PRIORITIES.

PROBATE COURTS.

Findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. When the law invests him with the power to exercise discretion, that exercise is not reviewable on exceptions. If he finds facts without evidence, or if he exercises discretion without authority, his findings may be challenged by exceptions.

Chaplin, Appellant, 287.

The verdict of the jury upon an issue out of probate is only advisory and never conclusive upon the court; that is, the court may or may not regard it.

Martin, Appellant, 422.

PUBLIC GARAGES.

The proprietor of a public garage is bound to use reasonable care to keep his garage safe for all persons coming into it by invitation, express or implied, and if it is in any respect dangerous, he is bound to give such invitees warning of the danger. They are bound to exercise due care on their own part in their use of the garage.

A garage proprietor who permits gun powder to be brought in and deposited in his garage and used to load a cannon brings himself within this rule.

Shannon v. *Dow,* 235.

PUBLIC UTILITIES.

The convenience and necessity, proof of which Section 2, Chapter 259, Public Laws, 1933, requires, is the convenience and necessity of the public as distinguished from that of any individual, or group of individuals.

Streets belong to the public, and are primarily for use in the ordinary way. No one has any inherent right to use such thoroughfares as a place of business. Their utilization for the transportation of internal commerce for gain, is not common to all, but springs from sovereignty. Even official license so to use the ways is neither property nor franchise.

Section 2 of Chapter 259 of the Public Laws of 1933 fixes a time limit after which motor vehicular intrastate carriers may not operate, without first having procured, from the Public Utilities Commission, an authorizing certificate. No discrimination is made for or against anyone as an individual, or as one of a class of individuals, but only against his locality, or occupation, as determined by rule or principle.

Section 2, of Chapter 259, of the Public Laws of 1933, does not transcend any constitutional provision.

In re: John M. Stanley. Exceptant, 91.

PUBLIC UTILITIES COMMISSION.

In an action on a contract between a water company and a town for supply of water to the town wherein the town agreed to pay a fixed sum per annum, and "such further sum each year as shall equal the amount of tax, if any, assessed against said company by the said town during said year," such rental sum having been several times changed by the Public Utilities Commission and wherein the company claimed a balance due on account of increased taxes not compensated for by increased rental:

HELD

The provisions of the contract between the town and the company remained binding and in force after the passage of the act establishing the Public Utilities Commission, but the commission had authority, if such rates were unjust or unreasonable, to modify them or, if necessary, to abrogate the contract altogether.

The commission by permitting the increase in the rates did modify the contract and all concerned regarded the contract as in this respect abandoned, and had submitted to the administrative commission set up by the statute the question of the rates to be charged the town for water.

The water company, if it considered the order of the commission entered October 26, 1928, was erroneous in law in not giving to it the revenue to which it was entitled, had its remedy by exception. Its right to recover under the contract was gone.

The fact that the order of the commission was not effective to reimburse the company for the taxes which it was obliged to pay for the period prior to the time when the order became effective is immaterial. Such decrees are intended to cover conditions as they are expected to be in the future and not to compensate for the past.

Milo Water Company v. *Inhabitants of Milo*, 4.

See *In re: Frank R. McLay*, 175.

QUANTUM MERUIT.

See *Stetson, Admr.* v. *Caverly, Executor*, 217.

When a party has entered into a special contract to perform work for another, and the work is done, but not in the manner stipulated for in the contract, the party performing it may recover on a *quantum meruit*, especially if the other party has accepted the labor or is in the enjoyment of its fruits.

Maine Sand & Gravel Co. v. *Green & Wilson, Inc.*, 313.

RAILROADS.

In an action for fire loss based on Section 63 of Chapter 65, R. S. 1930, providing "When a building is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury," and wherein plaintiff under written permit maintained a potato warehouse which was destroyed by fire communicated to it from defendant's locomotive, and wherein plaintiff in its permit expressly released the railroad from all risk of loss or damage to his buildings or potato warehouse occasioned by fire.

HELD:

That an assumption by the permittee of risk of loss or damage to such building . . . occasioned by fire, whether communicated directly or indirectly from locomotives, or in or by the operation of said railroad or otherwise . . . is not illegal and does not violate said statute, either expressly or impliedly.

Such an assumption of risk of loss from fire so communicated is not contrary to public policy and so illegal.

Even where fire is so communicated by the negligence of a railroad company, such assumption of risk releases it from liability if, as in this case, it enters into such a contract in its private capacity.

A railroad company, though a public carrier, in a contract not involving public carriage, can take a valid release of liability for destruction by fire of the leased property, whether the same be on its right of way or not, if it be along the route.

The words of the statute "along the route" describe buildings being near and adjacent to it so as to be exposed to the danger of fire from engines but without limiting or defining the distance.

The fire release in this permit is lawful and constitutes a valid defense to this action.

Cleveland Co. v. *Bangor & Aroostook Railroad Co.*, 62.

An agreement on the part of a lessee of a warehouse, on land owned by a railroad company but not used by it in connection with its business as a public utility, in which the lessee agrees "to protect and save harmless" the lessor from "all liability for damage by fire" caused by the railroad company to property owned by third parties and stored by them in the warehouse, is valid and binding on the lessee.

Such an agreement is neither in violation of statute law nor against public policy.

The fact that the lessor had not assented in writing to a subletting of the premises by lessee in no way affects lessee's liability under such an agreement, although it contained a clause forbidding such subletting.

The statutory liability of a railroad company for damages caused by fire from its locomotives is co-extensive with the right given by the same statute to insure the damaged property and, therefore, there must be such elements of

REFERENCE AND REFEREES.

REMAINDERS.

REVIEW.

RULES OF COURT.

SCHOOLS.

SERVICE.

STATE HIGHWAY COMMISSION.

STATUTES, CONSTRUCTION OF

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

STREETS.

STREET RAILWAYS.

While it is true that the operator of an electric car is not always bound to stop when he sees an approaching car, yet if he sees or should see an automobile approaching so closely to his car that it is or would be reasonable to believe that there will be a collision unless he stops, then an observance of due care requires him to stop.

In crossing a street from right to left, the motorman must have his car under such control that it may be stopped to avoid collision with the operator of an automobile who himself is in observance of due care.

Bedell v. *Androscoggin & Kennebec Railway Co.*, 268.

SURETYSHIP AND GUARANTY.

A bonding company, agreeing for a consideration is a surety, and its guaranty is not to be interpreted under the rule *strictissimi juris.*

The trend of all modern decisions, federal and state, in the construction of the law appertaining to sureties is to distinguish between individual and corporate suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business.

In the case of an individual surety, or a "voluntary surety" the contract will be strictly construed and all doubts and technicalities resolved in favor of the surety.

In the case of corporate surety, underwritten for a money consideration, the contract will be construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.

One who furnishes labor or materials may sue the surety when he can not collect of the principal contractor.

A city or town when contracting for the erection of a municipal building may, for its own protection and advantage, require the insertion in the bond of the surety a clause providing for payment to subcontractors.

The state highway commission has by statute, and from the necessities of the case the authority to require such a bond, binding principal and surety to payment of proper bills for materials and labor.

Beyond the penalty of a bond there can be no recovery against sureties so far as the principal of the claim is concerned, but interest may be allowed on the amount of the penalty from the date of the breach, when the claim upon the principal at that time exceeds or equals that amount, as the whole amount of the penalty is then a debt demandable of them.

Under this rule, when the bond is breached the penalty to the amount of the damages immediately becomes the debt of the surety and bears interest, the same as any other debt on contract, if the principal claim bears interest.

TOWNS.

TOWN OFFICERS.

TRESPASS.

TROVER.

TRUSTS.

In cases involving the application of the doctrine of *cy pres,* the equitable jurisdiction of the court is derived from its general power over the administration of trusts. Charitable trusts are objects of its peculiar regard. The power of the court is, however, limited to carrying out the intention of the donor of such a trust.

That the intent of the donor can not be exactly carried out does not mean that there must be a failure of his general benevolent purpose. A fund for a charity will be administered *cy pres,* to approximate the donor's intent, where there is a failure of the specific gift and a general charitable intent disclosed in the instrument creating the trust.

Whether the gift fails because it is impossible to carry out the particular object which the testator had in mind, or because the particular institution to which he made his gift may cease to exist, if there is a general charitable intent evident, equity will endeavor to carry out the intent of the benefactor as nearly as possible by directing the use of the fund to objects of a similar nature, or by designating some other institution with similar purposes to administer the trust.

Snow & Clifford v. *Bowdoin College, et als,* 195.

The use of trust funds by a bank to pay its own indebtedness dissipates those funds and does not allow necessarily a recovery of a preference.

Where, however, the debt paid by said trust funds is secured by collateral and this collateral is released and traced into the hands of a receiver, it will be impressed with a trust for the benefit of the defrauded trustor.

Annis v. *Security Trust Co.,* 223.

In an action in equity to compel defendant, as trustee, to carry out the terms of a trust as set forth in a trust instrument, and wherein by the terms of the instrument property was conveyed to the trustee in trust to pay the income or such part of the principal as he might see fit to the donor in her lifetime, and on her decease, to pay the principal remaining, one-third to one son, one-third to another son, and the remaining one-third in equal shares to two grandchildren, with a clause which stated, "that the trust herein created shall be irrevocable;" and wherein the donor sought to revoke the instrument by obtaining from the trustee a reconveyance of the property:

HELD

The authority of the trustee to pay the principal of the trust fund to the donor was not absolute. He could do so only that she might use it for her comfort and support and for such purposes in connection therewith as might

seem reasonable. The first trust indenture was irrevocable and the plaintiffs acquired a vested interest in the principal of the trust subject to the power of the trustee to pay the donor such part of it for her own use as might be reasonable. These rights of the plaintiffs could be divested only with their consent. The attempt to revoke the original indenture by a reconveyance of the trust res to the donor was unavailing.

Skillin v. *Skillin,* 347.

The waiver of the provisions of a will providing a life estate for a widow and her acceptance of her interest in the estate as provided in Sec. 13, Chap. 80, R. S. 1930, terminates the trust established for her benefit as effectually as would her death, so far as remaindermen are concerned.

Eastern Trust & Banking Co. v. *Edmunds et als,* 450.

In a gift by voluntary trust there is in such a gift of the equitable rather than of the legal interest therein.

A voluntary trust in personal property may be created by parol.

The passing of the complete equitable title need not be proven by an express statement by the settlor that he declares himself trustee but he must at least do something equivalent to it and use expressions which have that meaning. There must be convincing proof that the fiduciary relation is completely established.

The entry on a deposit book is not conclusive evidence of an absolute gift of an equitable interest and evidence is admissible to show the intention of the donor and to control the effect of the entry.

Where the word "trustee" appears on a bank book, indicating that it is a trust fund, there is raised the presumption that an irrevocable trust was intended and is sufficient proof of it in the absence of other controlling proof.

Rose, Admx. v. *Osborne, Jr.,* 497.

VERDICTS.

When two arguable theories are presented, both sustained by evidence, and one is reflected in the jury verdict, the Law Court is without authority to act. It is when a verdict is plainly without support that a new trial on general motion may be ordered.

Young v. *Potter,* 104.

On motion to grant a new trial, the reviewing court will not reverse upon a question of fact if there is sufficient evidence to support the verdict, especially if it is against the party having the burden of proof, and such proof depends appreciably upon the testimony of witnesses whom the jury saw and heard.

Susi v. *Davis et al,* 354.

Where there is sufficient credible evidence to justify a verdict the same will not be disturbed by the Law Court.

Collins v. *Kelley,* 410.

The verdict of the jury upon an issue out of probate is only advisory and never conclusive upon the court; that is, the court may or may not regard it.

Martin, Appellant, 422.

The sufficiency of the evidence to maintain a given fact, such, as plaintiff's due care, is primarily for the trial court, but the triers must find facts, not from speculation or conjecture, but from evidence. If the evidence, on a point essential to sustain the verdict, is clearly against the verdict, a new trial should be granted. That the jury had a view presents no insuperable obstacle to granting a new trial, on the ground that the verdict does not accord with the evidence.

Where, as in the case at bar, the testimony shows contributory negligence, the verdict cannot stand.

Eaton v. *Ambrose,* 458.

On motion to grant a new trial, the reviewing court will not reverse upon a question of fact if there is sufficient evidence to support the verdict, especially if it is against the party having the burden of proof.

Feurman v. *Rourke,* 466.

WATER COMPANIES.

In an action on a contract between a water company and a town for supply of water to the town wherein the town agreed to pay a fixed sum per annum, and "such further sum each year as shall equal the amount of tax, if any, assessed against said company by the said town during said year," such rental sum having been several times changed by the Public Utilities Commission and wherein the company claimed a balance due on account of increased taxes not compensated for by increased rental:

HELD

The provisions of the contract between the town and the company remained binding and in force after the passage of the act establishing the Public Utilities Commission, but the commission had authority, if such rates were unjust or unreasonable, to modify them or, if necessary, to abrogate the contract altogether.

The commission by permitting the increase in the rates did modify the contract and all concerned regarded the contract as in this respect abandoned,

and had submitted to the administrative commission set up by the statute the question of the rates to be charged the town for water.

The water company, if it considered the order of the commission entered October 26, 1928, was erroneous in law in not giving to it the revenue to which it was entitled, had its remedy by exception. Its right to recover under the contract was gone.

The fact that the order of the commission was not effective to reimburse the company for the taxes which it was obliged to pay for the period prior to the time when the order became effective is immaterial. Such decrees are intended to cover conditions as they are expected to be in the future and not to compensate for the past.

Milo Water Company v. *Inhabitants of Milo*, 4.

WATERS AND WATER COURSES.

See Mill Act — *Bean and Land Co.* v. *Power Co.*, 9.

No one may artificially collect water on his own land and discharge it unlawfully upon his neighbor's property upon which it would not have naturally fallen, and if he does so he is liable for the resulting damages.

There is a public or natural easement in a water course belonging to all persons whose lands are benefited by it, and it can not be stopped up or diverted to the injury of other proprietors.

To constitute a water course as defined by the law, it must appear that the water in it usually flows in a particular direction, by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It must have a well-defined and substantial existence, but need not flow continually or never be dry.

The evidence in the cases at bar showed that some of the salt water which the defendant Corporation pumped from the sea in making its fill seeped over upon the plaintiffs' lands. The plaintiffs were entitled to recover such damages as resulted from this seepage.

Also the jury were fully warranted in finding that the plaintiffs' lands were flooded by the defendant's obstruction of a natural water course by which they were drained, and that the damage which resulted was directly traceable to this cause.

Goodwin and Stewart v. *Texas Co.*, 260.

WILLS.

The law does not undertake to test the intelligence, and define the exact quality of mind which a testator must possess. Soundness is a matter of degree. That a man may make a valid will, it is not necessary that the greatest mental

strength shall prevail. The essential qualification for making a will is a sound mind, which is one in which the testator had a clear consciousness of the business he has engaged in; a knowledge, in a general way, without prompting, of his estate, and an understanding of the disposition he wished to make of it by his will, and of the persons and objects he desired to participate in his bounty.

Sound mind comprehends ableness enough to recollect property and beneficiaries, and conceive the practical effect of the will. The expression does not mean a perfectly balanced mind. A mind naturally possessing power, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence, is in legal contemplation, a sound mind.

Intellectual and physical weakness, with partial failure of mind and memory, is said not to be solely an indication of inability to make a will.

Hallucination, temporary in nature, is not, per se, insanity. It is undoubtedly true, that when a hallucination has become permanent, it is to be deemed insanity, general or particular according to the nature of the delusion. To invalidate a will, an insane delusion must be operative on testation. A person whose mind is affected by such a delusion, however unreasonable and absurd, may make a valid will, provided the delusion is not of influence. To affect its soundness, the will must be the direct offspring of delusion controlling the mind.

Mitchell et alii, re: Will of Loomis, 81.

In cases involving the application of the doctrine of *cy pres,* the equitable jurisdiction of the court is derived from its general power over the administration of trusts. Charitable trusts are objects of its peculiar regard. The power of the court is, however, limited to carrying out the intention of the donor of such a trust.

That the intent of the donor can not be exactly carried out does not mean that there must be a failure of his general benevolent purpose. A fund for a charity will be administered *cy pres,* to approximate the donor's intent, where there is a failure of the specific gift and a general charitable intent disclosed in the instrument creating the trust.

Whether the gift fails because it is impossible to carry out the particular object which the testator had in mind, or because the particular institution to which he made his gift may cease to exist, if there is a general charitable intent evident, equity will endeavor to carry out the intent of the benefactor as nearly as possible by directing the use of the fund to objects of a similar nature, or by designating some other institution with similar purposes to administer the trust.

Snow & Clifford v. *Bowdoin College, et als,* 195.

A widow waiving the provisions of a will made in her behalf, takes by virtue of the statutes of descents and distributions. One-third of the real estate of

which her husband died seized and possessed, or to which he was entitled, descends to her, in fee, free from liability to sale, on special license, to pay debts and charges of administration.

Given, Adm'r c. t. a. v. *Curtis et alii,* 385.

In a will contest, technical rules of pleading, in reference to bringing the case to the Law Court, have never been permitted to prevent the exercise of revisory power. No rule of court changing or modifying "customary procedure" has ever been adopted.

Ability to make a will depends upon mental competency. Wills are denied effect until they have been publicly proven. A fair preponderance of the evidence must establish not only that the testator signed, but that he was of sound mind at the time of doing so. Absolute soundness of mind is not essential, but "sound mind" is a condition precedent to making and executing a valid will. The expression "sound mind" does not mean a perfectly balanced mind. The question of soundness is one of degree. One is sane when he is possessed of a mind which is not that of an imbecile and which is healthy.

A person of statute age, who understands substantially the nature of the act he is performing, has a knowledge without prompting of the extent of his property, his relations to others who might or ought to be the objects of his bounty, is aware of those to whom he is giving as well as those from whom he withholds it, of the scope of bearing of what he is doing, and has sufficient memory to collect and hold in his mind the elements of the business to be transacted, long enough to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them, has that sound mind which qualifies him to make a valid will.

The want of capacity, when urged as a ground for invalidating a testamentary act, must relate to the time of the act. Incompetency may exist before or after, and still the will be valid.

On the issue of competency to make a will, the burden of proof is upon the proponent. It is for him to substantiate soundness of mind, even though the contestants offer no evidence at all.

A layman is not competent to give expert testimony; he is not at liberty to give his judgment as to the condition of the mind of the testator at the time he saw the acts of which he speaks; it is for him to describe the acts and the appearances that he saw.

An attending or family physician's opinion as to the mental health of his patient is competent; such patient's condition some time before, and some time after making the will is relevant, as tending to show the condition of mind when it was executed.

Martin, Appellant, 422.

WORDS & PHRASES.

WORKMEN'S COMPENSATION ACT.

The case at bar falls within the rule laid down in Johnson's Case, 125 Me., 443, wherein at the time the injury occurred the relation of employer and employee was suspended.

The decision of the Commission was correct.

King's Case, 59.

Whether there is a disability due to injury is a question of fact. Whether there is causal relation between injury and disability is likewise a question of fact.

On appeal respecting administration of the Workmen's Compensation Act, cognizance is taken of questions of law only. Decisions of the Industrial Accident Commission, upon questions of fact, are not subject to review.

In the case at bar, the finding that the evidence did not show causal relation between traumatic injury and tuberculosis, cannot be set aside. Findings of essential facts are conclusive on the courts.

Kilpinen's Case, 183.

Section three of the Workmen's Compensation Act (Chap. 55, R. S. 1930) only deprives the non-assenting employer of certain named defenses and besides doing this does not establish a statutory right of recovery based only on the fact that the employee sustained injuries by accident arising out of and in the course of his employment.

Said Section three neither expressly nor impliedly changes the common law, whereby a town is not liable for negligence of its agents and servants in the performance of public duties, performed as agents and servants of the State.

Palmer v. *Inhabitants of Sumner,* 337.

WRITS.

Under the provisions of Rev. Stat. 1930, Ch. 100, Sec. 8, a trustee writ may be served on a foreign corporation in the same manner as other writs are served except that the service shall be by summons.

The qualification of a foreign corporation to do business within the state is an assent by it to all reasonable conditions with respect to service of process.

There is no statute which requires a foreign insurance company to designate an agent in the state other than the insurance commissioner for the sole purpose of accepting service of process.

Ouellette & Cloutier v. *City of N. Y. Ins. Co.,* 149.

When a defect in a writ is apparent of record, advantage of it may be taken by motion to dismiss. Such a motion in the circumstances operates in effect as a demurrer.

Gordon, Pro Ami v. *Lee and Scannell,* 361.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF MAINE.

CONSTITUTION OF MASSACHUSETTS.

CONSTITUTION OF NEW HAMPSHIRE.

STATUTES OF THE UNITED STATES.

STATUTES OF MASSACHUSETTS.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Page 62, thirteenth and fourteenth lines, change citation Chapter 65 to Chapter 64.

Page 125, change name of case to *Bumpus* v. *Lynn* in place of *Bumpus* v. *Lyon.*

Page 210, eighteenth and nineteenth lines, change citation of *Walker* v. *Sanborn* to 8 Me., 288.