MAINE REPORTS

134

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

AUGUST 21, 1935 TO NOVEMBER 27, 1936

EDWARD S. ANTHOINE

REPORTER

PORTLAND, MAINE

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. CHARLES J. DUNN, CHIEF JUSTICE

HON. GUY H. STURGIS

HON. CHARLES P. BARNES

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER

NOTE. Chief Justice Pattangall's term of office expired July 16, 1935. Several opinions in cases argued, but not decided, before that date appear in this volume.

JUSTICES OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

HON. GEORGE H. WORSTER

HON. ARTHUR CHAPMAN

HON. GEORGE L. EMERY

HON. HERBERT T. POWERS

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

ATTORNEY GENERAL

HON. CLYDE R. CHAPMAN

REPORTER OF DECISIONS

EDWARD S. ANTHOINE

TABLE OF CASES REPORTED

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

LLEWELLYN B. TRAFTON *vs.* LLOYD H. HOXIE.

Piscataquis. Opinion, August 21, 1935.

FALSE IMPRISONMENT. SHERIFFS AND DEPUTIES. WRITS. DISCLOSURE.

It is a well-settled rule of law that for reasons founded on public policy the law protects its officers in the performance of their duties if there is no defect rendering the process void or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his process. He is not to exercise his judgment touching the validity of it in point of law. He may justify though in fact the warrant may have been issued without authority or if there be irregularities rendering it voidable but not void. Irregularities merely that are amendable do not vitiate it. The officer stands upon defensible ground unless the process be absolutely void.

The endorsement of the attorney for a judgment creditor on the back of an execution that the officer should collect or commit is not part of the process, and uncertainty therein, if there be such, can not affect its validity.

A return of final process, wherein an execution running against the body in the nature of a capias ad satisfaciendum, *is not required in order to permit the officer to justify under the process. It was so held at common law. The provisions of R. S., Chapter* 96, *Section* 162, *making executions returnable within three months, have not changed the rule.*

Statutory provisions which require sheriffs and constables to return writs of execution are designed for the benefit of the plaintiffs therein and are not available for defendants aggrieved by any omission.

In the case at bar, the reference of the Disclosure Commissioner in his certificate to "Section 38, Chapter 124 of the Revised Statutes" as the authority

for the default he recorded against the plaintiff and the capias issued thereon, as appears in the copy of the certificate attached to the execution on which the arrest was here made, was erroneous. The correct reference would have been to Section 39 of Chapter 124, R. S., which by reference adopts Section 38 as a part thereof. The error, however, was harmless. The reference to the statute was surplusage and can not vitiate the process.

The execution upon which the officer made the arrest being final process, his failure to return the execution into Court does not bar his right to justify under it.

On report. An action of trespass for false imprisonment. The issue involved the validity of the process on which defendant, a deputy sheriff, arrested the plaintiff and of the defendant's return thereon. Judgment for the defendant. The case fully appears in the opinion.

John S. Williams,
Durgin & Villani, for plaintiff.
Edward P. Murray,
C. W. & H. M. Hayes, for defendant.

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

STURGIS, J. Action of trespass for false imprisonment reported upon the agreement of the parties that if the action is not maintainable judgment shall be for the defendant, but if maintainable the case is to be sent back for the determination of damages.

The evidence and stipulations reported show that on January 25, 1933, the defendant, a duly qualified deputy sheriff of Piscataquis County arrested and committed the plaintiff to jail on a capias execution issued from the Superior Court within and for the County of Penobscot. The deputy did not return the execution to the court from which it issued but delivered it with his return endorsed thereon to the sheriff as keeper of the jail.

The execution having been issued after poor debtor disclosure proceedings on an original execution, a copy of the certificate of the Disclosure Commissioner of the following tenor was attached thereto:

"STATE OF MAINE

PISCATAQUIS, ss. September 28, A.D. 1932.

I, HAROLD M. HAYES, Judge of Piscataquis Municipal Court, within and for said County, and qualified as such, acting as Disclosure Commissioner, do hereby certify that upon application of Abraham M. Rudman, Esquire, as attorney of the owner of the judgment on which the within execution was issued, the debtor therein named was duly and legally summoned to appear before me, at the Municipal Court Room, in Guilford in said County, on the twenty-eighth day of September A.D. 1932 at ten o'clock, in the forenoon to make, on oath, a full and true disclosure of all his business and property affairs.

THAT AT SAID TIME AND PLACE the said debtor L. B. Trafton failed to appear and submit himself to examination and to make disclosure in manner aforesaid; whereupon his default was recorded and I issued a capias, as provided in Section 38, Chapter 124 of the Revised Statutes, and annexed the same to this execution.

HAROLD M. HAYES
Judge of Piscataquis Municipal Court,
acting as Disclosure Commissioner" (seal)

On the back of the execution appeared the endorsement, "Mr. Officer—Collect 220.66 or commit. A. M. Rudman, Attorney."

The defendant in his pleadings justifies under the process. The plaintiff attacks the validity of the execution on the grounds that the direction to the officer endorsed on it by the attorney for the judgment creditor is uncertain and the Disclosure Commissioner in his certificate referred to the wrong section of the statute as authority for the debtor's default and the issuance of the capias. The plaintiff also denies the right of the officer to justify under the process which was not returned to the court from which it issued. These are the only challenges to his imprisonment pressed before this Court.

It is a well-settled rule of law that for reasons founded on public policy the law protects its officers in the performance of their

duties if there is no defect rendering the process void or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his process. He is not to exercise his judgment touching the validity of it in point of law. He may justify though in fact the warrant may have been issued without authority or if there be irregularities rendering it voidable but not void. Irregularities merely that are amendable do not vitiate it. "The officer stands upon defensible ground unless the process be absolutely void." *Elsemore* v. *Longfellow*, 76 Me., 128; *Rush* v. *Buckley*, 100 Me., 322, 61 A., 774; *Kalloch* v. *Newbert*, 105 Me., 23, 72 A., 736; *Faloon* v. *O'Connell*, 113 Me., 30, 92 A., 932.

The endorsement of the attorney for the judgment creditor on the back of the execution that the officer should collect or commit is no part of the process and uncertainty therein, if there be such, can not affect its validity. The cases cited on the brief in this attack on the process are not in point.

The reference of the Disclosure Commissioner in his certificate to "Section 38, Chapter 124 of the Revised Statutes" as the authority for the default be recorded against the plaintiff in the poor debtor proceedings and the capias issued thereon, as appears in the copy of the certificate attached to the execution on which the arrest was here made, was erroneous. The correct statutory reference would have been to Secton 39 of Chapter 124, which is directly applicable to disclosure proceedings where, as here, the debtor cited to disclose fails to appear and submit himself to examination, provision being therein made that the petitioner for disclosure in such a case may have a default recorded against the debtor "and then proceed as in the preceding section," viz., Section 38, which requires the disclosure commissioner, when the debtor fails to obtain the poor debtor's oath, to endorse a certificate of that fact upon the execution then in force and issue and annex thereto a capias, with the further provision that a copy of such certificate shall be endorsed on every subsequent execution issued on the same judgment or any judgment founded thereon. This adoption by reference of the rules of procedure of Section 38 into Section 39 of Chapter 124, R. S., makes them a part of it as if originally enacted therein. *Furbish* v. *C. Com.*, 93 Me., 117, 44 A., 364; *Collins* v. *Blake*, 79 Me., 218,

9 A., 358; *Endlich on Interpretation of Statute*, Sec. 492; Vol. 2, *Sutherland Statutory Construction*, 788. To have been strictly correct, the Disclosure Commissioner in his certificate should have referred to the adopting not the adopted statute as the authority under which he acted. It was unnecessary, however, to make the reference. The form of the certificate is not prescribed by statute. All that is required is a certificate of the facts. The erroneous reference to the statute was surplusage which can not vitiate the process.

The failure of the officer in the case at bar to return his execution into court does not bar his right to justify under the process. If he had acted under mesne process, a return into court would have been necessary. *Hefler* v. *Hunt*, 120 Me., 10, 112 A., 675; *Brock* v. *Stimson*, 108 Mass., 520. A return of final process as here, an execution running against the body in the nature of a *capias ad satisfaciendum*, however, is not required in order to permit the officer to justify under the process. It was so held at common law. *Chesley* v. *Barnes*, 10 East., 73; *Clark* v. *Foxcroft*, 6 Me., 296; *Ingersoll* v. *Sawyer*, 2 Pick. (Mass.), 276; *Fulton* v. *Wood*, 3 Harr. & M. (Md.), 99; 57 C. J., 910 and cases cited. The provisions of R. S., Chapter 96, Section 162, making executions returnable within three months, have not changed the rule. *Clark* v. *Foxcroft*, supra. It is held that statutory provisions which require sheriffs and constables to return writs of execution are designed for the benefit of the plaintiffs therein and are not available for defendants aggrieved by any omission. *Robinson* v. *Williams*, 80 Me., 267. The mandate of the process for a return does not, in our opinion, extend beyond the statute.

In accordance with the stipulations of the Report, judgment must be for the defendant. So ordered.

Judgment for the defendant.

ELMER W. FULTON

vs.

FRED W. MCBURNIE AND HAZEL M. MCBURNIE.

Aroostook. Opinion, August 24, 1935.

EQUITY. DEEDS. MORTGAGES. EVIDENCE.

The character of the transaction, whether it be a sale or a mortgage, is determined at its inception, and though the deed be absolute in form, the conveyance may in equity be shown to have been intended as security for a pre-existing debt or a contemporaneous loan.

Evidence in such case is not confined to a mere inspection of the written papers alone; but extraneous evidence is admissible to inform the Court of every material fact known to the parties when the deed and memorandum were executed. To insist on what was really a mortgage, as a sale, is in equity a fraud, which can not be successfully practised under the shelter of any written papers, however precise they may appear to be.

In the case at bar, the testimony of the defendant as well as the circumstances under which the deed was given clearly show that the transaction in question was a loan. Furthermore the defendant rendered to the plaintiff an account of a balance due the first items on which were for money loaned and interest thereon.

The real dispute seems to have been not so much as to whether this conveyance was in fact a mortgage but rather over the sum claimed to be due. That amount can be determined by the Court, and the payment of it made a condition precedent to a reconveyance.

A bill in equity seeking to have a deed to real estate declared a mortgage, and praying for the right to redeem on payment of the amount found to be due. From a decree dismissing the bill plaintiff appealed. Appeal sustained. Case remanded to the sitting Justice to determine the amount due from the plaintiff to the defendant, Fred W. McBurnie, and for a decree ordering a reconveyance of the property from the defendant, Hazel M. McBurnie, on the payment by the plaintiff of the sum due within such time as may be

fixed in such decree. The case fully appears in the opinion.

R. W. Shaw,
Herschel Shaw, for plaintiff.
Bernard Archibald,
W. R. Roix, for defendants.

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

THAXTER, J. The plaintiff, Elmer W. Fulton, has brought a bill in equity against the defendants, who are husband and wife, seeking to have a deed conveying certain real estate declared a mortgage, and asking that he be given the right to redeem the property concerned on payment of the amount found to be due and owing by him. The conveyance was made to the defendant, Fred W. McBurnie, and by him the property was transferred to his wife without, as the bill alleges, any valuable consideration being paid therefor. The sitting Justice found that the evidence was not of "the clear and convincing character that is requisite to constitute a deed an equitable mortgage," and accordingly dismissed the bill. The plaintiff has appealed.

The property in question was owned by the plaintiff and was mortgaged by him to the Federal Land Bank for $2,500, and subsequently he executed a second mortgage which was foreclosed by the holder, who conveyed his interest to the International Agricultural Corporation. A reconveyance of this equity to the plaintiff was arranged for, and the defendant, Fred W. McBurnie, supplied the money amounting to $1,800. The deed was taken in the name of the plaintiff, who immediately conveyed the property to McBurnie. Contemporaneously with the drafting of this deed, which was in fact signed on January 22, 1931, a so-called contract was framed, which, though dated January 20, 1931, was not in fact executed by the plaintiff till January 26th, when he gave the deed in question to McBurnie. This agreement is of the following tenor:

"January 20, 1931.

I, Elmer Fulton of Houlton, Maine, hereby agree to deed and convey to Fred McBurnie, of Bridgewater, Maine my

homestead farm situated in Bridgewater, Maine on the main highway, otherwise known as the Fulton Farm, in consideration of One dollar ($1.00) and other valuable considerations, paid by said McBurnie, and the receipt of which is hereby acknowledged.

I also agree to purchase said farm from said McBurnie on or before November 1, 1931 at a price to be agreed upon.

I also agree to rent said farm from this date to November 1, 1931, for the sum of Seven Hundred Dollars ($700.00), payable in advance. Said sum to be deducted from the purchase price should I purchase said farm from said McBurnie on or before November 1, 1931.

Signed, sealed and delivered in the presence of

..... (Signed) Elmer W. Fulton"

The plaintiff claims that he asked McBurnie for a loan to recover back from the International Agricultural Corporation this property which had formerly been his, that the advance of $1,800 was made for this purpose and the deed given to McBurnie as security for the advance. McBurnie stated that there never was any talk of a loan prior to the conveyance, and that the farm was to be his on the payment of $1,800. That a reconveyance to the plaintiff was contemplated seems to be apparent, but McBurnie contends that the terms under which this should be made were to be fixed by him.

We have no quarrel with the principles of law which, counsel for the defendants asserts, are applicable to this case.

The character of the transaction, whether it be a sale or a mortgage, is determined at its inception, and though the deed be absolute in form, the conveyance may in equity be shown to have been intended as security for a pre-existing debt or a contemporaneous loan. *Reed* v. *Reed,* 75 Me., 264. "It is therefore," said the Court, page 270, supra, "a question of fact, whether, on looking through the forms in which the parties have seen fit to put the result of their negotiations, the real transaction was in fact a security or sale. Hence all the facts and circumstances of the transaction, whatever form the written instruments have been made to assume, are admissible, each case depending upon its own. The evi-

dence, therefore, is not confined to a mere inspection of the written papers alone; but 'extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised under the shelter of any written papers, however precise they may appear to be.' *Russell* v. *Southard,* 12 How. 139, 147, and cases cited on the latter page."

As we view all the circumstances surrounding this transaction and consider the facts, we can not escape the conclusion that the deed given by the plaintiff in this instance was intended by the parties as security for a loan of $1,800 advanced by McBurnie to permit the plaintiff to recover a piece of property which had once been his.

There may well be some ambiguity in the accompanying agreement signed by the plaintiff. Though insufficient in itself to indicate that there was a right of defeasance, it does show something other than an absolute sale. It tends to corroborate the plaintiff's testimony that there was an understanding about a reconveyance and that the deed was in fact given as security for money advanced.

But there is evidence in the case of much more decisive character. McBurnie at a number of points in his testimony refers to the transaction as a loan. In response to a question by the Court, he states that he figured interest at ten per cent. Why interest if there was no loan? At another point he testifies as follows:

"Q. Have you figured up since this suit was brought what you claim Mr. Fulton owes you?

A. Yes sir, we have got the payments all down.

Q. How much does he owe you?

A. Something over thirty-five hundred dollars actual money paid out, beside the improvements."

Why, it may be asked, should the plaintiff owe him for improvements if the property did not in fact belong to the plaintiff?

Furthermore, for what reason, when this property was bought from the International Agricultural Corporation, should the deed have been taken in the name of the plaintiff but to show that the subsequent deed from the plaintiff was in effect a mortgage?

Perhaps most significant of all is that McBurnie rendered an account to the plaintiff showing the balance due, on the payment of which he would make a reconveyance. The first item on this account significantly enough shows cash $1,800 and interest at 10%, $140. Then follow items for taxes and insurance paid by McBurnie.

The real dispute between these parties seems to have been not so much as to whether this conveyance was in fact a mortgage but rather over the sum claimed to be due. That amount can be determined by the Court, and the payment of it made a condition precedent to a reconveyance.

The claim that Hazel M. McBurnie, the wife of the equitable mortgagee, was in fact a bona fide purchaser of this property rests, it would seem, on a very flimsy foundation.

The appeal must be sustained and the case remanded to the sitting Justice to determine the amount due from the plaintiff to the defendant, Fred W. McBurnie, and for a decree ordering a reconveyance of the property from the defendant, Hazel M. McBurnie, on the payment by the plaintiff of the sum due within such time as may be fixed in such decree.

So ordered.

WENDELL R. BUBAR *vs.* VINCENT P. FISHER.

GEORGE S. FOSS, PRO AMI *vs.* VINCENT P. FISHER.

Aroostook. Opinion, August 26, 1935.

MOTOR VEHICLES. NEGLIGENCE.

In order to establish contributory negligence on the part of a passenger, the defendant driver having had liquor to drink, it is necessary not only that the driver of the car should, to the knowledge of the passenger have been under the influence of liquor, but that this condition should have been a contributing cause of the accident.

In the case at bar, that the defendant had had liquor to drink was established, but that his being under the influence of it was a contributing cause of the acci-

dent was not altogether clear, and much less so that the plaintiff knew his condition. The question of their contributory negligence was for the jury.

On exceptions and general motions for new trial by defendant. Two actions on the case tried together to recover damages for injuries received by the plaintiffs, guest passengers in an automobile driven by the defendant. Trial was had at the February Term, 1935, of the Superior Court for the County of Aroostook. The jury rendered a verdict for the plaintiff Bubar in the sum of $910.00, and for the plaintiff Foss in the sum of $322.00. To the refusal of the presiding Justice to grant certain requested instructions, defendant seasonably excepted, and after the jury verdict filed general motions for new trial in each case. Motions overruled. Exceptions overruled. The cases fully appear in the opinion.

Herschel Shaw, for plaintiffs.

Granville C. Gray,

Ralph K. Wood, for defendant.

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

THAXTER, J. The plaintiffs in these two cases, which were tried together, were passengers in an automobile driven by the defendant, Vincent P. Fisher. They were injured, when the car, in making a right angle turn from one street to another, went off the road, and plunged to the bed of a stream forty feet below. In each case a verdict was found for the plaintiff, and each is now before us on the defendant's general motion for a new trial and on an exception to the refusal to give a requested instruction.

There is ample justification for the finding of the jury that the defendant was negligent. The controversy is as to the contributory negligence of the plaintiffs, which, according to the defendant's contention, is indicated by their accepting an invitation to ride with him, when he was in an intoxicated condition. That the defendant had had liquor to drink seems to be established, but that his being under the influence of it was a contributing cause of the accident is not altogether clear, and much less so that the plaintiffs knew his condition. He states that he could drive "all right," and

that the accident happened because he got into some gravel and lost control of the car. The plaintiffs claim that they saw no indication that he was under the influence of liquor. Dr. Blossom, who treated him after the accident, testifies that he had been drinking heavily, and a police officer says that he smelled liquor on his breath. The evidence does not show that either of the plaintiffs was under the influence of liquor. Under such circumstances it seems clear that the question of the plaintiffs' contributory negligence was for the jury.

Neither can we hold that the damages are excessive. The plaintiff, Bubar, suffered severe lacerations to his head, and for a time was in a serious condition from shock caused by loss of blood and immersion in the water. He had some injury to his back, diagonsed as a sacro-iliac strain which has incapacitated him to some extent. He was awarded $910. The amount does not seem unreasonable, nor does the sum of $322 given to the plaintiff, Foss, who had bills for physicians, hospitalization, and nursing, and was incapacitated for work for some little time.

The defendant in each case requested the following instruction:

> "If you find that this plaintiff accompanied this defendant on the night of the accident and drank with the defendant or knew that the defendant was drinking to the extent that he was under the influence of liquor and then voluntarily reentered the car, or continued therein, and went on with the defendant, you must as a matter of law find that the plaintiff was negligent and that he cannot recover in this action."

This instruction would have required the jury to have found for the defendant, if the plaintiff had drunk with the defendant on the night of the accident regardless of the amount of liquor taken or the effect of it on the defendant. Furthermore, it is necessary in order to establish contributory negligence in a case such as this, not only that the driver of the car should, to the knowledge of the passenger, have been under the influence of liquor, but that this condition should have been a contributing cause of the accident. *Richards* v. *Neault*, 126 Me., 17, 135 A., 524. The instruction was properly refused.

Motions overruled.
Exceptions overruled.

FRED W. BOWLEY, ADMR. OF THE ESTATE OF RALPH W. BOWLEY,

vs.

AETNA LIFE INSURANCE COMPANY.

York. Opinion, August 26, 1935.

EQUITY. MOTOR VEHICLES. R. S., 1930, CHAP. 60, SECS. 177-178.

In a bill in equity under the provisions of R. S. 1930, *Chap.* 60, *Secs.* 177-178, *to enforce against an insurance company a judgment recovered by the plaintiff against the alleged insured, and wherein the sole question was whether the owner of the truck was in fact insured; and this in turn depended on whether there was a binding oral agreement to transfer the insurance coverage from a truck which had been sold, to a new truck purchased at the same time.*

HELD

The plaintiff's contention that the truck owner called the office of the agent of the defendant company on September 19, 1931, *and requested that the insurance be changed to cover the new truck is refuted by evidence which is decisive.*

First: A letter of the truck owner dated October 3, 1931, *requested the change, and there is no reference in this letter to any prior oral contract or to the fact that the insurance policy was to be made out as of a prior date.*

Second: The truck owner without any compulsion signed a statement on January 25, 1932, *shortly after the insurance company had first learned of the accident, in which he stated that he did not have insurance coverage changed to cover the new truck because he didn't suppose it was necessary.*

These statements of the truck owner support the claim of the insurance company that no request to change the insurance was made until after the date of the accident.

On appeal by defendant. A bill in equity brought under the provisions of R. S. 1930, Chap. 60, Secs. 177-178, to enforce a judgment against an insurance company. A judgment against the alleged insured for $5,136.60 had been recovered by the plaintiff. The issue involved the question of coverage. The sitting Justice

sustained the bill and ordered the insurance company to pay the amount of the judgment. Appeal was taken. Appeal sustained. Case remanded to sitting Justice for a decree dismissing the bill. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

William B. Mahoney,

Theodore Gonya, for defendant.

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

THAXTER, J. The plaintiff is the administrator of the estate of Ralph W. Bowley who, while on the highway in an automobile on September 30, 1931, was killed in a collision with a truck owned by Lawrence Smith and driven by an employee of the owner. Suit was instituted for damages for the death by the administrator against Smith based on the negligence of the operator of the truck, and a judgment for $5,136.60 was recovered. The plaintiff now has brought this bill in equity, under the provisions of Rev. Stat. 1930, Chap. 60, Secs. 177-178, to enforce this judgment against the insurance company, which he alleges insured Smith against loss by reason of his liability for such accident. The sole qestion in issue is whether the owner of the truck was in fact insured. The sitting Justice sustained the bill and ordered the insurance company to pay the amount of the judgment. From this decree it has appealed.

In May, 1931, Smith was the owner of a 1931 Chevrolet one and a half ton truck. This he insured with the defendant company through Boothby and Bartlett of Waterville, the agents of the company. On September 18, 1931, Smith traded this truck for a new one of the same model, which of course had different serial and engine numbers. The policy of insurance, which was admitted in evidence, contains a rider transferring the coverage from the first truck to the new one. This rider according to its terms became effective October 3, 1931, four days after the accident.

The plaintiff's contention is that Smith called the office of Boothby and Bartlett on the telephone on the morning of September 19th, and told them that he had traded the truck covered by the policy, and asked them to bind the new one, and that they agreed

to do so and told him to send in the engine and serial numbers of the new truck as soon as he found out what they were. Smith says that this call was made from a pay station in Augusta located in a fruit store, and that he talked with some man in the office of Boothby and Bartlett.

Walter S. Austin testifies that he handled such matters in the office of the agents, that no order for a transfer of coverage was reported to him, and that the transfer was in fact made because of a request in a letter from Smith dated October 3, 1931, of the following tenor:

"(Letterhead Utilities Pole Supply Company, Carrabassett, Me.) Oct. 3rd, 1931.

RECEIVED
Oct. 3 1931
Boothby & Bartlett Co.
Waterville, Maine

Boothby & Bartlett,
Waterville, Maine.
Gentlemen:—

Will you be so kind as to change the engine number and serial number on Policy No. J. A. 3496765 to cover truck of the same year, model number etc. having an engine number of T2681427 and Serial No. 12LT7520. Policy is enclosed.

Yours very truly,
LAWRENCE L. SMITH"

The defendant objects to the admission in evidence of the conversation which Smith claims to have had with the office of Boothby and Bartlett on the ground that its effect is to vary the terms of a written contract. There can be no doubt that an oral contract to bind a risk can be made. No responsible insurance representative would contend otherwise. If the written instrument in this case did not conform to an oral agreement entered into between the parties, the assured was not without a remedy. Just what the form of this relief should be, whether by reformation of the contract or the introduction in this proceeding of parol evidence to show its terms, it is unnecessary to decide, for we are satisfied that in this instance the plaintiff has failed to sustain the burden of showing that there was any oral agreement at all to transfer this coverage.

The main evidence to support the bill is the testimony of Smith himself. His method of handling this matter, which was certainly of

some importance, was to say the least casual. Those in the agent's office, to whom such a request would be naturally referred, did not hear of it. But discarding such considerations, facts which are undisputed refute the claim.

It is improbable that, if such a contract were outstanding, the assured would not have made some reference to it in his letter of October 3, 1931. That would lead any impartial reader to the conclusion that the transfer was to be made as of the date on which it was written. It certainly was not, according to its terms, to convey information to be embodied in a contract already made. It was itself the request for the transfer of the insurance.

Neither is it reasonable to suppose that the assured would write to the insurance company, four days after an accident resulting in death had taken place, about a policy which he now claims covered liability for that accident, and make no mention of the occurrence at all. He says that his reason for not doing so was because he did not feel that his driver was in any way to blame. However honest he may have been in that belief, he must have realized at least the possibility of a claim or of litigation which would result in expense, against which he would have been protected by the policy, if prompt notification were given the insurer.

Most important of all, however, is a statement made by the assured January 25, 1932. This was executed in the office of Charles J. McGraw, the attorney in Maine for the defendant. Mr. Smith had come to the office to discuss the suit which was about to be brought against him. Mr. McGraw expressed a doubt whether his insurance policy covered liability for this accident, and said that the insurance company could not proceed with any investigation of it, unless Smith would sign an agreement to the effect that such work by the company should not be construed as a waiver of its right to disclaim liability under the policy. Smith executed such paper. At the same time Mr. McGraw, in the presence of Smith, dictated a recital of facts which had been given to him by Smith relative to the accident and the insurance coverage. This statement Smith signed. There is not a suggestion that it was not a fair statement, or that any advantage whatever was taken of the assured at the time he executed it. He says that he suggested no correction in it. The following portion of this document is certainly significant

in the light of Smith's claim at the trial that he requested the transfer of his insurance coverage on September 19, 1931:

> "I have liability policy No. JA—3496765, in the Aetna Companies, covering 1931 Chevrolet 1½ ton truck, Serial No. 12LT5744, Motor No. T24943447. September 18th, 1931, I exchanged this truck for another 1931 1½ ton truck, exactly the same model. Inasmuch as the new truck was almost identical with the old one I did not understand that I was supposed to notify the insurance company and request them to change the motor and serial numbers in the policy. Bernard Dunham operating this truck was involved in a fatal accident near Gorham, Maine, on September 30, 1931. I saw the account of the fatal accident in the Press Herald the next morning and I immediately went to the telephone office for information as it was first believed that it was a telephone truck involved in the fatal accident. While making my own personal investigation of this accident the question of insurance came up and someone told me that I should have my insurance changed to cover the new truck purchased September 18th, 1931, and involved in this accident of September 30th, 1931, and accordingly, on October 3rd, 1931, I wrote in requesting the change."

Not only does he herein state in substance that prior to October 3rd, 1931, four days after the fatal accident, he had not had his insurance changed to cover his new truck, but he gives the reason why he had not done so. This deliberate narration of fact is a complete refutation by the assured himself of the only evidence in the case which supports the plaintiff's claim. Its effect is compelling, and explains why there was no knowledge in the office of Boothby and Bartlett of the telephone call of September 19th.

Appeal sustained.
Case remanded to sitting Justice for a decree dismissing the bill.

BERNICE COLBY, PRO AMI, SHIRLEY ALLEY, CHRISTINE COLBY

vs.

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK.

Kennebec. Opinion, August 26, 1935.

EQUITY. R. S. 1930, CHAP. 60, SECS. 177-178. PLEADING AND PRACTICE. WAIVER. ESTOPPEL. EVIDENCE.

In actions brought under Section 178 *of Chapter* 60, *R. S.* 1930, *to reach and apply insurance money in satisfaction of judgments obtained, where the plaintiff alleged permission to operate the automobile and the defendant denied the same, the plaintiff under equity practice in this State need file only a formal replication and need not set up therein facts claimed to show estoppel or waiver upon the part of the defendant.*

At common law estoppel in pais need not be pleaded.

Evidence of facts by the plaintiff tending to show estoppel or waiver is admissible, although there is no allegation of estoppel or waiver in the replication.

Under such circumstances, defendant if surprised by such evidence, should ask for a continuance of the trial of the case.

Where the facts show an estoppel to deny or waiver of proof of operation by permission, so far as permission is concerned there is sufficient proof of coverage.

That which operates as a waiver or estoppel in favor of the assured also operates in favor of the injured person.

An insurance company by assuming and conducting the defense in the original actions, both for the owner of the car, the assured, and the driver, with knowledge of all the facts and without reservation, can not defend against liability to pay the judgments obtained in the actions so defended.

In the case at bar, the insurance company's attorney made a statement at the trial of the original actions that "as far as the coverage was concerned it was all right," such statement is an admission either that the insurance company knew that there was permission or, if not, that it raised no question in regard to it.

The facts of the assumption of the defense by the insurance company (there being no right to assume a defense unless there was coverage), justifies the finding as an inference from facts proven that the insurance company reserved no right to defend for lack of coverage due to operation without permission.

On appeal and exceptions by defendant from findings of law and to final decrees sustaining plaintiffs' bill of complaint brought under R. S., Chap. 60, Sec. 178, to reach and apply to the satisfaction of their judgments against one John Graham, the insurance money provided by an automobile liability policy issued by the defendant to one Gladys Graham. The sitting Justice ruled as a matter of law, that the defendant had waived its right or was estopped from defending these suits and sustained the bills. Appeal and exceptions were thereupon taken by the defendant. Appeals dismissed. The cases fully appear in the opinion.

Locke, Campbell & Reid, for plaintiffs.

Ralph W. Farris,

Walter M. Sanborn, for defendant.

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

HUDSON, J. The plaintiffs seek to reach and apply "insurance money" in satisfaction of judgments obtained by them severally against John Graham, minor son of Gladys Urner Graham, the "named assured" in an automobile liability policy issued by the defendant.

On July 27, 1934, they were injured in an accident while the insured automobile was being driven by the son. The policy provided that:

> "The unqualified word 'Assured' includes not only the named Assured but any other person using and having a legal right to use any such automobile, . . . provided that such use is with the permission of the Named Assured, ..."

Section 178 of Chapter 60, R. S. 1930, provides that:

> "Whenever any person, . . . recovers a final judgment against any other person, firm, or corporation, for any loss or damage specified in the preceding section, the judgment creditor shall be entitled to have the insurance money applied to

the satisfaction of the judgment by bringing a bill in equity, in his own name, against the insuring company to reach and apply said insurance money; provided that when the right of action accrued the judgment debtor was insured against said liability, and that before the recovery of said judgment the insuring company had had notice of such accident, injury, or damage; . . . ."

The defendant was seasonably given the required notice and defended John. It now denies liability to pay these judgments. These actions were heard by a single Justice, who found that the "plaintiffs failed to prove such permission" but that the "defendant did assume the defense of the cases against John Graham in the Court below, without any reservation as to coverage and with knowledge of the facts; also that no notice was given plaintiffs at the time of the trial that such a defense was to be made" and held "as a matter of law that by so doing it is now estopped from setting up lack of coverage at the present time or has waived its right to make such defense . . . ."

From the decrees based on said findings of fact and law the defendant appealed.

"As a general rule, one who suffers injury which comes within the provisions of a liability insurance policy, is not in privity of contract with insurer, and can not reach the proceeds of the policy for the payment of his claim by an action directly against insurer, unless such recovery is permitted by statute, or by the express provisions of the policy." 36 C. J., Sec. 129, pages 1129 and 1130.

The plaintiffs base their rights both upon statute and this provision in the policy:

"If any person . . . shall obtain final judgment against the assured because of any such injuries. . . . if such judgment is not satisfied within thirty days after it is rendered, then such person or his legal representatives may proceed against the company to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto."

Was John's use of the automobile (admittedly the one described in the policy) covered? Yes, if "with the permission of the named assured," his mother.

The Justice below found that in fact he did not have such permission but held that this defendant, because of its conduct, was not in a position to set up this lack of coverage.

The decision, then, depends upon the application of the law of estoppel or waiver, or election, to the facts herein. Counsel have stated the issues to be:

1. Were plaintiffs required to plead estoppel or waiver?
2. Did plaintiffs fail to prove judgment debtor was insured against liability by defendant?
3. Was the finding that defendant was estopped or had waived defense of non-coverage justified in fact and in law?

These we will consider seriatim.

1. The plaintiffs in their bills, based either on this remedial statute or on the promise in the policy, alleged all matter necessary of proof. So alleged were the recovery of the final judgments, their non-payment; the negligent operation of the automobile covered by the policy, its ownership in the assured, and its use with her consent; and that "when the right of action represented by the aforesaid judgment accrued, the judgment debtor," John, "and the automobile, which he was operating and which caused the damage and injury . . . were insured against the liability upon which said judgment is based," and finally, that "before the recovery of said judgment said defendant insuring company had had notice of such accident, injury and damage." The defendant, answering, denied the consent and alleged that it never "issued a policy insuring said judgment debtor against liability." Then the plaintiffs, in full compliance with our equity practice, had only to and did file formal replications.

> ". . . Estoppels are of two kinds, viz.: those technically such, as by deed, etc., which must be pleaded, to make them absolutely such, and those in pais, which, though not pleaded, may be given in evidence, so as to operate as effectually as those technically such." *Rangely* v. *Spring*, 28 Me., 127, 143.

At common law an estoppel in pais need not be pleaded. 21 C. J., 1241, Sec. 248.

In *Miller* v. *Union Indemnity Company*, 204 N. Y. S., 730, in which in defense it was claimed there was non-coverage, not because of lack of permission but of cooperation, it was held that the plaintiff in framing his complaint need not anticipate that the defendant would claim non-cooperation as a defense and so plead facts showing the waiver of such a defense. The defense of non-cooperation is an affirmative one on which the insurer carries the burden of proof. *United States Fidelity and Guaranty Company* v. *Remond*, 129 So., 15 (Okla.); *Francis* v. *London Guarantee & Accident Company*, 138 Atl. 780 (Vt.); *Cowell* v. *Employers' Indemnity Corporation*, 34 S. W. (2d), 705 (Mo.).

When these plaintiffs drew their bills alleging permission, they were not chargeable with knowledge that the defendant would deny it and thus coverage. They were not bound to anticipate that such a defense would be made. Their allegations, conforming to the provisions of the statute and the terms of the policy, stated cases sufficient for equitable relief. The defendant, however, in denying permission and thus putting it in issue, gave the right to the plaintiffs to prove that the defendant was estopped to deny permission. To such answers the only duty of the plaintiffs in pleading was to file replications, in accordance with Equity Rule XVII, which provides:

> "The replication shall state in substance that the allegations in the bill are true and that those in the answer are not true."

This they did.

The following language from *Mabee* v. *Continental Casualty Company*, 219 Pac., 598, 602, 37 Idaho 667, is pertinent:

> "It is finally contended that the evidence of waiver was not admissible in the absence of an allegation of waiver in the plaintiff's complaint. Aside from the fact that it was not so much a waiver as an estoppel upon which respondent relied, it was the appellant who first alleged this provision of the policy

and its breach as an affirmative defense. No replication thereto was required under our system of pleading. The tender of this issue by the affirmative answer joined the issue, and the respondent, under the issue so joined, was entitled to avail herself of all defenses which she could command, whether they consisted of matters of mere denial or admitted the facts as pleaded and sought to avoid the same by reason of waiver, estoppel or other legal reason."

We see no distinction in a situation where there is no provision for a replication and one in which the replication, expressly provided for by statute, is made.

It is argued by the defense that the introduction of this testimony as to estoppel prejudiced it as surprise testimony; if so, its remedy was to ask for a continuance. Had the facts, however, claimed to constitute the estoppel, been alleged, namely, that the defendant assumed the defense in the original actions without reservations, it would have been apprised of nothing it did not already know.

2. It was incumbent upon the plaintiffs to prove that the judgment debtor was insured against liability by this defendant, unless by its conduct it had excused the necessity of such proof. The defense contends that inasmuch as the Justice below found as a fact that there was no permission of operation of this car by John, that that in and of itself was a finding of non-coverage and hence recovery could not be had either under the statute or by the terms of the policy. This contention, however, it seems to us, is based on a mistaken conception of the finding of the Justice and is only a partial statement of it. He found not only that the plaintiffs failed to prove the permission but that the defendant assumed the defense of these actions without any reservation as to coverage and with knowledge of the facts and that no notice was given the plaintiffs at the time of the trial that such a defense was to be made. We believe that he held correctly that on these facts the defendant was estopped from setting up lack of coverage which is an affirmative defense. Under these circumstances, the burden of proof of non-coverage was on the defendant. *Francis* v. *London Guarantee and Accident Co., Ltd.*, 138 A., 780; *U. S. Fidelity and Guaranty Com-*

pany v. *Remond*, 129 So., 15 (Ala.); *Cowell* v. *Employers' Indemnity Corp.*, 34 S. W. (2d), 705, 72 A. L. R., 1453 (IV).

The plaintiffs might safely assume that the defendant would not rely upon requirement of proof, which it had waived or which it was estopped to deny. *German Insurance Co.* v. *Shader*, 93 N. W., 972 (Neb.); *Levy* v. *Peabody Ins. Co.*, 27 Am. Rep., 598 (W. Va.). If the facts warranted the finding that there was an estoppel or waiver, there was sufficient proof as a matter of law that John Graham was insured against liability. The plaintiffs had John's rights and any estoppel or waiver inuring for his benefit, obtained for them. *Daly* v. *Employers' Liability Assurance Corp., Ltd., et al.*, 269 Mass., 1, 4, 168 N. E., 111.

> "... That which operates as a waiver or estoppel in favor of the assured, supposing an action upon the policy had been brought by him, also operates as a waiver or estoppel in favor of the injured person." 72 A. L. R., 1506, and cases cited therein.

3. The record discloses facts which warranted the finding below that there was an estoppel or waiver. The defendant company assumed the defense of the original actions and conducted it throughout. Counsel for the plaintiffs testified that at a conference in Chambers before the original trial the attorney for this defendant stated that "as far as the coverage was concerned it was all right." No refutation of this testimony was offered. That statement carried with it an admission by implication either that the defendant knew that there was permission or, if not, that it raised no question in regard to it. It might well have reasoned that permission being in dispute, it rather acknowledge it and defend than forego its right to assume and conduct the defense. With no consistency whatever, could the defendant say, "John is covered by the policy and so we will defend," then defend, and subsequently say, "having defended, we will not now pay the judgments because John was not covered." It is not claimed that the defendant in assuming the defense reserved or attempted to reserve any right to defend against payment of these judgments. Defendant's counsel contends, however, that there was no direct testimony in the case that warranted the finding by the Justice below that there was no such

reservation. But the fact of the assumption of the defense, (and there was no right to assume the defense unless there was coverage) justified the finding as an inference from facts proven that there was no reservation.

". . . where as insurance company takes control of the proceedings in an action brought against the assured, it is thereby estopped to say that the liability claimed is not within the terms of the contract." *Lunt* v. *Aetna Life Ins. Co. of Hartford*, 261 Mass., 469, 472, 473, 159 N. E., 461; *Daly* v. *Employers' Liability Ins. Corp., Ltd.*, supra.

Defending without reservation was entirely inconsistent with non-coverage.

"When confronted with this situation, assuming that the alleged defense was valid, the defendant was put to an election. It could stand on its defense and refuse to go on, or it could abandon such defense and conduct the insured's side of the action. It could not do both. The choice of the latter course was inconsistent with the maintenance of the claim of no liability." *Miller* v. *Union Indemnity Company*, supra, on page 732.

"When an insurance company or its representative is notified of loss occurring under an indemnity policy, it becomes its duty immediately to investigate all the facts in connection with the supposed loss as well as any possible defense on the policy. It can not play fast and loose, taking a chance in the hope of winning, and, if the results are adverse, taking advantage of a defect in the policy. The insured loses substantial rights when he surrenders, as he must, to the insurance carrier the conduct of the case. . . . The estoppel to assert the breach of warranty as to title is no higher in right than an estoppel generally to deny that the claim came under the policy. In effect, both are of equal merit. With a little diligence and within a brief time, the carrier could have procured the exact knowledge on which it now relies, and in most cases may similarly prepare a defense. Here an inquiry from public officials,

at the State Capitol, would have revealed plaintiff's exact relation with regard to ownership. With these facts before it, had they been deemed sufficient, it could have declined to defend the case, resting its right on the supposed breach of warranty; in deciding what course it should pursue, it is guided as any person confronted by similar circumstances; but, once having made its decision, the rights of others in relation thereto can not be prejudiced." *Malley* v. *American Indemnity Corporation*, 146 A., 571, 573 (Penna.).

Again, in *Francis* v. *London Guarantee and Accident Company, Ltd.*, 138 A., 780, 781, it is stated:

"It has come to be well established in the law of insurance that forfeitures of policy contracts are not favored and that to avert the same courts are always prompt to lay hold of any circumstance that indicates an election to waive a forfeiture already incurred. So it is that an insurer who, with full knowledge, elects not to take advantage of a forfeiture, is thereby bound to treat the contract as if no cause of forfeiture had occurred. . . . It deliberately took the chance of a trial, and it was only after a verdict was rendered adverse to its interest that it made any claim that it was released from liability. . . . This action was so inconsistent with a purpose to assert the forfeiture and so convincing of an intent to waive it that it must be held to amount to a waiver as matter of law."

In *Horn* v. *Commonwealth Casualty Co.*, 147 A., 483 (N. J.), the Court stated:

"The defendant by its policy covered the car which injured the plaintiff. It defended the suit growing out of the accident over a period of years. It is now too late for it to say that there is no proof of the permission by the named assured, or some member of her household, for the operator of the car on the day of the accident to use the same. The defendant company by its very act has solemnly and in a court of law admitted the point. Its conduct is proof of the fact and the trial court could not have found otherwise."

Even where the insurer's attorney stated, "Although there is no obligation upon us to do so, we are appearing for you in this case," it was held that an assumption of the defense constituted a waiver or estoppel. *Peterson* v. *Maloney, et al.*, 232 N. W., 790 (Minn.). Also see *Automobile Underwriter's Ins. Co.* v. *Murrah*, 40 S. W. (2d), 233; *Meyers* v. *Continental Casualty Co.*, 12 Fed. (2d), 52; *Constitutional Indemnity Co.* v. *Beckham, et al.*, 289 Pac., 776 (Okla.); *Royle Mining Co.* v. *Fidelity and Casualty Company of New York*, 103 S. W., 1098; *Tozer* v. *Ocean Accident and Guarantee Corp. of London, England, Ltd.*, 103 N. W., 508 (Minn.); *Fairbanks Canning Co.* v. *London Guaranty and Accident Company*, 133 S. W., 664 (Mo.).

Counsel for the defendant objected that there could be no estoppel because it did not appear that the defendant's conduct had changed the position of the plaintiffs. As to this, we quote this language in the last cited case, on page 667:

> "Who can say what plaintiff might have done in its own behalf had it not been ousted from control and direction of the defense. . . . If a man is to bear the burden of the result of a defense to an action, it is his privilege to have his own personality appear in its course. He is entitled to have the results measured up to him and not to some other. . . . The loss of the right to control and manage one's own case is itself a prejudice. . . . One must be presumed to have been prejudiced by such conduct, and need not be put to the proof that it could have achieved better results had there been no interference." Also *Humes Const. Co.* v. *Philadelphia Casualty Co.*, 79 A., 1 (R. I.); *Malley* v. *American Indemnity Corp.*, supra.

A study of the cases above cited and others reveals that the great weight of authority holds that an insurance company by assuming and conducting the defense of the main action, both for the owner of the car and the driver, with knowledge of all the facts and without reservation, can not defend against liability to pay the judgment obtained in the action so defended.

> "The liability is variously referred to the ground of waiver, or estoppel, or waiver in the nature of estoppel, or a contem-

poraneous construction of the contract, or an election by the insurer, or an estoppel by election—all of which terms are at times used. Courts have approached the question from different angles, have used different phraseology, and have criticized that of others, but have reached the same result whatever they named their route, and, although we appreciate the advantage of correct distinctions, especially in waiver and estoppel, as noted in *Vance on Insurance* (2d Ed.), p. 457 et seq., the thing itself which fixes the serious rights of the parties is more important than its name." *Oehme* v. *Johnson, et al.*, 231 N. Y., 817 (Minn.).

We perceive no error in findings of fact or law in the decrees appealed from. The entry must be,

Appeals dismissed.

ALFRED J. SWEET, INC., APPELLANT

vs.

CITY OF AUBURN.

Androscoggin. Opinion, August 29, 1935.

TAXATION. ASSESSORS. WORDS AND PHRASES.

Every property owner must bear his just share of the public expense. A remedy does not lie in the courts merely because that burden is too heavy. It is only when the owner bears a disproportionate share of the load that he has a just claim for judicial redress. If, however, he shows that his property is assessed substantially in excess of its true value, a presumption arises of inequality and he has made out a prima facie case for relief.

The Constitution of Maine provides, Art. IX, Sec. 8, that "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." The phrase "just value" is the equivalent of "value" or "market value."

In appraisal for tax purposes due consideration must be given to all the uses to which such property may be put by an owner. Its value is measured by the highest price that a normal purchaser, not under peculiar compulsion, will pay for it. It is what it will bring at a fair public sale, when one party wishes to sell and another to buy.

If, during a time of crisis, it is impossible to determine the true worth of real estate by reference to the price which it will bring in the market, resort may be had to other factors such as original cost less depreciation, to reproduction cost with an allowance for depreciation, to the purchase price, if not sold under stress or under unusual conditions, and to its capacity to earn money for its owner. No one of these elements is controlling, but each has its place in estimating value for purposes of taxation.

The burden is on the petitioner to show that the valuation is unjust, and not on the assessors to establish that their figures are correct. The presumption is that the assessment is valid.

It is not sufficient to show merely that the assessors have made an error, even though such mistake may result in a lack of uniformity. It is solely where there is evident a systematic purpose on the part of a taxing board to cast a disproportionate share of the public burden on one taxpayer, or on one class of taxpayers, that the Court will intervene.

In the case at bar, while the values placed on this property at first glance seemed high, the Court holds the petitioner has not sustained the burden of proving, as set forth in its petition, that the real estate was appraised in excess of its just value.

Likewise the Court holds that the petitioner has not established its second claim that the valuation of its property was fixed unequally and on a greater percentage of the true value than the rate at which other property subject to like taxation was assessed. The petitioner can not establish its case on this point merely by showing inconsistencies in the testimony of Mr. Ford, the city manager, or confusion in the method by which he arrived at his estimate of value. He was not one of the assessors, and the chairman of the board testified that, though they often relied on his advice and accepted his computations, they only did so when they considered them fair.

On report. An appeal from a decision of the tax assessors of the City of Auburn refusing to grant an abatement to the petitioner on account of taxes assessed for the year 1933. Appeal dismissed. The case fully appears in the opinion.

Skelton & Mahon, for plaintiff.

Donald W. Webber, for defendant.

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

THAXTER, J. This case is before us on report from the Superior Court. It is an appeal to that court, authorized by R. S. 1930, Chap. 13, Secs. 76, 77, from a decision of the tax assessors of the City of Auburn refusing to grant an abatement to the petitioner on account of taxes assessed for the year 1933.

The petitioner on the date of the assessment was the owner of a piece of land lying between Minot Ave. and South Goff Street in Auburn. This measured 773 feet on Minot Ave. and 825 feet on South Goff Street. It varied in width from 159 feet at its southerly end to 225 feet at its northerly end, and contained 151,112 square feet. On this land was a large three-story brick building which had been built for a shoe factory and used as such for approximately twenty years, a wooden storehouse, two tenement houses, and a stable. This real estate, the valuation of which is in controversy, was assessed for the year 1933 at $191,000. The petitioner complains only as to the assessment on the land of $60,700, and on the factory building of $120,000.

In December, 1932, the petitioner purchased this property at public sale from the receiver of Alfred J. Sweet Co., together with certain equipment and materials worth from $10,000 to $15,000, paying for the whole the sum of $100,000. Alfred J. Sweet Co. had in turn in 1927 bought the property and the business from the original owner, Alfred J. Sweet, Inc., which received therefor 1200 shares of the common stock of the purchasing corporation and $1,320,000 in preferred stock. To the time of this purchase the business had been very profitable.

The original building was constructed in 1908; a second section was added in 1912, and in 1914 more land was bought and a third section was built. The total net book value of land and buildings December 1, 1916, was $184,646.95. The factory was well built, in fact much better than the average shoe factory, and undoubtedly would not be duplicated today in so costly a form, assuming that there were a demand for an additional plant. It is conceded that the modern trend in the shoe business is to operate in much less substantial buildings, and thereby tie up less capital in

fixed assets. This tendency is properly alluded to by the petitioner, and unquestionably has a bearing on the consideration which must be given to reproduction costs in determining the true value of the property.

The petitioner bases its claim for an abatement on two grounds, first, that the valuation was greatly in excess of the just value of the property, and second, that it was fixed unequally and on a greater percent of the true and full value than the rate at which other property, subject to like taxation in said city, was assessed.

Every property owner understands the obligation that he must bear his just share of the public expense. If that burden is too heavy, his remedy lies not in the courts. It is only when he bears a disproportionate share of the load that he has a just claim for judicial redress. The real gravamen of his complaint is the lack of equality and uniformity. *Spear* v. *City of Bath*, 125 Me., 27, 130 A., 507; *City of Roanoke* v. *Williams*, 161 Va., 351, 170 S. E., 726. If, however, he shows that his property is assessed substantially in excess of its true value, a presumption arises of inequality and he has made out a prima facie case for relief. *Spear* v. *City of Bath*, supra.

The Constitution of Maine provides, Art. IX, Sec. 8, that "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."

It has been said that the term "just value" is the equivalent of "correct," "honest," or "true" value. 4 Words & Phrases, 3904. Such definition is, however, not particularly helpful in the solution of the problem before us. If has been held that "market value" is the equivalent of "real value," *Bangor & Piscataquis Railroad Company* v. *McComb*, 60 Me., 290; and in *Chase* v. *City of Portland*, 86 Me., 367, 29 A., 1104, "value" is said to be synonymous with "market value." Such being the case it is difficult to conceive of any substantial difference in the words "value," "just value" and "market value."

The real problem lies not so much in defining terms as in applying them; and particularly during the chaotic conditions of the last few years have the difficulties of tax assessors been enhanced, when they must, as it were, catch values which are on the wing. In

an appraisal for tax purposes, due consideration must be given to all the uses to which such property may be put by an owner. *Lodge* v. *Inhabitants of Swampscott*, 216 Mass., 260, 103 N. E., 635. Its value is measured by the highest price that a normal purchaser, not under peculiar compulsion, will pay for it. *National Bank of Commerce* v. *City of New Bedford*, 175 Mass., 257, 56 N. E., 288. It is what it will bring at a fair public sale, when one party wishes to sell and another to buy. *Chase* v. *City of Portland*, supra; *Lawrence* v. *City of Boston*, 119 Mass., 126; *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone*, 200 Mass., 82, 85 N. E., 880. Assessors are not, however, obliged to follow the fleeting, speculative fancy of the moment; they should recognize that the true value of a fixed asset such as real estate is fairly constant and must be gauged by conditions not temporary and extraordinary, but by those which over a period of time will be regarded as measurably stable. *Tremont and Suffolk Mills* v. *City of Lowell*, 271 Mass., 1, 170 N. E., 819; *Central Realty Co.* v. *Board of Review*, 110 W. Va., 437, 158 S. E., 537; *Somers* v. *City of Meriden*, 174 A., 184 (Conn. 1934). Violent fluctuations in municipal income are not desirable, and assessors in listing values may, to a certain extent, disregard the excesses of a boom as well as the despair of a depression.

If, during a time of crisis, it is impossible to determine the true worth of real estate by reference to the price which such property will bring in the market, resort may be had to other factors. Consideration may be given to the original cost of construction less depreciation, although perhaps this is less important than other things, to reproduction cost with an allowance for depreciation, to the purchase price, if not sold under stress or unusual conditions, to its capacity to earn money for its owner. No one of these elements is controlling, but each has its place in estimating value for purposes of taxation. *Spear* v. *City of Bath*, supra; *Central Realty Co.* v. *Board of Review*, supra; *Underwood Typewriter Co.* v. *City of Hartford*, 99 Conn., 329, 122 A., 91; *Massachusetts General Hospital* v. *Inhabitants of Belmont*, 233 Mass., 190, 124 N. E., 21; *Somers* v. *City of Meriden*, supra; 2 *Cooley, Taxation* (4 ed.), 1147.

The burden is on the petitioner to show that the valuation is un-

just, not on the assessors to establish that their figures are correct. The presumption is that the assessment is valid. *Penobscot Chemical Fibre Co.* v. *Inhabitants of the Town of Bradley*, 99 Me., 263, 59 A., 83; *Spear* v. *City of Bath*, supra; *City of Roanoke* v. *Williams*, supra; *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S., 350.

It is furthermore generally recognized that it is not sufficient to show merely that the taxing board has made an error, even though such mistake may result in a lack of uniformity. *Penobscot Chemical Fibre Co.* v. *Inhabitants of the Town of Bradley*, supra; *Maish* v. *Territory of Arizona*, 164 U. S., 599; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S., 441. The reason for such a doctrine is obvious. Mathematical precision is impossible in dealing with taxable values. Uniformity can only be approximated. The court is not a board of review to correct errors. It is solely where there is evident a systematic purpose on the part of a taxing board to cast a disproportionate share of the public burden on one taxpayer, or one class of taxpayers, that the court will intervene. In *Shawmut Manufacturing Co.* v. *Town of Benton*, 123 Me., 121, 130, 122 A., 49, 53, this principle has been definitely enunciated in the following language, quoting with approval the words of Chief Justice Taft in *Sioux City Bridge* v. *Dakota County*, supra; "The proving of a mere error of human judgment, as has been indicated, will not support a claim of overrating; 'there must be something more —something which in effect amounts to an intentional violation of the essential principle of practical uniformity.'"

Such being the law, has the petitioner shown, as claimed, either that his property was assessed in excess of its just value, or at a higher per cent of the true value than other property subject to like taxation was assessed generally?

To support the first claim, the petitioner relies on the testimony of Alfred J. Sweet, the president and the treasurer of the petitioner, who also had been the principal owner and directing head of the original company, and on the testimony of John W. Wood, a prominent shoe manufacturer of Auburn.

Mr. Sweet points out that the property, which included also about $10,000 of equipment, was bought by the petitioner at a receiver's sale in 1932 for $100,000, and that this in his opinion rep-

resents what at that time it was really worth. It is established that owing to the grade and the undeveloped condition of South Goff Street the back part of the land is of very much less value than the front; and the petitioner contends that a valuation of forty cents a foot for so large a tract, a part of which can not be used, is excessive. It is further shown that the book value of the real estate in 1916 was $184,646.95, which represented the original cost less a small amount charged off for depreciation to that time. Mr. Sweet also satisfies us that the present trend is to build much less costly factories; and counsel argues that, such being the case, the permanent and substantial character of this factory building adds but little to its worth. Mr. Sweet is corroborated on this point by Mr. Wood, who also places a value on the real estate of $100,000. A tabulation is also offered by the petitioner showing the income and expense of the property for 1933 and for eleven months of 1934. This shows a gross income for 1933 of $13,871.26 and an expense of $22,189.29, a gross income for 1934 of $29,146.86 and an expense of $21,396.87. Some adjustment of these figures is undoubtedly necessary, as no depreciation is charged and no allowance made for loss of rental due to changes in tenancies. The figures for 1933 mean but little because of the fact that certain allowances in rent were made at the beginning of tenancies.

Such in brief is the testimony which the petitioner claims shows an over-valuation of this property. It does not, however, tell the whole story. The original cost, measured by a scale of prices of a score of years ago, may throw some light on the problem but is of minor significance. Neither is the purchase price at the receiver's sale of great consequence. The property changed hands during the depths of a depression at a time when, to say the least, it was difficult to find purchasers who could finance so large an enterprise. That the petitioner was able to buy it at that time for $100,000 is of small moment. *Spear* v. *City of Bath*, supra; *Tremont and Suffolk Mills* v. *City of Lowell*, supra. The important evidence supporting the petitioner's contention is, therefore, the opinion expressed by Mr. Sweet, that the value was $90,000, and that of Mr. Wood that it was $100,000, and even so far as these men are concerned, it is apparent that their views are colored by the conditions existing during the depression.

To meet this testimony, the defendant offers evidence of the reproduction cost of this factory with a deduction for depreciation. Figured on this basis, the building would have a value of approximately $179,000. In considering this figure, however, allowance should be made for the fact that today as serviceable a building could be constructed for less cost. Mr. Greenleaf, who testified on this point, also placed a value on the land of sixty-five cents a foot. In addition to this, there was the testimony of Mr. Ford, the city manager, who, from a rather involved formula, figured a rental value for the property, which, for what it is worth, would indicate that the assessment of $120,000 on the building was not far wrong. Mr. Ford also gave his opinion that the land was worth from sixty-five to seventy cents a foot and the building from $165,000 to $175,000. Mr. Whitney, the chairman of the Board of Assessors of Auburn, testified that the board relied on Mr. Ford, the city manager, for technical advice, and that his formula was given consideration. The witness stated that, regardless of any formula, the value of the factory building was considerably in excess of $120,000. A Mr. Gayton, a real estate broker in Auburn, was called as a witness by the city. He testified that the land was worth $105,000. His testimony does not seem particularly convincing, and we prefer to rely on other evidence in reaching our conclusion.

It is true that the values placed on this property, particularly that on the land, at first glance seem high; but, considering all of the testimony, and particularly the tabulations showing probable earnings, we can not say that the petitioner has sustained the burden of proving, as set forth in its petition, that the real estate was appraised greatly in excess of its just value.

Has the petitioner established its second claim, that the valuations on its property were fixed unequally and on a greater per cent of the true value than the rates at which other property subject to like taxation was assessed? We think not.

The petitioner relies on the fact that the assessors claim to appraise property at approximately seventy-five per cent of its true value. Counsel then assert that without regard to such percentage the taxing board has adopted Mr. Ford's formula as the measure of the sound value of industrial property and assessed the peti-

tioner's property at one hundred per cent of such figure. There is a good deal in Mr. Ford's testimony to justify the claim of counsel that the result obtained from his very complicated formula is a figure which represents what is to him the sound value of the property, and that such value is synonymous with market value. Hence it is not unreasonable to assert that if the property was assessed at one hundred per cent of this figure, it was overvalued with respect to other property. Mr. Ford subsequently, however, seemed to qualify this portion of his testimony and arrived at a figure of $163,700 as the sound value, seventy per cent of which would be approximately the valuation fixed by the assessors. But it is a difficult matter for the petitioner to make out its case by showing inconsistencies in Mr. Ford's testimony or confusion in the method by which he arrived at his result. Mr. Ford was not one of the assessors. Mr. Whitney, the chairman of the board, testified that they relied on Mr. Ford's advice, and accepted his computations when they considered them fair. He testifies categorically that the figure of $120,000 placed on this building by the assessors was considerably less than its true value and that it was within the sixty-five or seventy per cent ratio established for other property.

In the light of this evidence, we can not hold that there was in fact any disproportionate burden put on the property of the petitioner, much less that there is evidence of any intent on the part of the board of assessors to do so. Mistakes may have been made. In the work of assessors they are inevitable, particularly in such times as we are now passing through. Due consideration must be given to the fact that in assessing property for purpose of taxation, it is impossible to obtain absolute equality, and that good faith is the most important element in the work of a taxing board.

Appeal dismissed.

BERNARD F. MANN *vs.* HOMESTEAD REALTY COMPANY.

Androscoggin. Opinion, September 6, 1935.

MORTGAGES. FORECLOSURE. PLEADING AND PRACTICE.

A completed foreclosure of a mortgage amounts to a satisfaction of the mortgage debt to the extent of the value of the mortgaged property at the date the foreclosure becomes absolute. If the value of the property is less than the debt, the holder is entitled to recover the deficiency.

A completed foreclosure is in legal effect a payment of the debt at least pro tanto, *and is a defense open under the general issue.*

The burden of proving payment of the mortgage debt, however, is upon the mortgagor and includes the establishment of the value of the mortgaged property at the time foreclosure is completed.

The Law Court has no power to permit an amendment of a bill of exceptions.

In the case at bar, by the introduction of his note, the plaintiff made out a prima facie case for a recovery of the full amount due thereon. The finding of fact, without evidence, that the plaintiff had received full payment of his debt was error of law and subject to exceptions.

The certificate of the presiding Justice in the trial court without qualification or limitation was conclusive as to the regularity of the filing and allowance of the exceptions.

On exceptions by plaintiff. An action of assumpsit to recover a deficiency judgment upon a promissory note for $3,500.00 secured by a mortgage of real estate upon which prior to this action strict foreclosure proceedings were completed and the equity of redemption expired. The sitting Justice found that the evidence failed to show with sufficient force that the plaintiff had not received property equal in value to the sum due him and rendered judgment for the defendant. Exceptions were seasonably taken. Exceptions sustained. The case fully appears in the opinion.

Seth May, for plaintiff.

Pulsifer & Ludden, for defendant.

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

STURGIS, J. This is an action of assumpsit to recover a deficiency judgment upon a promissory note for $3,500 secured by a mortgage of real estate upon which on February 9, 1934, and prior to the bringing of this suit, strict foreclosure proceedings were completed and the equity of redemption expired. The plea was the general issue. Judgment was for the defendant and the plaintiff reserved exceptions.

When the foreclosure was completed, $3,736.25 was due on the note and remained unpaid. The plaintiff offered evidence tending to show that when foreclosure became absolute something less than $2,800 was the fair market value of the mortgaged real estate. The witnesses for the defendant placed a value of from $4,000 to $4,200 on the property. The trial Judge, after referring to this conflict in the evidence, made the following written statement of the reasons for his decision:

> "When real estate men, experienced in market values of property like that in question, are so widely divergent in their judgment as to values, the Court cannot be expected to guess, 'as a guess is not a safe basis for a judgment.'*
>
> The evidence fails to show with sufficient force that the plaintiff has not received property equal in value to the sum due him.
>
> Judgment for Defendant."

It is well settled that a completed foreclosure of a mortgage amounts to a satisfaction of the mortgage debt to the extent of the value of the mortgaged property at the date the foreclosure becomes absolute. If the value of the property is less than the debt, the holder is entitled to recover the deficiency. *Flint* v. *Land Co.*, 89 Me., 420, 36 A., 634; *Marston* v. *Marston*, 45 Me., 415. See *Viles* v. *Korty*, 133 Me., 154, 174 A., 903. The completed foreclosure is in legal effect a payment of the debt at least pro tanto. *Flint* v. *Land Co.*, supra; *West* v. *Chamberlin*, 8 Pick., 336; 2 *Greenleaf on Evidence*, Sec. 524. The defense of payment is open under the general issue. *Hibbard* v. *Collins*, 127 Me., 383, 143 A.,

600; *Lee* v. *Oppenheimer*, 32 Me., 253, 255; 2 *Encyc. Pl. & Pr.*, 1028. The burden of proving payment of the mortgage debt, however, is upon the mortgagor. *Davis* v. *Poland*, 99 Me., 345, 59 A., 520; *Crooker* v. *Crooker*, 59 Me., 416. This burden necessarily includes the establishment of the value of the mortgaged property at the time foreclosure is completed and the resulting satisfaction of the mortgage debt. The ruling below must be construed as casting the burden of proving this value upon the mortgagee. This is not the rule.

It further appears in the Bill of Exceptions that the mortgage note in this case was admitted in evidence without objection. By the introduction of the note, the plaintiff made out a prima facie case for a recovery of the full amount due thereon. *Eisenman* v. *Austen, Ex'r.*, 132 Me., 214, 169 A., 162. All evidence tending to show partial or full satisfaction and payment of the note through completed foreclosure of the mortgage given to secure it being rejected as of no probative value, as the record reads the trial Judge found as a fact without evidence that the plaintiff had received full payment of his debt. A finding of fact unsupported by evidence is an error of law and subject to exceptions. *Weeks* v. *Hickey*, 129 Me., 339, 151 A., 890.

The defendant's motion addressed to the Law Court, objecting to the sufficiency of the Bill of Exceptions and praying that the same may be supplemented by the production of printed copies of the evidence, can not be granted. The certificate of the presiding Justice is merely, "exceptions allowed." There is no qualification or limitation whatever. The certificate is conclusive as to the regularity of the filing and allowance of the exception. *Dunn* v. *Motor Co.*, 92 Me., 165, 42 A., 389; *Poland* v. *McDowell*, 114 Me., 511, 96 A., 834. The Law Court has no power to permit an amendment of the Bill of Exceptions. *True* v. *Plumley*, 36 Me., 466.

Exceptions sustained.

THOMAS A. COOPER,

BANK COMMISSIONER OF THE STATE OF MAINE

vs.

FIDELITY TRUST COMPANY.

PETITION OF ROBERT BRAUN, CONSERVATOR

IN RE: CERTIFICATES OF DEPOSIT.

Cumberland. Opinion, September 7, 1935.

BANKS AND BANKING. R. S., CHAP. 57, SECS. 89-91.

Ordinary certificates of deposit in their essential elements resemble negotiable promissory notes, and in general have that legal effect.

The word deposit, in its broad and comprehensive sense, includes deposits for which certificates, whether interest-bearing or not, are issued payable on demand or on certain notice at a fixed future time.

The nature of a deposit, however, is fixed by the contract of the depositor and the bank. The relation of banker and depositor is voluntarily assumed as matter of contract. The contract need not be in any particular form, being governed like all other contracts by the mutual intention and understanding of the parties.

Although the right to issue certificates of deposit is not expressly granted nor are controlling regulations found in the statutes, it is well-settled law that banking corporations authorized to receive deposits and exercise the usual powers incidental to the business of banking, unless there is a constitutional or statutory restriction, may issue certificates of deposit payable either on demand or time.

There are no constitutional or statutory restrictions in this State upon the power of trust companies to issue certificates of deposit for either savings or commercial deposits.

A certificate of deposit is not the usual evidence of a deposit in the savings department of a bank, and when it recites a receipt of a deposit only, without

defining its character, it must be presumed that the deposit which it represents was made and accepted as a commercial deposit.

Revised Statutes, Chapter 57, Secs. 89-90, regulating the segregation of assets by a trust company, enumerates the kinds of savings deposits for which assets must be segregated in terms seemingly broad enough to include all savings deposits in such institutions, but it can not be construed as a statutory declaration or determination of what are savings deposits and thereby abrogate the common law rule that the character of the deposit is determined by reference to the agreement of the bank and its depositor.

In the case at bar, the listing of the deposits of the holders of certificates of deposit as savings deposits by the officials of the Fidelity Trust Company did not of itself give the deposits that character. The Bank Commissioner of the State was without lawful authority to convert a commerical deposit into a savings deposit. His directions to that effect, growing out of an excusable but erroneous interpretation of the law, were outside of his authority and void.

Upon this Petition, the holders of certificates of deposit issued by the Fidelity Trust Company have not established their right to share in assets of the bank segregated as security for savings deposits.

All certificate holders should be allowed reasonable time and opportunity, however, to procure a reformation of their certificates by appropriate decrees in Equity if, through mistake, the certificates do not correctly represent the contracts of deposit actually made.

Holders of certificates of deposit who, through reformation, finally establish their rights to be classed as savings depositors under their contracts of deposit must be treated as such by the Conservator in the distribution of the assets of the closed bank. All other certificate holders must abide by the terms of their certificates and share in the assets of the bank as general commercial depositors.

On report. A petition to the Supreme Judicial Court in Equity brought by Robert Braun as Conservator of the Fidelity Trust Company, for instructions with respect to certain certificates of deposit issued by the Fidelity Trust Company and outstanding at the time of its closing. The petitioner sought a ruling whether these certificates of deposit were entitled to the protection of the segregated assets under R. S., Chap. 57, Sec. 89. Leave to intervene was granted to the holders of the respective certificates involved, and counsel appointed to represent the interests of the savings depositors. Ordered that opportunity be granted to holders to correct their certificates if through mistake they did not represent the

contract of deposit actually made. Those who by reformation of their certificates finally establish their right to be classed as savings depositors to be treated as such in distribution of the assets of the Trust Company. All others to abide by the terms of their certificates. The case fully appears in the opinion.

Cook, Hutchinson, Pierce & Connell, for Petitioner.

Verrill, Hale, Booth & Ives, for Portland Company and Chapman Electric Neutralizer Company.

William B. Skelton, for Portland Morris Plan Bank.

Grover Welch, for City of Westbrook.

Francis W. Sullivan, for John H. Simonds Co.

Charles J. Nichols, for Charles C. Bickford.

Philip W. Buchanan, for New York Trust Co. and General Electric Co.

Harry L. Cram,

William B. Mahoney, for Savings Depositors.

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

STURGIS, J. In this Petition in Equity, the Conservator of the Fidelity Trust Company of Portland, now in liquidation under Chapter 93 of the Public Laws of 1933, applies for instructions as to whether the holders of certain certificates of deposit issued by the Bank before it closed are entitled to share in the distribution of its assets on a parity with general creditors and depositors, or, as they make claim, may share equally with others entitled thereto in assets segregated as security for savings deposits. Notice to all holders of certificates of deposit and parties of record was ordered and proved. Special counsel for savings depositors were appointed. Upon hearing, the matter was reported to the Law Court.

Trust companies doing both a savings and commercial bank business in this State are required by Revised Statutes, Chap. 57, Secs. 89-91 to protect their savings deposits by segregating and holding assets of at least equal value as security for their payment. The essential provisions of the law read:

"Sec. 89. Every trust company soliciting or receiving savings deposits which may be withdrawn only on presentation of the passbook or other similar form of receipt which permits successive deposits or withdrawals to be entered thereon; or which at the option of the trust company may be withdrawn only at the expiration of a stated period after notice of intention to withdraw has been given; or in any other way which might lead the public to believe that such deposits are received or invested in the same manner as deposits in savings banks; or which advertises or holds itself out as maintaining a savings department, or uses the term 'savings' in connection with any part of its business, shall segregate and set apart, and at all times keep on hand so segregated and set apart, assets at least equal to the aggregate amount of such deposits, and in the case of any trust company which also acts as surety upon any bonds or other obligations the amount of its assets so segregated and set apart shall be at least fifteen per cent in excess of the aggregate amount of such deposits. The bank commissioner may require all such assets as appear to him to be carried in excess of their true value to be charged down to such value.

Sec. 90. Such assets so segregated and set apart shall be held in trust for the security and payment of such deposits, and shall not be mingled with the other assets of the company, or be liable for the debts or other obligations thereof until after such deposits shall have been paid in full. All other assets of the company, including the liability of the stockholders, shall be held equally and ratably for the payment of all claims, including any balance due such savings depositors after applying to their payment the assets so segregated and set apart."

The mandates of the statute are clear and explicit. It is the only authority a trust company has for segregating its assets for the benefit of any of its creditors. Its scope can not be enlarged nor its limitations abridged by any act or agreement of the officials of the bank or by the fiat of the banking department of the State. They

are bound by its provisions as is the conservator on liquidation under the "Emergency Banking Act."

The case reported shows that the Fidelity Trust Company, in carrying on its general banking business in Portland, maintained a savings department in which it accepted savings deposits and segregated assets as security therefor as required by the statute. It kept a separate book entitled "Record of Assets Segregated to secure Savings Deposits," in which in former years appeared the amount of typical savings deposits represented by savings pass books, followed by a descriptive list of the assets segregated. Beginning with December 5, 1927, being directed by the Bank Commissioner of the State to include as savings deposits all deposits evidenced by certificates of deposit and increase its segregation of assets accordingly, its Record was supplemented by each day adding to the total of savings deposits all outstanding time and demand certificates of deposit, but the total book value of segregated assets listed remaining at all times substantially in excess of the total of the savings deposits proper and the additions made thereto, although withdrawals, substitutions and additions were made, there was no change in the total amount of the segregation. On the general ledger of the Bank, with respect to such segregated assets, the notation was made "Segregated to secure Savings Deposits." This system was followed until some time in January, 1933, when, in accordance with further directions of the Bank Commissioner, demand certificates of deposit were dropped from the list of savings deposits, the segregation in fact and of record otherwise remaining the same and continuing so until the Bank ceased doing business. Holders of certificates who made inquiry were informed of the segregation made as security for their deposits, but no general notice was given to the public.

The holders of thirty-three certificates of deposit issued by the Fidelity Trust Company and outstanding when it closed have filed their proofs before the Special Master appointed in the liquidation proceedings and demand classification of their deposits as savings deposits. The certificates are all substantially similar in form. Some are payable on demand, some on certain notice, and others at a fixed future time. All bear interest, but at varying rates. The holders of all the certificates claim the benefit of the segregation of

assets originally made under the directions of the Bank Commissioner. The owners of typical savings deposits evidenced by pass books oppose these claims.

The certificates of deposit presented here are in the usual form issued by banks and are each framed as a written acknowledgment by the Fidelity Trust Company or one of its branches of the deposit of a sum of money payable to the depositor or his order. In their essential elements, they resemble negotiable promissory notes, and in general have that legal effect. 3 *Daniel on Negotiable Instruments* (7th ed.), Sec. 2019; 5 *Michie on Banks and Banking*, 598; 1 *Morse on Banks and Banking* (6th ed.), Sec. 51,297; 3 *Ruling Case Law*, 570; *Note*, 75 *Am. State Reports*, 43; 7 *Corpus Juris*, 647 and cases cited. See *Hatch* v. *National Bank*, 94 Me., 348, 47 A., 908. They each purport on their face, however, to represent a deposit in the bank by which they were issued and the verity of this recital is not refuted. So far as appears in the reported case, the transactions out of which they arose were deposits, as that term is known and accepted in the banking business and the law by which it is governed. The word "deposit," in its broad and comprehensive sense, includes deposits for which certificates, whether interest-bearing or not, are issued payable on demand or on certain notice or at a fixed future time. *Lamar* v. *Taylor*, 141 Ga., 227, 239, 80 S. E., 1085; *McCormick* v. *Hopkins*, 287 Ill., 66, 122 N. E., 151; *People* v. *Belt*, 271 Ill., 342, 348, 111 N. E., 93; *State* v. *Savings Bank*, 136 Iowa, 79, 113 N. W., 500; *State* v. *Cadwell*, 79 Iowa, 437, 44 N. W., 700; *Goldband* v. *Commissioner of Banks*, 245 Mass., 143, 139 N. E., 834; *Southern Surety Co.* v. *Ruark*, 97 Okla., 268, 223 P., 622; *Wilkes & Co.* v. *Arthur*, 91 S. C., 163, 74 S. E., 361; *State* v. *Shove*, 96 Wis., 1, 70 N. W., 312.

The nature of a deposit, however, is fixed by the contract of the depositor and the bank. The relation of banker and depositor is voluntarily assumed as a matter of contract. 5 *Michie on Banks and Banking*, 38. The contract need not be in any particular form, being governed like all other contracts by the mutual intention and understanding of the parties. *Fogg* v. *Tyler*, 109 Me., 109, 82 A., 1008. This rule applies to trust companies doing a banking business in this State. They are authorized to receive and accept deposits without limitation as to kind or amount. R. S., Chap. 57,

Sec. 61 et seq. Subject to statutory regulations which do not affect the questions raised here, they have the inherent power vested generally in banks to fix the terms and conditions upon which they will accept deposits and enter into agreements therefor with their depositors, and this power extends to both savings and commercial deposits. Although the right to issue certificates of deposit is not expressly granted nor are controlling regulations found in the statutes, it is well-settled law that banking corporations authorized to receive deposits and exercise the usual powers incidental to the business of banking, unless there is a constitutional or statutory restriction, may issue certificates of deposit payable either on demand or time. 5 *Michie on Banks and Banking*, Sec. 314; 1 *Morse on Banks and Banking* (6th ed.), Sec. 51; 3 *R. C. L.* 571. The power of banks to issue certificates of deposit for savings deposits under varying circumstances has been recognized in *State* v. *Savings Bank* (Iowa), supra; *Murray* v. *First Trust & Savings Bank*, 201 Iowa, 1325, 207 N. W., 781; *Goldband* v. *Commissioner of Banks*, supra; *Wasserman* v. *Cosmopolitan Trust Company*, 252 Mass., 253, 147 N. E., 742; *Cronan* v. *Commissioner of Banks*, 254 Mass., 444, 150 N. E., 193; *Barkas* v. *Commissioner of Banks*, 254 Mass., 451, 150 N. E., 178. There are no constitutional or statutory restrictions in this State upon the power of trust companies to issue certificates of deposit for either savings or commercial deposits.

The character of deposits for which certificates of deposit substantially similar to those involved here were issued, and the controlling effect of the contracts made by the parties, has been passed upon somewhat recently in Massachusetts. In *Andrews* v. *Commissioner of Banks*, and *Goldfine* v. *Same*, reported with and under the title of *Goldband* v. *Commissioner of Banks*, 245 Mass., 143, 139 N. E., 834, 836, the complainants offered moneys for deposit in the savings department of the Cosmopolitan Trust Company which was accepted as savings deposits and certificates of deposit in the usual form issued. In each case, an officer of the Trust Company represented to the depositor that his deposit was held as a savings deposit, when in fact it was not entered on the books of the savings department but carried in the commercial department and mingled with its funds. The Trust Company being in liquidation, the com-

plainants in equity prayed that their deposits be declared to be savings deposits. Neither accident, fraud or mistake was alleged or proven. The Court said:

> "The certificates of deposit issued to the plaintiffs Andrews and Goldfine as matter of law are not the usual evidence of deposit in the savings department. They are in form obligations commonly issued and recognized as incidents of commercial banking. They have for the most part the characteristics of promissory notes. The respects in which they differ do not aid these plaintiffs. . . . Some of the certificates here in issue are by express terms made payable on time. Those not so payable are by law payable on not less than thirty days' notice, G. L. c. 172, sec. 32, and some show on the face the interest to be paid. These elements, as matter of construction of written instruments, indicate deposits upon special terms and conditions agreed upon between the depositor and the trust company. . . . Money thus received must be treated as general deposits and not as deposits in the savings department."

Continuing, the Court finds controlling confirmation of its classification of certificates of deposit as evidence of commercial transactions in local statutes and holds as a matter of substantive law that the certificates can not be varied by parol evidence. The complainants were held to be bound by the terms of their certificates of deposit.

In *Wasserman* v. *Cosmopolitan Trust Company*, 252 Mass., 253, 147 N. E., 742, supra, the facts were substantially the same as in the Goldband case and the action was of the same nature, but fraud was alleged and found to be proved. On this ground, parol evidence of the contract of deposit actually made was admitted and, it appearing that it was for a savings deposit, it was held that the complainant was entitled to be treated as such in the liquidation proceedings.

In *Cronan* v. *Commissioner of Banks*, 254 Mass., 444, 150 N. E., 193, 195, other deposits in the Cosmopolitan Trust Company made and received as savings deposits and evidenced by certificates of deposit, but recorded and treated by the bank as commercial accounts, were under consideration. Here, as in *Wasserman* v. *Cos-*

mopolitan Trust Company, supra, fraud practiced upon the depositor was alleged and proved. In the course of this opinion, the Court said:

"It is the contention of the defendants that the entire contract between the parties is evidenced by the instruments delivered to the plaintiffs after the deposits had been made; that such instruments properly construed are certificates of deposit as such certificates are usually understood and construed and are negotiable instruments; that they show the real contract between the parties and can not be modified, varied or controlled by parol evidence to the contrary, with the result that the deposits are not to be treated as having been made as savings deposits, but are in fact and law deposits made in the commercial department. It is also argued by the defendants that 'The plaintiffs' rights are further affected by the fact that the money paid in by them was never in fact placed with savings funds, but was immediately used by the trust company in its general business.' As to this last contention it is sufficient to say that if a person goes to a trust company having a savings department and delivers money, and states to the official of the company that it is to be deposited in the savings department, and they agree that it shall be so deposited and accept the deposit, it becomes and remains a savings deposit whether it was ever placed in that department or not, or was stolen by the officials of the company or otherwise misappropriated by them.

The contention that the plaintiffs can not prevail because they accepted the instruments delivered to them is untenable in view of the findings of the master and the agreed facts. The effect of the master's findings is that before these certificates were delivered, a completed oral contract for the deposit of the funds in the savings department had been made and that the certificates were given as evidence or security therefor. These deposits having been solicited and received as savings deposits are savings deposits in fact and must be so treated, although by reason of some error, mistake or fraud they were not entered in the savings department. . . .

> The plaintiffs in seeking a proper classification of their claim are entitled to relief in equity if it appears that by mistake or by fraud the certificates do not express the contract made by them."

The Court then finds that this case is governed by the rules stated in *Wasserman* v. *Cosmopolitan Trust Company*, supra, and is distinguishable from *Goldband* v. *Commissioner of Banks*, supra. A final decree allowing the complainant to prove her claim as a savings depositor was ordered.

In *Barkas* v. *Commissioner of Banks*, 254 Mass., 451, 150 N. E., 178, upon closely analogous facts the same principles were applied.

We find no provisions in the statutes of this State which compel the conclusion that as a matter of law certificates of deposit in the usual form payable on time or on certain notice represent commercial transactions. In this respect, the statutes of Maine and Massachusetts are different. We concur, however, in the view that, nothing to the contrary appearing, such certificates of deposit, as well as those payable on demand, usually indicate on their face that the deposits for which they were issued were of that character. History places them in that category and common knowledge establishes the classification as the long-prevailing rule of banking. *Pierce* v. *State National Bank of Boston*, 215 Mass., 18, 101 N. E., 1060; 3 *Daniel on Negotiable Instruments* (7th ed.), 2043; 1 *Morse on Banks and Banking* (6th ed.), Sec. 297. The issuance of certificates of deposit for savings deposits seems to be of comparatively recent origin and the exception rather than the rule. We are of opinion that, when, as here, certificates of deposit recite the receipt of deposits without in any way defining their character, it must be presumed that the deposits which they represent were made and accepted as commercial deposits.

The certificate holders in the case at bar, with one exception, base their claims for classification as savings depositors in the Fidelity Trust Company on (1) the terms of their certificates, (2) the listing of their deposits as savings deposits by the officials of the trust company under orders from the Bank Commissioner, and (3) the statute, supra, regulating the segregation of assets as

security for savings deposits. One certificate holder introduced evidence into the Report tending to show that its deposits were made and accepted as savings deposits, but no evidence to this effect in behalf of the other holders was offered. No charge of fraud is made or supported in the reported case, and there is no prayer in any of the pleadings for reformation on the ground of mistake.

The certificates of deposit, on their face, refute the claim that the deposits which they represent are savings deposits. As already pointed out, the contracts of deposit as expressed in the certificates in which they were reduced to writing must be construed as contracts for commercial deposits. The terms of the certificates give no support to the claim of the holders that they should be classified as savings depositors.

Neither does the listing of the deposits as savings deposits by the officials of the trust company, of itself, give them that character. If the original contracts of deposit were for savings deposits, the listing added nothing to them. If, when made, the contracts were for commercial deposits, it required something more than the voluntary act of the trust company to convert them into contracts for savings deposits. It was undoubtedly competent for the parties by mutual consent to modify their original contracts of deposit after they were made. *Johnson* v. *Burnham*, 120 Me., 491, 115 A., 261; *Storrer* v. *Taber*, 83 Me., 387, 22 A., 256. But such modification must have been by mutual consent. The trust company could not enlarge or abrogate its contracts of deposit without the consent of the depositors with whom they were made. *Wasserman* v. *Cosmopolitan Trust Company*, supra; 13 *Corpus Juris*, 591, and cases cited. Nor is power vested in the Bank Commissioner to override this salutary rule. His duty is to administer the law, not to make it or set it aside. His directions to that effect, reported here, were clearly outside his authority and void. They appear to have grown out of an excusable but erroneous interpretation of the law seemingly justified by precedent. They can not control the legal effect of valid contracts of deposit made by the trust company with its depositors.

The final contention of the certificate holders that the statute, R. S., Chap. 57, Secs. 89, 90, regulating the segregation of the assets of a trust company fixes the status of their deposits as sav-

ings deposits can not be sustained. Although the statute enumerates various kinds of savings deposits for which assets must be segregated, designating them according to the manner or means of their withdrawal, it makes additional general provisions seemingly broad enough to include all savings deposits in such institutions. This enumeration, with its general addenda, prescribes the kind of savings deposits which are entitled to the security of assets segregated under the Act, but can not be construed as a statutory declaration or determination of what are savings deposits. The statute does not expressly or by necessary implication abrogate the settled common law rule that the character of a deposit is determined by reference to the agreement of the bank and the depositor. If the deposit is in fact a savings deposit and by the terms of its withdrawal or otherwise is within the purview of the statute, it is entitled to the security there provided. If it can not qualify as a savings deposit in fact, it remains a general debt or obligation of the bank.

The claim of the Portland Morris Plan Bank, which is the one certificate holder who offered evidence as to the nature of its deposits, remains to be considered. This claimant contends that the report tends to show that at the time the deposits represented by its certificates were made it was mutually understood and agreed between its representatives and the officers of the Fidelity Trust Company that the deposits should be taken as savings deposits and have the security of segregated assets, and it was through accident or mistake that this part of the contracts of deposit was omitted from the certificates. This, if clearly established, is a reason for reforming the certificates, which as they stand bear a contrary import. *Johnson* v. *Burnham*, supra. But reformation must be sought in another proceeding where the issue can be fully presented and fairly met if contested. It is not here alleged or affirmatively pleaded. The established rules of chancery practice in this regard have not been abrogated in this jurisdiction.

We must, therefore, instruct the Conservator of the Fidelity Trust Company that the certificates of deposit referred to in his Petition do not, on their face, represent savings deposits in that institution and the holders have not here established their right to share in assets segregated against such deposits. Reasonable time

and opportunity, however, should be allowed the holders to correct their certificates if, through mistake, they do not represent the contracts of deposit actually made. This applies to all certificate holders. None can be equitably concluded by the pleadings in this proceeding or the report sent forward, both left incomplete through a common misconception of the law of the case. Those who by reformation of their certificates finally establish their right to be classed as savings depositors according to their contracts of deposit must be treated as such in the distribution of the assets of the Trust Company. All others must abide by the terms of their certificates.

So ordered.

BERTHA L. WIGHT,

TRUSTEE UNDER THE WILL OF CLARA B. WOOLLS

vs.

FLORENCE MASON, ET ALS. (DOCKET NO. 1484).

ESTATE OF CLARA B. WOOLLS, BERTHA L. WIGHT, APPELLANT FROM THE DECREE OF THE JUDGE OF PROBATE (DOCKET NO. 1470).

York. Opinion, September 13, 1935.

WILLS. TRUSTS. EVIDENCE.

The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rule. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implication and necessary inferences.

It is only where the will is ambiguous that extrinsic circumstances, such as the relation subsisting between the testator and the claimants or objects of his bounty, his intimacy or association with and affection or lack of affection for them and their relationship by blood or otherwise, are admissible.

When a testator lodges discretion in his trustees it must be exercised in good faith according to their best judgment and uninfluenced by improper motives. When so exercised their discretion is not reviewable.

In the case at bar, the annuity provided for in sub-section "a" (not being in the nature of a demonstrative legacy) was payable only out of income. Likewise payments provided for under sub-section "b."

When the net income was not sufficient to pay both the annuity under sub-section "a" and the debts under sub-section "b," whether payments should be made under said sub-sections "a" and "b" was for the determination of the trustees, acting in good faith according to their best judgment and uninfluenced by improper motives.

Under sub-section "c" any other net income remaining after payments in full under sub-sections "a" and "b" was payable to the daughter named therein.

By the last clause of said sub-section "c," the testatrix gave to the trustees a discretionary right to pay the daughter from the corpus of the trust estate such sums for her proper maintenance and support as in their judgment seemed wise. Payments so made were proper.

In the case No. 1484, bill sustained. As to case No. 1470, exceptions sustained. Decrees in both cases in accordance with this opinion.

Case No. 1484 on report. A Bill in Equity seeking construction and interpretation of the will of Clara B. Woolls, particularly of paragraphs 19-a, 19-b and 19-c. Case No. 1470 on exceptions by trustee to final decree of the Supreme Court of Probate in York County disallowing her appeal from the Judge of Probate in said county. As to case No. 1484, bill sustained. As to case No. 1470, exceptions sustained. Decrees in both cases in accordance with the opinion. The cases fully appear in the opinion.

George W. Abele,
Verrill, Hale, Booth & Ives, for Appellant.
Mary A. Bradbury,
Waterhouse, Titcomb & Siddall, for Appellee.

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

HUDSON, J. Clara B. Woolls of Saco died September 13, 1924, leaving a will dated May 5, 1922, probated November 12, 1924.

Case No. 1484, on report, is a bill in equity praying for the construction and interpretation of this will, particularly of Paragraphs 19-a, 19-b and 19-c.

In Case No. 1470 Bertha L. Wight, Trustee under said will, presents exceptions to the final decree of the Supreme Court of Probate in said York County dated July 11, 1934, disallowing her appeal from the decree of the Judge of Probate in said county.

Beneficiaries named in the will particularly interested are Winifred M. Devine, married daughter and only child of the testatrix, the testatrix's grandchildren and friends, Ella M. Freeman and Florence Mason. In paragraph 1 she bequeathed $10,000.00 to her daughter; in paragraph 2, $20,000.00 to her daughter and Miss Freeman in trust for the education of the grandchildren; in paragraph 4 she devised to Miss Mason a life estate of real estate at 21 Cutts Avenue in Saco, consisting of a house, stable and about nine thousand square feet of land, with a remainder over to the trustee or trustees under said paragraph 19th of the will; in paragraphs 4 to 18 inclusive bequests to individuals, unions, churches and societies ranging in amount from $500.00 to $2,000.00 and aggregating $15,000.00.

Paragraph 19, of which construction and intepretation are sought, is:

> "All the rest, residue and remainder of my estate, both real and personal, and wheresoever located, to *Ella M. Freeman*, in trust, nevertheless, for the following purposes:
>
> "a. To pay from the net income thereof the sum of two thousand (2000) dollars each year in quarterly payments to said *Florence Mason*, during her life.
>
> "b. To pay from said net income during the lifetime of said *Florence Mason*, and for her benefit, if said property at 21 Cutts Avenue, Saco, Maine, is part of my estate at the time of my decease,—
>
> "all taxes assessed by said City of Saco on said real estate;
>
> "all premiums on fire insurance policies covering the same and covering all personal effects therein contained;
>
> "all bills for coal necessary for heating said premises and for necessary repairs and improvements thereon.

"c. To pay the balance of said net income in monthly, quarterly or semi-annual payments, as may be deemed most convenient by the trustee or trustees, to my daughter, the said *Winifred M. Devine*, during her life; also such portion or portions of the principal sum for her proper maintenance and support as in their judgment may seem wise."

Then follow in sub-section d, (upon the decease of the daughter or in the event that the daughter should pre-decease the testatrix) certain trust provisions for the proper maintenance and support of the grandchildren and for final distribution to them upon the termination of the trust.

Miss Freeman did not qualify as trustee and in her stead were appointed Marcus S. Wight and Bertha L. Wight as provided in the will.

Involved are their joint account, covering the period from July 16, 1931, to May 23, 1932, and that of the surviving trustee, Bertha L. Wight, from May 23, 1932, to July 16, 1932, together covering a twelve-month period, both of which may be considered herein as one account.

Like questions of law are presented in the bill for construction and interpretation of the will and by the exceptions.

The exigency, prompting this litigation, is the fact that the income from the corpus of the trust estate has depreciated to such an extent that there can not be full compliance with the provisions of said paragraph 19. For the year in question the gross income was $2779.41. From this amount the trustees deducted uncontroverted disbursements of $817.83, leaving as net income $1961.58, insufficient by $38.42 to pay the annuity in full. Still they paid the annuitant $2000.00, the $38.42 necessarily coming out of the corpus.

Under paragraph 19-c, out of the corpus of the estate the trustees paid $2950.00 to the daughter.

The exceptant claims as grievances:

1. The disallowance of the $2950.00.

2. The disallowance of disbursements by the trustees of an amount totalling $596.42 on account of the Cutts Avenue real estate for taxes, insurance and painting.

3. The disallowance of so much of the two payments of $1000.00 each August 26, 1931, and February 23, 1932, to Florence Mason as is in excess of the said $1961.58.

4. The investments of the trust estate.

The last grievance, however, is not relied on in argument and so we disregard it.

> "The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rule. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implication and necessary inferences." *Green* v. *Allen et als.*, 132 Me., 256, 258, 170 A., 504, 505; *Davis et als.* v. *McKown, et als.*, 131 Me., 203, 209, 160 A., 458; *Edwards* v. *Packard*, 129 Me., 74, 77, 78, 149 A., 623; *Harris* v *Austin*, 125 Me., 127, 131 A., 206; *Cook* v. *Stevens*, 125 Me., 378, 381, 134 A., 195; *Thatcher* v. *Thatcher*, 117 Me., 331, 332, 104 A., 515; *Bodfish* v. *Bodfish*, 105 Me., 166, 170, 73 A., 1033.

In amplification of the above principle, may this be quoted from an extensive note in 94 A. L. R., 257:

> "The question in interpreting a will is not what the testator actually intended, or what he meant to write, but merely what is the meaning of the words used in the will; not what intention existed in his mind, but what is expressed by the language of the will; . . ."

Paragraph 19

We will now consider said paragraph 19 with its component parts, state their meaning where necessary, and make application to the particular alleged grievances.

Sub-section a: By sub-section a, a $2000.00 annuity is created payable to Florence Mason for life. Her counsel does not claim that this annuity is in the nature of a demonstrative legacy. Its payment is specifically required to come out of the net income. It is so stated plainly and without ambiguity. If and when the net in-

come is not sufficient, the loss falls upon the annuitant. The appellee contends that the Court should declare that there "be a theory of equitable abatement as between the annuitant, Miss Mason on the one hand and the power of appointment of the trustees to the remaindermen on the other." The will discloses nothing permitting this. It speaks unambiguously for itself. To it we can not in effect add provisions based on what we may think she would have had done, had she forseen shrinkage of her estate. It would be speculative so to do and there would be no certainty that it would carry out her intention. We may construe and interpret her language found in the will but not incorporate in it unused words and thereby place a construction on an untreated subject.

We can not "under a state of circumstances never in the testator's contemplation give a different construction to the will, and impose, as it were, a new intention upon the testator." *Veazie* v. *Forsaith*, 76 Me., 172, 184.

In the last cited case, on page 180, the Court, in discussing a distinction between a testamentary trust and one by deed, said:

> "His" (meaning the testator) "is the property given, he can do with it as seemeth to him right. The legatees are but the objects of his bounty, and must submit to that which has been provided for them. Hence in a will the great purpose is to ascertain the meaning of the testator only. A deed is a contract, and in construing it we are to ascertain the meaning or the understanding of both parties to it."

Evidence was introduced as to the friendly relations between the annuitant and the testatrix, as well as the annuitant's financial means. There being no ambiguity in the will, this evidence was inadmissible. *Bodfish* v. *Bodfish*, supra, page 171; *Bryant* v. *Bryant*, 129 Me., 251, 258, 151 A., 429; *Cook* v. *Stevens*, 125 Me., 378, 380, 134 A., 195.

It is only where the will is ambiguous that extrinsic circumstances, such as the relation subsisting between the testator and the claimants or objects of his bounty, his intimacy or association with and affection or lack of affection for them and their relationship by blood or otherwise, are admissible. 94 A. L. R., 235, supra.

"Where no doubt exists as to the property bequeathed or the identity of the beneficiary there is no room for extrinsic evidence; the will must stand as written." *Mahoney et al.* v. *Grainger et al.*, 186 N. E., 86, 283 Mass., 189; also see *Kingman* v. *New Bedford Home for Aged*, 237 Mass., 323, 129 N. E., 449; *Calder* v. *Bryant*, 282 Mass., 231, 184 N. E., 440; *Moffatt* v. *Heon*, 242 Mass., 201, 136 N. E., 123.

However friendly the testimony may have shown the testatrix was toward Miss Mason, we can not know from any language in the will what, had she forseen the present condition of her estate, she would have had done under such circumstances as between her friend and her daughter. As a consequence, the trustees can not be allowed for the excess payment of $38.42 over and above the net income of $1961.58.

Sub-section b: Hereby was provision made for Miss Mason's benefit conditional upon the Cutts Avenue real estate being a part of the estate at the time of the testatrix' decease. It was. Thus it was provided that the trustees might pay only from net income certain debts that should be incurred on account of said real estate, as taxes assessed by the City of Saco, premiums on fire insurance policies covering it and personal effects therein, and bills for coal necessary for heating the buildings and for necessary repairs of and improvements thereon. Here again the language is plain and under this sub-section nothing can be paid by these trustees, even for purposes expressed therein, except out of net income.

So far paragraph 19 has dealt only with net income as a source. If there is not enough net income to pay both the annuity under sub-section a and the debts under sub-section b, whether payments shall be made on the annuity or on account of the Cutts Avenue property, is a matter for the trustees to determine, acting in good faith according to their best judgment and uninfluenced by improper motives. Nothing in this record discloses that the trustees acted otherwise, so, the net income having been exhausted by its application to the annuity, nothing of income remained by which the trustees under said sub-section b could pay these charges on account of this real estate.

Sub-section c: This sub-section deals both with income and corpus.

Under it, only if there be any of the net income left after payment of the annuity provided for in sub-section a and the payment of the debts as named in sub-section b, is income payable to the daughter.

Said sub-section c then provides that there may be paid to her "also such portion or portions of the principal sum for her proper maintenance and support as in their judgment may seem wise."

Thus the testatrix lodged a discretion in the trustees. How is it to be exercised? In good faith, according to their best judgment and uninfluenced by improper motives. When so exercised their discretion is not reviewable. *Kimball* v. *Blanchard*, 101 Me., 383, 390, 64 A., 645; *True Real Estate Company* v. *True & True*, 115 Me., 533, 539, 540, 99 A., 627; *Alford* v. *Richardson*, 120 Me., 316, 321, 114 A., 193.

> "But whatever the reason, the bestowal of the power is made plain. Interference with the exercise of this power, will be employed on the part of the Court only when there is made to appear an abuse of discretion by proof 'of the fullest and clearest character.' *Morton* v. *Southgate*, 28 Me., 41." *Hichborn* v. *Bradbury*, 111 Me., 519, 523, 90 A., 325, 327.
>
> "So long as he acts within his power, honestly and in good faith, his determination is conclusive." *Alford* v. *Richardson*, 120 Me., 316, 321, 114 A., 193, 196.

The appellee contends, however, that the rule as stated in the cases just cited is not correct but that adopted and applied in *Corkery* v. *Dorsey*, 223 Mass., 97, 101, 111 N. E., 795, preferable, namely, that the trustees must exercise that soundness of judgment which follows from a due appreciation of trust responsibility. The principal difference, it would seem, between the Maine and Massachusetts rules, is that Massachusetts holds the trustee to a soundness of judgment which follows a due appreciation of trust responsibility, no matter who the trustee is, while in Maine the requirement is that the best judgment of the particular trustee, uninfluenced by improper motives and exercised in good faith, be

exercised. We adhere to the Maine rule. We think it preferable with relation to a testamentary trust in which ordinarily the trustee is the personal selection of the testator and so is one of whom he has knowledge and in whom he places confidence. His intention is that his self-chosen trustee shall act according to *his* best judgment, not the judgment of someone else, though it be sound, or even of the Court; and as long as he does so in good faith, uninfluenced by improper motives, he commits no breach of his fiduciary obligation.

In *Alford* v. *Richardson*, supra, on page 321, appears a quotation from *Corkery* v. *Dorsey*, supra, but we do not consider that the Massachusetts rule is for that reason adopted in Maine. True, in *Alford* v. *Richardson*, supra, our Court dealt with "sound judgment" but in the will in that case the testator left "the whole matter to the sound judgment and discretion of the trustee."

> "If a settlor has given his trustee a discretionary power, the court is reluctant to interfere with the trustee's use of the power . . . as long as the honest judgment and decision of the trustee can be obtained by the cestui on the use of the corpus, no matter how inefficient the cestui may think the trustee is in this respect, the beneficiary has no ground for complaint. He is getting just what the settlor provided for him. Hence chancery takes the position that it will not direct the trustee when and how to use his discretionary power, so long as he is honestly and with some degree of reason employing that power. Even though the Court would make a far different decision from that which the trustee has made or is about to make with regard to the discretionary power, the Court will not overrule the trustee or take other action, unless he is refusing to exercise the power at all, or is guilty of bad faith, or is acting in a wholly unreasonable and arbitrary manner. . . . But if the trustee who has the discretionary power is wholly refusing to exercise his discretion, or is using the discretionary power in a manner which shows that he is obviously not honestly attempting to act for the benefit of the cestui, but is making decisions out of ill will toward the cestui, or capriciously, or from other motives which involve bad faith and abuse of his powers, equity will act and will direct the trustee to use his

discretion as the Court thinks it should be employed, or will, so far as possible, undo acts done by the trustee in abuse of his power." *Bogert on Trusts and Trustees*, Vol. 3, Sec. 560, on pages 1788, 1789, 1791, 1792 and 1793.

It not having been made to appear that these trustees exercised their discretion other than in good faith, according to their best judgment and uninfluenced by improper motives, their payment of $2950.00 out of the corpus to the daughter must be allowed.

As to Case No. 1484, the entry shall be, bill sustained; and as to Case No. 1470, exceptions sustained. Decrees in both cases in accordance with this opinion.

So ordered.

MARTHA THOMPSON

vs.

AMERICAN AGRICULTURAL CHEMICAL COMPANY.

Aroostook. Opinion, September 18, 1935.

REVIEW. JUDICIAL DISCRETION. EXCEPTIONS.

A petitioner to obtain review of a judgment, claiming right under Sec. 1, *Paragraph VII, Chapter* 103, *R. S.* 1930, *must satisfy the court at* nisi prius (1) *that justice has not been done;* (2) *that the consequent injustice was through fraud, accident, mistake or misfortune; and* (3) *that a further hearing would be just and equitable.*

Such a petition is addressed to the discretion of the court and its decision thereon can be revised upon exceptions only for erroneous rulings in matter of law.

Exceptions do not lie to findings of facts by a single Justice to whom a case is submitted for determination, for such submission is to his discretion. His findings of facts must abide in the absence of proof of abuse of discretion.

In the case at bar, the petitioner knew that an action against her was pending at the time the various payments were made. She knew of the death of her

attorney immediately after it occurred. Ten months before judgment was entered, and nine months after the death of her attorney, she was fully advised as to the status of the case but apparently made no effort to employ another attorney or do anything for her own protection. Upon these facts, the finding that she was negligent was not error in law.

On exceptions by plaintiff. A petition for review heard at the November Term, 1934, of the Superior Court for the County of Aroostook. To the denial by the presiding Justice of the petition, exception was seasonably taken. Exception overruled. The case fully appears in the opinion.

W. P. Hamilton, for plaintiff.

Bernard Archibald,

Aaron A. Putnam, for defendant.

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

HUDSON, J. Petition based on Section 1, Paragraph VII, Chapter 103, R. S. 1930, to review a judgment recovered against the petitioner by the defendant company. To obtain such a review, the petitioner must prove "to the satisfaction of the Court at *nisi prius* three propositions (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable." *Thomaston* v. *Starrett*, 128 Me., 328, 330.

Where the presiding Justice is satisfied that any one of the above requirements is not proven and so denies the petition, his decision is final and is not subject to review upon exceptions.

> "A petition for review is addressed to the discretion of the Court and its decision thereon can be revised upon exceptions only for erroneous rulings in matter of law." *Thomaston* v. *Starrett*, supra, page 334.

> "The allowance or denial of the petition rested wholly in the discretion of the Court." *Leviston* v. *Standard Historical Soc.*, 173 A., 810, 812; 133 Me., 77.

In the instant case, the exception is to the denial of the presiding Justice to grant the review.

A careful study of his decision shows that it was based on findings of fact. He held that the petitioner herself by her negligence, with full knowledge of the situation, permitted the judgment to be entered. Her counsel claims that this was an error in law because such a finding was due to an error in the Justice's "interpretation or remembering of the testimony." The parties in permitting him to hear the case as a single Justice submitted their cause to his discretion and in the absence of its abuse must abide by his decision so far as the facts found by him are concerned.

> "What facts were proved were solely for the determination of the presiding Justice, to which exceptions do not lie." *Bradford* v. *Philbrick*, 96 Me., 420, 421; *Moody* v. *Larrabee*, 39 Me., 282.

We must accept as true his statement that "she knew an action against her was pending at the time the various payments were made; she knew of the death of her attorney immediately after it occurred. Ten months before judgment was entered, and nine months after the death of her attorney, she was fully advised as to the status of the case but apparently made no effort to employ another attorney or to do anything for her own protection." Upon these facts, the finding that she was negligent we can not say is error in law. As said in the last paragraph of *Leviston* v. *Standard Historical Soc.*, supra:

> "These questions were addressed to his discretion. His decision presents no erroneous rulings of law. It is final."

If the petitioner has been injured, she has mistaken her remedy.

Exceptions overruled.

HIGHLAND TRUST COMPANY

vs.

FLORENCE M. HAMILTON

Androscoggin. Opinion, October 5, 1935

REAL ACTIONS. SHERIFF'S SALE. R. S., CHAP. 90, SEC. 31.

Revised Statutes, Chapter 90, Section 31, which authorizes the seizure and sale of real estate attachable and all rights and interests therein, including rights of redeeming real estate mortgaged, and contains the provision that "such seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption" does not pass to the purchaser at such sale all the title which the judgment debtor has in the property described, regardless of the estate, right or interest seized, sold or conveyed by the sheriff's deed.

In order to render a seizure and sale on execution legally effective, the nature of the right taken must be truly described in the notification and advertisement and the deed executed by the officer.

A seizure and sale of a specifically described right or interest in the debtor's land will not pass title to a greater estate not described or conveyed, or to a right or interest which does not exist.

A seizure and sale on execution of an equity of redemption which does not exist is void. It is not the "seizure and sale" contemplated by the statute.

In the case at bar, the sheriff's deed given by the officer described the property therein conveyed as "all the right in equity of redemption" which the execution debtor had at the date of the original attachment. The defendant had, however, an unencumbered freehold in her lands and not an equity of redemption. This sale and conveyance of the defendant's equity of redemption conveyed no title to the grantees.

The proven facts did not establish a waiver of the fatal defects in the levy in the original suit between the parties. Nor were the essential and well-recognized elements of estoppel shown to exist.

On exceptions by plaintiff. A writ of entry to recover possession of a parcel of land in the town of Poland. The defendant pleaded

nul disseisin. Trial was had before the presiding Justice of the Superior Court with right of exceptions as to matter of law reserved. Judgment was for the defendant, and plaintiff reserved exceptions. Exceptions overruled. The case fully appears in the opinion.

Pulsifer & Ludden, for plaintiff.

Ralph W. Crockett, for defendant.

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

STURGIS, J. This writ of entry to recover possession of a parcel of land with the buildings thereon situated in the town of Poland in Androscoggin County was heard by the trial Judge in the Superior Court with right of exceptions to rulings of law reserved. The action is brought by the Commissioner of Banks of Massachusetts in behalf of the Highland Trust Company of Somerville in that Commonwealth. The plea is *nul disseisin.* Judgment was for the defendant. The plaintiff reserved exceptions.

The material facts in this case are not seriously in dispute. On September 18, 1930, the defendant, Florence M. Hamilton, a resident of Poland, Maine, executed a promissory note for $15,000, payable on October 11, 1930 to the order of one Carl S. Flanders, which in due course was transferred by endorsement to the Highland Trust Company. The note remaining unpaid at maturity, on October 15, 1930, suit was begun in the courts of this State and on the same day a general attachment was made upon the real estate of the defendant. The action was entered in the Superior Court and continued until the April term, 1931, when judgment by default was recorded against the defendant and execution issued.

The return of the deputy sheriff, to whom the execution was given for levy by sale, recites that on May 25, 1931, he "took all the *right in equity*" which the defendant at the date of the attachment on the original writ "*had . . . to redeem*" the demanded premises which were then described; that notice in writing that "said *right in equity* would be sold by public auction on the twenty-ninth day of June, 1931, etc." was served upon the defendant, and that "a like notice" was posted and published as required by law; and, except for statements of the adjournments made, the application

of the proceeds of the sale and the satisfaction of the execution, concludes with the statement that:

> "I sold by public auction all the *right in equity* which the said Florence M. Hamilton sometime known as Florence Abrams of the City, County and State of New York, had on the fifteenth day of October 1930 as aforesaid, *to redeem* the said land and buildings thereon, described as hereinbefore written, to James A. Pulsifer and Forest E. Ludden, both of said Auburn, they being the highest bidders therefor, for the sum of $18,855.23, and thereupon I executed and delivered to the said James A. Pulsifer and Forest E. Ludden, a sufficient deed of said *right in equity* . . . "

The sheriff's deed given to the purchasers at this sale, after reciting compliance with all statutory requirements, contains the following words of conveyance:

> ". . . and do hereby give, grant, bargain, sell and convey to them, the said James A. Pulsifer and Forest E. Ludden, *all the right in equity of redemption* which the said Florence M. Hamilton, sometime known as Florence Abrams, has or had on the fifteenth day of October, 1930, being the date of attachment on the original writ, *of redeeming* the following described real estate."

The description which followed identifies the real estate of which the equity was sold as the premises demanded in this action. The deed was duly recorded, and Messrs. Pulsifer and Ludden, the grantees therein, conveyed the property to their client, the Highland Trust Company, by quit claim deed, in no way limiting their conveyance to the equity of redemption which they had acquired according to the terms of the sheriff's deed. This is the source of the title to the demanded premises upon which the Highland Trust Company relies in this writ of entry.

The all important and controlling fact in this case, however, appears in the stipulation of the parties made during the trial. On October 15, 1930, when the attachment was made in the original suit, Florence M. Hamilton, the defendant here, held full and complete title free of all encumbrances to the premises taken on execu-

tion and, except for the lien of that attachment, continued to have clear title thereto until and including January 18, 1932, the date of the attempted sheriff's sale. Neither at the time of attachment or of seizure or of sale was she the owner of an equity of redemption in the property. She had a legal estate free from mortgage liens. She also at all times continued in and still held possession of the demanded premises at the time of the trial.

First Exception

Exception was reserved to the following ruling made by the presiding Justice at the request of the defendant:

> "It being shown by the evidence that, neither on October 15, 1930, the date of the attachment of the defendant's real estate in the original suit of *Highland Trust Company* v. *Florence M. Hamilton,* nor on January 18, 1932, the date of the sale by Raymond L. Poulin, deputy sheriff, to James A. Pulsifer and Forest E. Ludden, nor at any time between said dates, was there any mortgage or other encumbrance on the defendant's real estate in Androscoggin County, the sale and conveyance to the said James A. Pulsifer and Forest E. Ludden of 'all the right in equity of redemption, which the said Florence M. Hamilton sometime known as Florence Abrams has or had on the fifteenth day of October, 1930, being the date of attachment on the original writ, of redeeming' the real estate described in the deed from said Raymond L. Poulin, deputy sheriff, to said James A. Pulsifer and Forest E. Ludden, dated January 18, 1932, and recorded in the Androscoggin County Registry of Deeds, Book 415, Page 443, conveyed no title to said grantees."

We find no error in this ruling.

The current statute governing a levy of execution by sale of real estate and rights and interests therein is Revised Statutes (1930) Chapter 90, Sections 31 to 39 inclusive. As counsel on their briefs seem to agree, the correctness of the ruling complained of in the first exception depends upon a proper construction of Section 31, which, with Section 35, is directly applicable to the sale attempted

to be made in this case. The pertinent provisions of these sections read:

> "Sec. 31. Real estate attachable and all rights and interests therein, including the right to cut timber and grass, as described in chapter ninety-five, rights of redeeming real estate mortgaged, rights to a conveyance of it by bond or contract, interests by virtue of possession and improvement of lands as described in chapter one hundred eighteen, and estates for a term of years, may be taken on execution and sold, and the officer shall account to the debtor for any surplus proceeds of the sale, to be appropriated as provided in section twenty-two, of chapter ninety-eight. Such seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption. This section does not repeal any other modes of levy of execution, provided in this chapter.
>
> Sec. 35. The officer shall sell such right or interest at public auction to the highest bidder, and execute and deliver to the purchaser a sufficient deed thereof, which, being recorded in the registry of deeds of the county or district where the land lies, within three months after the sale, conveys to him all the title of the debtor in the premises. . . ."

The Highland Trust Company, through its counsel, contends that the seizure and sale of the defendant's real estate made pursuant to these provisions of law passed to the purchasers all the title which the defendant had in the property at the time of the original attachment regardless of the estate, right or interest seized, sold or conveyed by the sheriff's deed. It relies on the provision in Section 31, supra, that

> "Such seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption."

And it points out, as the record shows, that, at the time of the attachment and the seizure on execution of the defendant's equity of redemption, she had an unencumbered freehold estate in her lands.

We are not of opinion that this construction of this estate is sustained either by reason or authority. Until Chapter 80, Public Laws 1881, was enacted, unencumbered lands could not be sold in this State on execution. Prior to that time, rights of redeeming real estate mortgaged, rights to have a conveyance of it by bond or contract, interests by virtue of possession and improvement of lands, and estates for terms of years only could be taken on execution and sold. All real estate attachable was subject to levy by appraisement or extent, as it is usually termed, but seizure and sale on execution was restricted to the specific rights and interests in lands just enumerated. R. S. 1871, Chap. 76, Sec. 1 *et seq* and statutes of earlier enactment.

Under these earlier statutes, it became the settled law in this State that, in order to render a seizure and sale on execution legally effective, the nature of the right taken must be truly described in the notification and advertisement and the deed executed by the officer. It was accordingly held in *Stevens* v. *Legrow*, 19 Me., 95, that even under a general attachment of a debtor's real estate, who had only a right in lands under a contract, a purported seizure and sale of his equity of redemption which did not exist, passed no title. In *Pillsbury* v. *Smyth*, 25 Me., 427, it was adjudged that the sale of an equity of redemption of real estate is void if the mortgage upon the land had been paid and the debtor had an unencumbered title thereto at the time of the seizure on the execution. This rule is affirmed in *Brown* v. *Snell*, 46 Me., 490; *Bartlett* v. *Stearns*, 73 Me., 17, 21. It prevails in Massachusetts. *Freeman* v. *McGaw*, 15 Pick., 82; *Perry* v. *Hayward*, 12 Cush., 344; *Gardner* v. *Barnes*, 106 Mass., 505; *Hackett* v. *Buck*, 128 Mass., 369.

The original authority for the sale on execution of a debtor's unencumbered lands as already stated was Chapter 80, Public Laws 1881. This Act was re-enacted practically verbatim as Chapter 42, Section 76, R. S., 1883. In the Revised Statutes of 1903, Chap. 78, Sec. 32, the then existing statutory provisions authoriz-

ing the seizure and sale on execution of a debtor's real estate and his rights and interests therein were condensed into a single section, and in this form have been brought forward through subsequent revisions and now appear as R. S. (1930), Chap. 90, Sec. 31.

In *Millett* v. *Blake*, 81 Me., 531, Chapter 80, P. L. 1881, as reenacted in R. S. (1883) Chap. 76, Sec. 42, was construed by this Court. In that case, the officer's return stated that he seized and sold "all the right, title and interest" which the defendant had in the land described on the date of attachment in the original suit. The debtor, at the time of the attachment and of the seizure and sale, had an equity of redemption in the land and no more. The Court said:

> "Prior to the enactment of this statute, the right to redeem the debtor's lands under mortgage could be acquired by the creditor by levy of his execution upon the lands as provided in said chapter, or by seizure and sale of the equity of redemption. If by levy, the amount due upon the mortgage would be deducted from the appraised value of the land taken. So that by either mode, the creditor took the right to redeem only. Under Sec. 42, the right of the creditor was enlarged so that he might sell a debtor's lands instead of making the levy, and in that way take all of the right, title and interest that he has in the lands, of any nature.
>
> "It is the settled law of this state, that an attachment of all the right, title and interest which the debtor has in lands, is a good attachment of the land itself. And the question presented here is whether under this enlarged remedy of the creditor, a seizure and sale of all the debtor's right, title and interest as rights of redeeming real estate mortgaged are taken on execution and sold, will pass to the creditor the debtor's right of redemption where the land is mortgaged. We think it will. We can see no good reason, and no sufficient reason has been pointed out by counsel, why the statute should not be so construed. We think such a seizure and sale will pass to the creditor all the debtor's right, title and interest in the land, whether it be a fee or a less estate."

This opinion of this Court followed *Woodward* v. *Sartwell*, 129 Mass., 210, where, in considering the statute of that State of 1874, Chap. 188, which is substantially if not precisely like our statute, it was held that the seizure and sale upon execution of all the right, title and interest of the debtor in lands passed title in such estate as the debtor had in the premises at the time of the attachment.

The construction put upon the Statute in *Millett* v. *Blake* must be affirmed. There has been no change in the law. A seizure and sale upon execution of all the right, title and interest which a debtor has in lands undoubtedly will pass title to any interest of any nature he has at the time, whether it be "a fee or a less estate" which necessarily includes an equity of redemption. It does not follow, however, and *Millett* v. *Blake* does not hold, that a seizure and sale of a specifically described right or interest in the debtor's lands will pass title to a greater estate not described or conveyed in the sheriff's deed, or to a right or interest which does not exist.

As already stated, and as is recognized in *Millett* v. *Blake*, supra, the Statute of 1874, Chap. 188, of Massachusetts is substantially identical with our statute. It is, as was Chapter 80, P. L. 1881 of this State, the original authority in that Commonwealth for the levy of execution by sale instead of extent upon lands not subject to mortgage. Its interpretation confirms our conclusions upon the question now under consideration. In *Hackett* v. *Buck*, supra, that Court said:

> "The St. of 1874, c. 188, has changed the law so far as to authorize an estate not subject to mortgage to be levied upon by sale instead of by extent, but not so far as to authorize the officer to levy upon, advertise and sell such an estate as an equity of redemption, or to sell less than the entire estate which is at the time of the beginning of the levy bound by the lien of the attachment. In this case, by the discharge of the mortgage, after the attachment and before the levy, the equity of redemption had ceased to exist; the advertisement that the right to be sold on execution was an equity of redemption only, tended to limit to the prejudice of the debtor the sums bid at the sale; and the deed of the officer, being in terms limited to the right in equity, which had ceased to exist and

which could not be revived by any act of his, was a nullity, and passed no title to the purchaser."

We are of opinion, therefore, that the "seizure and sale" on execution which will pass to the purchaser "all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ," as provided in R. S., Chap. 90, Sec. 31, must conform with and be valid under the rules stated. The right or interest of the debtor seized and sold must be truly described either specifically or in terms broad enough to include it, whatever be its nature. If the right or interest attempted to be seized and sold does not exist at the time, as in the case at bar, the levy is void. A seizure and sale on execution which is not according to law will not pass any title to the purchaser at a sheriff's sale. It is not the "seizure and sale" contemplated by the statute.

Second and Third Exceptions

At the trial, the presiding Justice, although requested, refused to rule that the several adjournments of the sale on execution of the defendant's land at her request constituted a waiver of formal defects in the proceedings or that payment of costs and taxes by the plaintiff, pending the sale and subsequent thereto, as shown by the record, estopped the defendant to deny the validity of the attempted sale. The refusal to make these rulings was not error. The record tends to show that the defendant made an honest but ineffectual attempt to adjust or pay the judgment debt, and the continuances were requested for that purpose. Proof of these facts does not establish a waiver of fatal defects in the levy. Nor do we find evidence of acts or assurances on the part of the defendant which estopped her from denying the plaintiff's title. The essential and well-recognized elements of estoppel are not present in this case.

Exceptions overruled.

INHABITANTS OF TOWN OF WINSLOW

vs.

INHABITANTS OF CITY OF OLD TOWN.

Kennebec. Opinion, October 14, 1935.

PAUPERS & PAUPER SETTLEMENT. MINORS. P. L. 1931, CHAP. 124, P. L. 1933, CHAP. 228.

Under the statutes of this State, children, when emancipated, take the pauper settlement their father has at the time of emancipation and this settlement continues until they gain a new one for themselves.

If the emancipation is during minority, the gaining of a new settlement by the minor can begin only as of the date of his majority. It is a person of age who can acquire a pauper settlement in his own right.

When a child attains his majority, unless he is non compos mentis, *he is emancipated within the meaning of the pauper law.*

The words in the provision of the statutes that "he and those who derive their settlement from him lose their settlement in such town" includes only those who are deriving their settlement from the father at the time he loses his settlement. The statute has no retroactive force to bring a loss of settlement to those who at one time derived their settlement from the father but do so no longer.

The Legislature, having repeated these words with full knowledge of a judicial construction placed upon them is presumed to have intended that the meaning which had attached to them should remain unchanged.

The pauper to whose family the supplies were furnished in the case at bar had a legal settlement in Old Town and, according to the stipulations of the report, the mandate must be; Judgment to be entered in the trial Court for the plaintiff for $772.08 with costs to be assessed by the Clerk.

On report on an agreed statement of facts. An action of assumpsit for pauper supplies furnished the family of Elroy E. Temple, Jr., by the plaintiff town. The issue involved the question of pau-

per settlement in the defendant town, and the construction of the provision of P. L. 1931, Chap. 124 as amended in P. L. 1933, Chap. 228. Judgment to be entered in the trial Court for the plaintiff for $772.08 with costs to be assessed by the Clerk. The case fully appears in the opinion.

Perkins & Weeks, for plaintiffs.

William H. Powell, Stanley Needham, for defendants.

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

STURGIS, J. Report on agreed statement of facts of an action of assumpsit for pauper supplies furnished the family of Elroy E. Temple, Jr., while he was living in the town of Winslow. When the pauper attained his majority on May 4, 1929, his father had a pauper settlement in the city of Old Town but lost it on May 1, 1932, having at that time lived five consecutive years outside of Old Town without receiving pauper supplies from any source within the State. It is not stated in the report that the pauper was *non compos mentis* when he attained his majority or that he was not at that time fully emancipated. It is agreed that the supplies in suit were furnished during the period from October 7, 1933 to December 24, 1934, and that the necessary statutory notices were sent to the overseers of Old Town and his settlement there seasonably denied.

The statutes of this State governing the settlement of paupers and fixing the liability of towns and cities for their relief is found in Revised Statutes, Chapter 33 as amended. The following provisions are directly applicable to the case at bar:

> "A person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein." Sec. 1, Par. VI.
>
> "Legitimate children have the settlement of their father, if he has any in the State; if he has not, they shall be deemed to have no settlement in the State. Children . . . shall not have the settlement of their father . . . acquired after they become

of age and have capacity to acquire one." Sec. 1, Par. II; P. L., 1933, Chap. 203, Sec. 2.

"Settlements acquired under existing laws, remain until new ones are acquired. Former settlements are defeated by the acquisition of new ones. Whenever a person of capacity to acquire a settlement, having a pauper settlement in a town, has lived, or shall live, . . . 5 consecutive years outside of the town in which he has a settlement after August 1, 1926, without receiving pauper supplies from any source within the state, he and those who derive their settlement from him lose their settlement in such town." Sec. 3; P. L. 1931, Chap. 124; P. L. 1933, Chap. 228.

It is well settled under the pauper statutes that children, when emancipated, take the pauper settlement their father has at the time of emancipation, and this settlement continues until they gain a new one for themselves. *Liberty* v. *Levant*, 122 Me., 300; *Eagle Lake* v. *Fort Kent*, 117 Me., 134; *Bangor* v. *Veazie*, 111 Me., 371; *Thomaston* v. *Greenbush*, 106 Me., 242; *Carthage* v. *Canton*, 97 Me., 473. If the emancipation is during minority, the gaining of a new settlement by the minor can begin only as of the date he attains majority. It is a person of age who can acquire a pauper settlement in his own right. *Exeter* v. *Stetson*, 89 Me., 531; *Thomaston* v. *Greenbush*, supra; *Bangor* v. *Veazie*, supra; R. S., Chap. 33, Sec. 1, Par. VI. If the emancipation is by becoming of age, however, the power of the child to gain a new settlement is not postponed. The word "emancipation", as used in the cases concerning pauper settlements, includes the emancipation implied by the law when a child becomes of age. *Shirley* v. *Lancaster*, 6 Allen (Mass.) 31. And it has long been held in this State that when a child attains his majority, unless he is *non compos mentis*, he is deemed to have been emancipated. *Monroe* v. *Jackson*, 55 Me., 55, 57; *Hampden* v. *Troy*, 79 Me., 484. See also *Milo* v. *Gardiner*, 41 Me., 549; *Hampden* v. *Brewer*, 24 Me., 281; *Springfield* v. *Wilbraham*, 4 Mass., 493; *Andover* v. *Merrimack County*, 37 N. H., 437; *Gloucester* v. *Springfield*, 2 R. I., 30; 18 *Am. & Eng. Encyc. of Law*, 789. We see no reason and find no authority for drawing a distinction in the pauper law between the emancipation which

results from a minor's becoming of age and that which grows out of the voluntary acts or agreements of the parent or child.

In *Thomaston* v. *Greenbush*, supra, affirmed in *Bangor* v. *Veazie*, supra, the minors were emancipated by abandonment and the father thereafter lost his settlement by living five consecutive years beyond the limits of the State, as provided by P. L. 1893, Chap. 269. That statute, as does that part of P. L. 1933, Chap. 228 already quoted, under which the father of the pauper in this case lost his settlement, both statutes now by codification being made a part of the same section, provided that as a result of the loss, "he and those who derive their settlement from him lose their settlement in such town." The Court there said:

> "From a cursory reading of the words 'he and those who derive their settlement from him lose their settlement in such town,' it might be assumed that this covers all who in the past have derived their settlement from him. But further consideration shows that this is not the true construction. It means that those who, at the time he loses his settlement, namely, at the end of five years, are so connected with him as to then have a derivative settlement from him, lose theirs also. The tie of settlement still existing between father and unemancipated minors, his loss is their loss. But when that tie has been severed before the five years expire, then the loss is his alone, because the emancipated children are pursuing an independent course and the expiration of the five years cannot revive the relations between parent and child nor reunite the tie once broken. The statute was not designed to disrupt already acquired settlements in this way. . . . The statute does not speak until the end of five years and when it does speak it has no retroactive force to bring a loss of settlement to those who at one time derived their settlement from such party but do so no longer.

The opinion in *Thomaston* v. *Greenbush*, supra, interpreting the words "he and those who derive their settlement from him lose their settlement, etc." was announced long before the passage of P. L. 1931, Chap. 124, and P. L. 1933, Chap. 228. Under the established rules of statutory construction, it is to be presumed

that the Legislature repeated the words in their later enactments with full knowledge of the judicial construction placed upon them and with the intention that the meaning which had already attached to them should remain unchanged. *Hathorn* v. *Robinson*, 96 Me., 33; *Endlich on the Interpretation of Statutes*, Sec. 367; 25 R. C. L., 992. There are no qualifying or explanatory provisions in the later statutes indicating a contrary intention.

Upon the facts stated, the pauper to whose family supplies were furnished had a legal settlement in the defendant city, and the mandate must be, according to the stipulations of the report

Judgment to be entered in the trial Court for the plaintiff for $772.08 *with costs to be assessed by the Clerk.*

HAROLD SEARLES *vs.* HOWARD ROSS AND FRED ROSS.

WARREN SEARLES, PRO AMI *vs.* HOWARD ROSS AND FRED ROSS.

Franklin. Opinion, October 15, 1935.

PLEADING & PRACTICE. NEW TRIALS. BURDEN OF PROOF. NEGLIGENCE. CHILDREN.

In considering motions by the defendant for new trials the evidence must be viewed in the light most favorable to the plaintiffs. On the defendants is the burden of proving that the jury's verdict is manifestly wrong.

Ordinarily when evidence is in conflict as to the negligence of the defendant the question is for the jury. The question of contributory negligence of the plaintiff is likewise ordinarily for the jury.

Children, even those of tender years, are not absolved from the obligation to use some care, but the law has regard for the frailties of childhood and the thoughtlessness of youth.

A child is required to exercise only that degree of care and judgment which children of the same age and intelligence ordinarily exercise under the same circumstances.

In the case at bar, the evidence was sufficient to warrant the jury's finding that in the operations on the farm the defendants were partners. The evidence justified the jury's finding that the child was not a trespasser. He had the status of an invitee, and, as such, the defendants owed him the affirmative duty of using reasonable care, not only to see that the premises to which he was invited were in a reasonably safe condition, but also to take precautions to guard him from dangers arising out of instrumentalities under their control.

The question of negligence on the part of Victor Weed and of the contributory negligence of the child was for the jury.

The child was doing that which he was told to do by a much older boy who the defendant thought qualified to operate a mowing machine. The compliance by him with the request of the boy driving the machine to touch up the horses was not contributory negligence as a matter of law on the part of the plaintiff. If what the plaintiff did was heedless, it was a question for the jury to determine whether it was only such heedlessness as is natural to boyhood.

On general motions for new trials by defendants. Action brought by Warren Searles, Pro Ami to recover for personal injuries, and by his father Harold Searles to recover for medical expense and loss of services. Trial was had at the October Term, 1934, of the Superior Court, for the County of Franklin. The jury rendered a verdict for the plaintiff, Warren Searles, in the sum of $5272.00, and for the plaintiff Harold Searles, in the sum of $1045.00. General motions for new trials were thereupon filed by the defendants. Motions overruled. The cases fully appear in the opinion.

Benjamin L. Berman, David V. Berman, Frank Deering, for plaintiffs.

Currier C. Holman, Cyrus N. Blanchard, for defendants.

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

THAXTER, J. There are involved here two suits, one by Warren Searles, a minor, who seeks to recover damages for personal injuries occasioned, as he says, by the negligence of the defendants, the other by his father who claims reimbursement for medical expenses and damages for the loss of services of his son. After a ver-

dict for the plaintiff in each case the defendants filed general motions for new trials which are now before this Court.

At the time of the accident Warren Searles was nine years old. The members of his family, who were living in the Town of Temple, fell into financial distress, and the selectmen of the Town of Phillips, which was responsible for their care, removed them to Phillips and placed them on the Dill Farm, so called, which was owned by the defendants, who were father and son. The town paid the defendants for such use of the farm a rental of six dollars a month. The exact terms of the arrangement are not altogether clear, but it is apparent that the Searles family was to occupy the premises, was to have the right to plant a garden and to pick fruit and berries which might grow on the place. The defendants reserved the right to cut the hay. On the day of the accident the defendants were mowing one of the fields in the farm. There were two machines engaged in the work, one operated by Archie Rowe, an adult, the other by Victor Weed, a boy of thirteen. The plaintiff, Warren Searles, with his sister, Phyllis, of the age of eleven were picking blueberries on the border of this field or in the field immediately adjacent thereto. According to the testimony of the injured boy, Victor Weed called to him and asked him to come down and touch up the horses which Victor was driving. The plaintiff says that he first touched up the near horse with a stick, and then ran around in front and touched up the off horse. As he did so, they plunged forward, and before he could get out of the way his right foot was struck by the cutter bar which extended out about five feet from the right side of the machine. His foot was almost severed from his leg, and amputation was necessary. According to the testimony of Victor Weed, he did not ask Warren to strike the horses, and the first that he knew of the boy's presence in front of the machine was when he suddenly came from the rear and struck the off horse. There is here a clear conflict in the evidence. In some particulars the boy is corroborated by his sister, and Victor Weed by Archie Rowe.

There are a number of grounds why, according to the defendants, the motion should be sustained. They say that Fred Ross, the father, had nothing whatever to do with running the farm and

hence could not be liable, that the plaintiff was a trespasser, that there was no negligence of the defendants either in permitting Victor Weed, a boy, to run the mowing machine, nor any negligence on the part of Weed for which they, as principals, are answerable, and that Warren Searles, the plaintiff, was clearly guilty of contributory negligence.

In considering these motions we must view the evidence in the light most favorable to the plaintiffs. On the defendants is the burden of proving that the jury's verdicts are manifestly wrong. *King* v. *Wolf Grocery Company*, 126 Me., 202; *Hatch* v. *Portland Terminal Company*, 125 Me., 96; *Daughraty* v. *Tebbets*, 122 Me., 397.

There was ample warrant for the jury's finding that in the operations on this farm the defendants were partners. Their testimony that there was an undisclosed arrangement between them, by which the son was to have the sole charge and to pay his father a rental, is refuted by facts which are not in dispute. Victor Weed was apparently boarded and paid by the father, Fred Ross; the property was owned by both defendants and assessed against them under the name of F. M. Ross & Son; under this designation they had carried on a milk business for fifteen years; and the hay cut was used to feed stock owned by both defendants. To this testimony the language of this court in *Roux* v. *Lawand*, 131 Me., 215, 219, is peculiarly applicable. "Viewing the testimony, as the plaintiff was entitled to have it viewed, in the light most favorable to him, and giving him the benefit of every inference to be drawn therefrom, evidence tended to sustain that, as between the defendant and the deceased person, at the time of the unfortunate disaster, there was that community of interest and of property, which, in general, constitutes partnership."

The jury has found under instructions of the court, which we must assume to have been correct, that this child was not a trespasser. The evidence justifies such conclusion. His father was a tenant of the farm of which this field was a part. Even without that relationship the children were given permission, according to their mother's testimony, to pick berries on the property, and they were at all times treated by the defendants and their em-

ployees as lawfully present. On these premises the plaintiff, Warren Searles, certainly had the status of an invitee, and as such the defendants owed him the "affirmative duty of using reasonable care, not only to see that the premises to which he was invited were in a reasonably safe condition, but also to take precautions to guard him from dangers arising out of instrumentalities under their control." *Brown* v. *Rhoades*, 126 Me., 186, 188.

The negligence of Victor Weed, who was clearly the employee and agent of the defendants, is in dispute. If what the injured boy says is true, that he was asked to touch up the horses with a stick and did so in the manner claimed by him, and that at that time Weed was in control of the horses which lunged forward and dragged the cutter bar of the mowing machine against the plaintiff's foot, there is sufficient evidence to justify the jury's finding on this point. The little boy is corroborated by his sister, who states that she heard Victor Weed call to him to whip up the horses and saw him strike the near horse first. If the story told on the witness stand by Victor Weed is true, that the plaintiff jumped from behind the machine without warning and struck the off horse, certainly no blame could attach to the boy driving the machine. The force of Victor Weed's testimony is greatly weakened by his mother's statement that he told her an entirely different story of the accident shortly after it happened, and by his having signed a statement that he did request Warren Searles to come over "to browse up the horses." Victor Weed is corroborated by Archie Rowe, who at the time, was running the other mowing machine in the same field. The weight to be given this testimony, especially in view of the opportunity that Rowe had to observe while he was himself at work, was for the jury. There can be no doubt that according to well-established rules the conclusion to be drawn from all the evidence on the question of the defendants' negligence was for the jury.

In determining the issue as to the contributory negligence of the boy, we must view the evidence in the light most favorable to him. The question really is whether on his version of the occurrence we must hold him guilty of contributory negligence as a matter of law.

Children, even those of the tender years of this boy, are not absolved from the obligation to use some care. But the law has regard for the frailties of childhood and the thoughtlessness of youth. A child is required to exercise only that degree of care and judgment which children of the same age and intelligence ordinarily exercise under the same circumstances. *Garland* v. *Hewes*, 101 Me., 549; *Brown* v. *Rhoades*, supra. A study of the authorities clearly indicates that except in obvious cases the determination of this issue is for the jury. Examples of heedlessness, which will bar a recovery, are indicated in the following cases. *Brown* v. *European & North American Railway Company*, 58 Me., 384; *Colomb* v. *Portland & Brunswick Street Railway*, 100 Me., 418; *Morey* v. *Gloucester Street Railway Company*, 171 Mass., 164; *Young* v. *Small*, 188 Mass., 4; *Godfrey* v. *Boston Elevated Railway Company*, 215 Mass., 432. Each of these cases, except the first, concern the rights of a child who thoughtlessly and without looking darted into a public street and was struck by a vehicle therein; and in each it is recognized that a child, even of very tender years, is bound to exercise some care to avoid a danger so obvious. In the first case and certainly in some of the others the accident was caused not by the contributory negligence of the child but by its sole negligence.

The issue now before us is readily determined by a consideration of those cases where it is held that the question of the contributory negligence of a child was for the jury.

Plumley v. *Birge*, 124 Mass., 57, was an action brought by a boy thirteen years old to recover for the bite of a dog. The boy struck the dog with a stick and the question was as to the plaintiff's negligence. The court in holding that this question was properly submitted to the jury said, pages 58-59: "It was necessary that the plaintiff, though a boy, should prove that he was in the exercise of due care. But due care on his part did not require the judgment and thoughtfulness which would be expected of an adult under the same circumstances. It is that degree of care which could reasonably be expected from a boy of his age and capacity. *Munn* v. *Reed*, 4 Allen, 431. *Carter* v. *Towne*, 98 Mass., 567; *Lynch* v. *Smith*, 104 Mass., 52. *Dowd* v. *Chicopee*, 116 Mass., 93. If the court had ruled that, if the plaintiff was old enough to know that striking the dog would be likely to incite him to bite, he could not

recover, it would have been erroneous. This is not the true test. It entirely disregards the thoughtlessness and heedlessness natural to boyhood. The plaintiff may have been old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, and yet, in striking him, he may have been acting as a boy of his age would ordinarily act under the same circumstances."

Garland v. *Hewes*, supra, is a similar case and the following language of our own court at pages 551-552 is significant: "The mere fact that he was old enough to know that striking the dog over the head and pulling his ears might cause the dog to bite him, would not bar his recovery if he was in the exercise of such care as would be due care in a boy of his age and intelligence. *Plumley* v. *Birge*, 124 Mass., 57. This question was for the jury to determine and it was submitted to them under instructions to which no exception was taken."

The case of *Milliken* v. *Fenderson*, 110 Me., 306, is to the same effect, as the above cases, and in the opinion *Plumley* v. *Birge*, supra, is cited with approval.

The case of *Krumposky* v. *Mt. Jessup Coal Co., Ltd.*, 266 Pa., 568, lays down the broad rule that a child nine years old will not be held guilty of contributory negligence as a matter of law. Though in this jurisdiction we have not in every instance adhered to this doctrine, we nevertheless realize that the application of the well-settled rule governing the responsibility of young children will result in holding in all but exceptional circumstances that the negligence of a child of such tender years is a question of fact to be settled by the jury.

The facts in the case of *Camp* v. *Hall*, 39 Fla., 535, are in point. The plaintiff, a boy of fourteen, employed by the defendant was directed to assist in moving some freight cars loaded with lumber. This was outside of his regular work. He went between two of the cars to help push, fell, and was run over by the car behind him. The defendant contended that he was guilty of contributory negligence in taking the position which he did. The court said, page 573: "He was a mere boy and presumptively wanting in discretion." The question of his due care was held to be for the jury.

Foley v. *California Horseshoe Company*, 115 Cal., 184, was an

action brought by a boy of fourteen who was employed in operating a machine to punch holes in horseshoes. He was directed to make some minor repairs to the machine, a labor outside of his regular work. He knew that it might start, while he was so engaged, but he neglected to take precautions to keep clear of it, and was injured by its starting. The court in holding that his contributory negligence was a question for the jury said, page 192, with reference to the responsibility of children: "Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability."

Though we should probably take a different view of the defendant's negligence than did the court in *Price* v. *The Atchison Water Company*, 58 Kan., 551, the language of that court with respect to the contributory negligence of a child is in point. At page 557 it is said: "The contributory negligence of the deceased, can be shortly disposed of. What might be negligence in an adult will not of necessity be negligence in a child. Persons of tender years are not held to the same degree of care that a mature and experienced person is required to exercise. As remarked in *Kan. Cent. Rly. Co.* v. *Fitzsimmons*, supra:

> 'Boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own natures—instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys, and boys with less intelligence, would not be. And the question of negligence is, in nearly all cases one of fact for the jury, whether the person charged with negligence is of full age or not.'
> "This view of the law we believe to be taken by all the courts."

To the same effect as the above cases are the following, *Omaha & Republican Valley Railway Company* v. *Morgan*, 40 Neb., 604;

Carmer v. *Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 95 Wis., 513.

In the case which we are considering, if, as we must, we view the evidence in the light most favorable to the plaintiff, we have an additional circumstance of the utmost importance. Warren Searles was doing that which he was told to do by a much older boy, whom the defendant thought qualified to operate a mowing machine. Can we say as a matter of law that he was not justified in placing some reliance on the judgment of that older boy? Was he not warranted in placing confidence in Victor Weed's implied assurance that he could control the horses? Victor Weed knew them, the plaintiff did not. The language of the court in *Camp* v. *Hall*, supra, page 573-574, in discussing a somewhat similar relationship is in point here. "When a person authorized by the master to control and direct another youthful and inexperienced servant, directs the latter to perform a dangerous service not in the line of his employment, without warning or instructing him as to the danger of the particular service, the obedience of the latter servant will not be contributory negligence on his part, and he will be entitled to recover for any injury which may occur by reason of the failure to warn or instruct."

If what the plaintiff did was heedless, was it not a question for the jury to determine whether in the view taken by the court in *Milliken* v. *Fenderson*, supra, it was only such heedlessness as is natural to boyhood?

The members of a jury are peculiarly qualified to weigh such evidence as was offered in these cases. We are satisfied that the question of the plaintiff's due care was properly submitted to them.

Motions overruled.

FEDERAL TRUST COMPANY *vs.* LEWIS WOLMAN, JR.

Kennebec. Opinion, October 25, 1935

PLEADING & PRACTICE. DEMURRER. DECEIT. MORTGAGES.

In the absence of a covenant in a mortgage to pay the mortgage debt, or a binding admission of the indebtedness, a mortgage is not of itself an instrument which imports a personal liability on the mortgagor, the remedy of the mortgagee in such a case being confined to the land alone.

In the case at bar, on payment, which is admitted for the purpose of the case by the demurrer, the promissory notes held by the bank became commercially dead and its right of action thereon was surrendered and extinguished.

This was true although one of the notes was not then due, for a debtor may pay his note to the bona fide holder thereof at any time before maturity provided the holder consents to receive payment.

On the pleading, there was no basis for inference that the bank received a note, bond or other evidence of indebtedness along with the mortgage upon which it had a present right of action and could reach other assets of its debtor.

Nor could it be inferred from the mere allegation that the bank received a mortgage that it could maintain a suit on its indebtedness or other obligation secured thereby.

The averment that the Federal Trust Company accepted payment of its collectible promissory notes in a medium without value through the fraudulent representations of the defendant sufficiently alleged remediable loss or damage.

On exceptions by defendant. An action of deceit. The defendant filed a general demurrer to the plaintiff's declaration. The sole question at issue was the sufficiency of the declaration. To the overruling of the demurrer the defendant seasonably excepted. Exception overruled. The case fully appears in the opinion.

Harvey D. Eaton, Gordon F. Gallert, for plaintiff.

Bernstein & Bernstein, for defendant.

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

STURGIS, J. In this action of deceit, the defendant's general demurrer to the declaration was overruled and exceptions reserved.

The gist of the declaration is that on February 16, 1932, the Federal Trust Company being the holder of two promissory notes upon which $3864 in the aggregate remained unpaid and which were signed by Lewis M. Wolman, Senior, as a co-maker with a son then deceased, the defendant, another son, falsely and fraudulently represented that his father had no assets except a possible equity of redemption in certain lands, and thereby induced the bank to accept from Wolman, Senior, in payment of its notes a second mortgage which was of no value. It is also alleged that when this representation was made, as the defendant well knew, his father, Wolman, Senior, was entitled to $5,000 of insurance on account of the death of his deceased son.

The only question raised before this Court is the sufficiency of the plaintiff's allegations of damage and injury, it being conceded that all the other essential elements of actionable fraud are well pleaded.

On payment by the surviving co-maker, which is admitted for the purposes of this case by the demurrer, the promissory notes held by the bank became commercially dead. *First National Bank* v. *Maxfield*, 83 Me., 576; *Mitchell* v. *Albion*, 81 Me., 482. This is true although one of the notes was not then due. A debtor may, of course, pay his bill or note to the bona fide holder thereof at any time before maturity provided the holder consents to receive payment. The allegation of payment of the promissory notes in this declaration is an averment that the right of action of the bank on the paper was surrendered and extinguished.

The bank accepted a worthless mortgage in payment of its notes, which on the pleadings were collectible in full, states the declaration. This averment in itself shows loss or damage. It is conjecture only to assume that the bank received a note, bond or other evidence of indebtedness along with the mortgage upon which it had a present right of action and could reach the other assets of its debtor. Nor can it be inferred from the mere statement that the bank received a mortgage that it could maintain a suit on the indebtedness or other obligation secured thereby. In the absence of a covenant in a mortgage to pay the mortgage debt, or a bind-

ing admission of the indebtedness, a mortgage is not of itself an instrument which imports a personal liability on the mortgagor. In such case, the remedy of the mortgagee is confined to the land alone. *Jones on Mortgages* (*8th Ed.*), Secs. 90, 837 et 1599; 41 C. J., 653, and cases cited; 19 R. C. L., 513; see *Cook* v. *Johnson*, 165 Mass., 245, 247, and dissenting opinion in *Brookings* v. *White*, 49 Me., 479, 486.

We are of opinion that the averment in the case at bar that the Federal Trust Company accepted payment of its collectible promissory notes in a medium without value through the fraudulent representations of the defendant sufficiently alleges remediable loss or damage. In principle, the following authorities support this view. *Buck* v. *Leach*, 69 Me., 484; *Bailey* v. *London Guarantee, etc. Company*, 72 Ind. Ap. 84, 105; *Gould* v. *Cayuga County National Bank*, 99 N. Y., 333; 26 C. J. 1173.

Exception overruled.

EDWIN A. ROGERS

vs.

LAWRENCE A. BROWN, ET ALS,

SELECTMEN OF THE TOWN OF BRUNSWICK.

Cumberland. Opinion, October 28, 1935.

PLEADING AND PRACTICE. CERTIORARI. MANDAMUS.

A writ of certiorari is not one of right, but grantable at the sound discretion of the Court when it appears that some injustice will be done.

On the hearing on the petition, the only question for the Court to determine is whether in its discretion it will issue the writ, and the grant of leave for the writ to issue is not a judgment that the record below be quashed.

No stipulation can sweep away the established rules of procedure and confer power on the Court to render final judgment on a mere petition for certiorari.

The writ of certiorari issues only to review and correct proceedings of bodies and officers acting in a judicial or quasi judicial capacity.

It is the office of the writ of mandamus to compel inferior tribunals, magistrates and officers to perform a duty imposed upon them by law.

The case at bar was brought forward on report prematurely. It falls into the well-settled rule that cases should be disposed of at *nisi prius* and not be sent to the Law Court upon report at the request of the parties, except at such stage or upon such stipulation that a decision of the question may in one alternative at least supersede further proceedings.

In the case at bar, the relief sought, as the brief disclosed, was an order directing the issuance of the license for which application had been made. The remedy was by mandamus instead of certiorari.

On report on an agreed statement of facts and stipulation. A petition for a writ of certiorari. The petition presented for consideration the regularity of the action of the selectmen of the town of Brunswick in denying petitioner a license to plant and propagate clams on flats adjoining his lands in that town. Report discharged. Case dismissed from the law docket. The case sufficiently appears in the opinion.

Joseph A. Aldred,
Verrill, Hale, Booth & Ives, for petitioner.
Clement F. Robinson, for respondents.

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

STURGIS, J. The petitioner for a writ of certiorari in this proceeding applied to the selectmen of Brunswick for a license to plant and propagate clams on the flats adjoining his lands in that town as authorized by P. L. 1933, Chap. 2, Sec. 43, *et seq.*, and his application was denied. His petition in the usual form prays that a writ of certiorari issue and the action of the selectmen be quashed. Their answer admits the truth of the facts alleged, asserts their authority to refuse to issue the license, and prays that the petition be dismissed. Without ordering the writ to issue, by agreement of the parties the case was certified forward on report.

The case is brought forward on report prematurely. If the tri-

bunal whose records are attacked has jurisdiction in the premises, a writ of certiorari is not one of right, but grantable at the sound discretion of the Court when it appears that some injustice will be done. *Levant* v. *Co. Com.*, 67 Me., 429; *White* v. *Co. Com.*, 70 Me., 317. On the hearing on the petition, the only question for the Court to determine is whether in its discretion it will issue the writ, and the grant of leave for the writ to issue is not a judgment that the record below be quashed. *Lord* v. *Co. Com.*, 105 Me., 556; *Stevens* v. *Co. Com.*, 97 Me., 121. Nor is a denial of the petition an affirmation of the record attacked in the petition. In order to make that adjudication, the writ must issue and the record attacked be before the Court. *Ford* v. *Erskine*, 109 Me., 164. The report in this case falls into the well-settled rule that cases should be disposed of at *nisi prius* and should not be sent to the Law Court upon report at the request of the parties, except at such stage or upon such stipulation that a decision of the question may in one alternative at least supersede further proceedings. *Casualty Co.* v. *Granite Co.*, 102 Me., 148; *Libby* v. *Water Co.*, 125 Me., 144; *Cheney* v. *Richards*, 130 Me., 288, 290. No stipulation can sweep away the established rules of procedure and confer power on the Court to render final judgment on a mere petition for certiorari.

Furthermore, the petitioner has mistaken his remedy. The relief sought, as the brief discloses, is an order directing the issuance of the license for which application has been made. It is the office of the writ of mandamus to compel inferior tribunals, magistrates and officers to perform a duty imposed upon them by law. *Williams* v. *Co. Com.*, 35 Me., 345; *Townes* v. *Nichols*, 73 Me., 515, 517. The writ of certiorari issues only to review and correct proceedings of bodies and officers acting in a judicial or quasi judicial capacity. *Frankfort* v. *Co. Com.*, 40 Me., 391; *Nobleboro* v. *Co. Com.*, 68 Me., 551; *Devlin* v. *Dalton*, 171 Mass., 338, 341; *People, ex rel, Trustees* v. *Board Supervisors*, 131 N. Y., 468; 4 Encyc: Pl. & Pr., 39; 5 R. C. L., 258; 11 C. J., 90, and cases cited. As is said in 2 *Spelling on Ex. Remedies*, Sec. 1958, "Where an officer or official body is charged with a legal duty and upon proper application refuses to act, mandamus and not certiorari is the proper remedy for the party aggrieved, the proper function of the latter remedy being confined to a review of action already taken, rather than for

non-action." The propriety of resort to mandamus to compel the issuance of occupational or privilege licenses is well recognized. 18 R. C. L., 292; 125 Am. St. Rep. 505, 515 et seq.; 16 Annotated Cases, 184.

Report discharged.
Case dismissed from the law docket.

BESSIE A. SAKALLARIS

vs.

NEW YORK LIFE INSURANCE COMPANY.

Cumberland. Opinion, November 4, 1935.

INSURANCE. FALSE REPRESENTATION.

False and untrue representations of facts in an application for a life insurance policy, which are material to the risk, void the policy.

In the case at bar, the applicant for the life policy denied that he had raised or spat blood, consulted a physician or practitioner for or suffered from any ailment or disease of the heart, had within the past five years consulted with or been treated by a physician. In truth within a period of one year theretofore he had raised and spat blood, consulted and been treated by a physician for coronary occlusion, which heart trouble caused his death within fourteen months after the date of the application. He stated false and untrue facts material to the risk and by so doing made recovery by the beneficiary impossible as a matter of law.

On report. An action brought by plaintiff as beneficiary of a policy issued by defendant on the life of plaintiff's husband. Defendant pleaded the general issue with brief statement claiming the policy was voided by misrepresentations of the assured in his application. After the evidence had been taken out, the case was, by the agreement of the parties, reported to the Law Court for its de-

termination upon so much of the evidence as was legally admissible. Judgment for defendant. The case fully appears in the opinion.

Woodman, Skelton, Thompson & Chapman, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

HUDSON, J. The plaintiff as beneficiary brings this action of assumpsit on a life insurance policy dated December 4, 1933, issued by the defendant to her deceased husband.

The defense is misrepresentation of material facts in his application for the policy.

Reported for decision on so much of the evidence as is legally admissible, the record warrants the finding of these facts: The insured, fifty-five years old at the time of his death on January 13, 1935, born in Greece, came to America in 1900, worked in a "tannery shop" in Massachusetts for a few years, then in a "bakery shop," again in a tannery, and in 1909 or 1910 returned to Greece for a year, after which he returned to Massachusetts. In 1918 he came to Portland, where until his death he conducted a fruit business.

As a boy he went to school three or four years in Greece but did not study English. Greek mostly was spoken in his home, his wife being able to speak only a little English, although his children were educated here and speak our language. While working in the tannery and "baker shop" in Massachusetts, he associated principally with Greeks who spoke broken English. Ever after coming to Portland, however, he dealt with Americans and learned the language sufficiently to carry on his business, practically wholly in English. He never learned to read and write English to any extent but could make out headlines in American newspapers. He had a sufficient knowledge of our language so that at different times he was used as an interpreter by an American doctor in treating Greek patients. In that capacity he translated from the Greek to English the symptoms of the patient and from the English to the Greek the treatment prescribed by the physician. Qualifying therefor as to

knowledge of the English language, by naturalization he became an American citizen.

On November 24, 1933, at the solicitation of the defendant's agent, the insured applied for his policy and answered as follows the questioning of the examining physician:

"Q. Have you ever raised or spat blood?

"A. No.

"Q. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of . . . the heart, blood vessels or lungs?

"A. No.

"Q. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?

"A. No.

"Q. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?

"A. None."

He signed this statement:

"On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them."

Unknown by the defendant or its agent at the time of the issue of the policy, it appears that the insured was taken sick in January preceding the date of his application and was treated by a Portland physician for heart trouble. The doctor found him in bed, short of breath, spitting blood, with low blood pressure and complaining of pain in hip, left shoulder and back of neck. The diagnosis was coronary occlusion. Digitalis was prescribed and taken. The patient remained in bed over two weeks and was subsequently treated by this doctor in February, March, April and May and at one later visit. The physician testified that he informed the insured two or three different times that the trouble was with his heart and

that the medicine taken must be supplemented with complete rest. The attending physician stated that his patient always talked with him in the English language, had no difficulty in conversing, understood the language and expressed himself "very well" in English.

In approximately fourteen months after the application, the insured died with "acute dilation of the heart with pulmonary edema."

Counsel agree that the answers are representations and do not constitute warranties; but false and untrue representations of fact which are material to the risk void the policy.

> "The answers of an applicant for life insurance, as to his present and past condition of health, are unquestionably material to the insurance risk proposed. The policy, if issued at all, will be issued on the faith that they are true. These answers afford in part the test by which it is determined whether to issue a policy at all or not. Hence it follows that such answers are material and must be true." *Jeffry, Excr.* v. *The United Order of the Golden Cross*, 97 Me., 176, 179.
>
> "A false statement as to whether applicant has consulted or been attended or treated by a physician is material to the risk and will defeat recovery, especially where it is warranted to be true." *Hughes, Admrs.* v. *Metropolitan Life Insurance Company*, 117 Me., 244, 249.

When the applicant for this policy denied that he had "raised or spat blood," had "consulted a physician or practitioner for or suffered from any ailment or disease of the heart," that within the past five years had "consulted with or been treated by a physician," he stated facts material to the risk which were false and untrue and by so doing made recovery in this case by his beneficiary impossible as a matter of law.

A careful examination of the evidence convinces us not only that his denials were false and untrue but that he knew them so to be. His knowledge of English permitted him to understand the questions read to him, as well as, understandingly, to carry on the conversation with the examining physician.

Our finding on this issue of fact as to his understanding of the

questions makes it unnecessary to decide the issue of law raised by the plaintiff's counsel as to whether or not plaintiff could recover if, not understanding the questions, he made untrue statements of fact material to the risk. As yet that has not been passed upon in this State. We leave it for decision in some case where it would not be purely *obiter dictum.*

Judgment for defendant.

CITY OF ROCKLAND ET ALS

vs.

CAMDEN AND ROCKLAND WATER COMPANY.

Knox. Opinion, November 5, 1935.

PUBLIC UTILITIES COMMISSION. WATER RATES. CORPORATIONS.

The Public Utilities Commission is an administrative body, of limited though extensive authority, having such powers as are expressly delegated to it by the Legislature, and incidental powers necessary to the full exercise of those so invested.

Jurisdiction of the Commission, in the class of cases as in this at bar, is to determine judicially the fair value of the utility property devoted to public service, figure a just return thereon, and establish a rate which shall be reasonable, to apply with substantial equality to all receiving a similar service.

Such is the fair value concept, better called the rate base.

A corporate charter is a contract between the corporation and the State, in which no person is legally interested but the parties thereto, the same general rules applying as in other contracts; that if the corporation fails to keep its side of the contract, the State can take advantage of the default or not as it pleases; that the policy as to what should be done in the circumstances of each particular case is one which the State may decide differently at different times, according to its discretion and the public good.

If a corporation holds property, in the face, not of a prohibitory provision declaring the holding void, but of a directory and regulative limitation, title is good, until invalidated in a direct proceeding, instituted for the purpose.

In the case at bar, upon all the evidence, the Commission evalued the property of this utility essential to the performance of imposed duty, at a sum greater than that permitted by its charter, that is to say, in excess of an amount equal to the total of capital stock, both common and preferred, plus bonds; and held net revenue on fixed capital within lawful bounds.

The Commission refused to lower existing rates.

It was not within the province of the complainants to make use of the charter restriction as to the value of the utility's property.

On exceptions by complainants from decree of the Public Utilities Commission refusing to lower existing water rates of the defendant company. Exceptions overruled. The case fully appears in the opinion.

Z. M. Dwinal, for complainants.

Clyde R. Chapman, Attorney General,

Alan L. Bird, for defendants.

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

DUNN, C. J. The record shows that the respondent is the operator of a system of waterworks. Ten persons and corporations, interested only as customers, complained to the Public Utilities Commission for reductions of service rates. After notice, and upon hearing, the complaint was ordered dismissed. The case is brought forward on exceptions to rulings that provisions in the special act under which corporate organization had been formed, restrictive of holding property and declaring dividends, neither restrained nor controlled the rate fixing power of the Commission.

The Camden and Rockland Water Company, though privately owned, is a public utility, as that term is applied to corporations rendering a public service.

The Company antedates, as the Artesian Water Company, to 1880. 1880, P. & S. L., Chap. 212. In 1885, name was changed, and increase of capital stock to $150,000.00 authorized; realty and personalty necessary and convenient might be held equaling capital stock. 1885, P. & S. L., Chap. 522. Further, these sections, among others, were inserted:

"Sect. 8. Said corporation may declare dividends on its capital stock, not exceeding six per cent per annum; if there should be a surplus of receipts or income after paying operating expenses, salaries, repairs and interest on the bonds and notes of the company, said surplus may be applied to reduction of water rates or to extension and alterations of its pipes and appurtenances."

"Sect. 11. Said corporation may issue bonds for construction of its works, upon such rates and time as it may deem expedient, not exceeding the sum of one hundred and fifty thousand dollars and secure the same by mortgage of the franchise and property of said company."

In 1887, capital stock was defined at not exceeding $600,000.00, and additional competency to issue and negotiate mortgage bonds conferred. 1887, P. & S. L., Chap. 9. The next legislation relevant to inquiry was in 1925. Leave was given to bring capital stock, common and preferred, to $1,000,000.00; empowerment to hold real and personal estate to a like sum, then granted, yet remains. 1925, P. & S. L., Chap. 6.

The Public Utilities Commission in an administrative body of limited, though extensive authority, having such powers as are expressly delegated to it by the Legislature, and incidental powers necessary to the full exercise of those so invested. The Commission was created in 1913. 1913, Public Laws, Chap. 129; now contained in R. S. 1930, Chap. 62.

Jurisdiction of the Commission, in the class of cases to which this belongs, is to determine judicially the fair value of the utility property devoted to public service, figure a just return thereon, and establish a rate which shall be reasonable, to apply with substantial equality to all receiving a similar service. In re: *Searsport Water Company*, 118 Me., 382, 108 A., 452; In re: *Guilford Water Company*, 118 Me., 367, 108 A., 446.

"The commission shall fix a reasonable value upon all the property of any public utility . . . whenever it deems a valuation thereof to be necessary for the fixing of fair and reasonable rates . . . ." R. S., *supra*, (Sec. 40).

"The rate . . . shall be reasonable and just, taking into due

consideration the fair value of all its property with a fair return thereon, ... " R. S., *supra*, (Sec. 16).

Such is the fair value concept, better called the rate base.

The Commission found the worth of all property owned by respondent utility being used or required for purposes contemplated by the special charter of incorporation, and refused to lower existing rates.

There is no insistence of error in the valuation as a whole, nor, on this basis, of unfair rates.

It was claimed, in oral argument, by counsel for the complainants, that the common stock of the corporation had been issued without consideration; that it is watered stock, and therefore without significance on present issues. The printed argument is colored by the same contention.

In the hearing before the Commission, complainants called the corporation treasurer to the witness stand. He testified as to preferred stock; also bonds. Then, in replying to a question, he answered:

> "How the common stock was subscribed, I cannot testify. I was not here, and I know nothing that would show it."

The upshot of his testimony was that, issuance of the common stock having been before he came with the company, he was not cognizant of details, and was without known source of information.

This testimony did not tend to sustain insistence. The exception crumbles to pieces.

Upon all the evidence, the Commission evalued the property of the utility essential to performance of imposed duty, at a sum greater than the total of capital stock, both common and preferred, plus bonds; and held net revenue on fixed capital within lawful bounds. The specific findings are not now material.

If a corporation holds property, in the face, not of a prohibitory provision declaring the holding void, but of a directory and regulative limitation, title is good until invalidated in a direct proceeding instituted for the purpose. That restrictions upon the amount of property which may be held cannot be taken advantage of collaterally, has been settled by a long line of decisions. Outstanding is *Farrington* v. *Putnam*, 90 Me., 405, 37 A., 652, 667.

There, in difference from the situation here, capacity of a charitable institution, whose holdings already footed up full statute allowance, to take estate devised and bequeathed it, was of concern. The opinion is replete with sense; its clarity is convincing; its analogy compelling. To quote, briefly:

> " . . . . the charter is a contract between the corporation and the state in which no person is legally interested but the parties thereto, the same general rules of interpretation applying as in other contracts; that if the corporation fails to keep its side of the contract the state can take advantage of the default or not as it pleases; that the transgression may be so slight in its consequences that the state will forgive the offense, or forgive it because occasioned by some accident or error resulting while the corporation is acting in good faith, or the state may, . . . if the increase be made without authority, may ratify the act afterwards either by some legislative provision or, as may be done between any other contracting parties, by its silence and any other acts indicating consent; . . . policy belongs to the state and not to the court and is an executive and not a judicial right, for the court would decide the question in the case for all cases and all time, while the state may decide the question differently at different times according to its discretion and the public good."

The complainants may not make use of the charter restriction. This conclusion accords with what seems to be the general rule. 14A, C. J., 559; *Farrington* v. *Putnam*, supra; *West Springfield* v. *Aqueduct Co.*, 167 Mass., 128, 44 N. E., 1063; *Nantasket Beach etc., Co.* v. *Shea*, 182 Mass., 147, 65 N. E., 57; *Hubbard* v. *Art Museum*, 194 Mass., 280, 80 N. E., 490; *Rutland, etc., R. Company* v. *Proctor*, 29 Vt., 93; *Goundie* v. *Northampton Water Company*, 7 Pa. St., 233; *Grant* v. *Henry Clay Coal Company*, 80 Pa. St., 208; *Leazure* v. *Hillegas*, 7 Serg. & R. (Pa.), 313; *Barnes* v. *Suddard*, (Ill. 1886) 7 N. E., 477; *Water-Supply & Storage Co.* v. *Tenney*, (Colo. 1897) 51 P., 505; *Hickory Farm Oil Co.* v. *Buffalo, N. Y. & P. R. Co.*, 32 Fed., 22; *Mallett* v. *Simpson*, (N. C.) 55 Am. Rep., 594; *Runyan* v. *Coster*, 14 Pet., 122, 10 Law ed., 382; *Union National Bank* v. *Matthews*, 98 U. S., 621, 628, 25 Law ed.,

188; *National Bank* v. *Whitney*, 103 U. S., 99, 26 Law ed., 443; *Jones* v. *Habersham*, 107 U. S., 174, 27 Law ed., 401; *Reynolds* v. *Bank*, 112 U. S., 405, 28 Law ed., 733; *Fritts* v. *Palmer*, 132 U. S., 282, 33 Law ed., 317; *Kerfoot* v. *Farmers & Merchants Bank*, 218 U. S., 281, 54 Law ed., 1042.

Exceptions overruled.

STATE OF MAINE *vs.* TONY SUTKUS.

Oxford. Opinion, December 7, 1935.

PLEADING & PRACTICE. CRIMINAL LAW. EXHIBITS.

The remedy of one convicted of a felony to present to the Law Court the correctness of the ruling of the nisi prius *Judge in denying his motion for new trial is by appeal and not exception.*

Where an admittedly true transcript of evidence given by the complainant in the Municipal Court is by agreement read to the jury, the State's Attorney not having agreed that the transcript itself should be admitted as an exhibit, and the statutory requirements of a deposition in a criminal case not having been complied with, its exclusion as an exhibit by the Trial Court is not exceptionable error.

An exception taken but not alluded to in argument before the Law Court may by the Court be deemed waived by the exceptant.

On motion for new trial and exceptions to ruling of the presiding Justice. Defendant indicted for assault with a dangerous weapon with intent to kill, was found guilty. His motion for new trial was denied by the presiding Justice, and exceptions taken. Exceptions overruled. The case fully appears in the opinion.

Matthew McCarthy, County Attorney, for State.

Aretas E. Stearns, for respondent.

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

HUDSON, J. On exceptions. The respondent stands jury-convicted of an assault and battery with intent to kill and slay while armed with a dangerous weapon. The presiding Justice denied his motion for a new trial, to which exception was taken. Instead, his remedy was to appeal. R. S. 1930, Chap. 146, Sec. 27; *State* v. *O'Donnell, et als.*, 131 Me., 294, 161 A., 802; *State* v. *Dodge*, 124 Me., 243, 127 A., 899. Without particular comment, however, it may be stated that, although the ruling on the motion is not properly before us, we have carefully examined the evidence and found it sufficient to warrant the verdict.

Another exception presents a question of law, thus arising: The State produced the complainant. He was cross-examined at length as to what he testified in the Municipal Court. At the opening of the defense, respondent's attorney said: "I would like to have the record show that the testimony by Tony Rogers" (this complainant) "at a preliminary hearing as shown by the transcript of evidence I hold in my hand is a correct transcript of the testimony he gave at that hearing." The County Attorney so admitted. The Court asked: "You will read it?" Respondent's counsel answered: "I will read it in testimony" and did. The transcript itself was not then offered. At the conclusion of the evidence and before argument, it was. The State's objection was sustained, to which ruling the respondent's counsel excepted. We perceive no merit in this exception. While the State's attorney agreed that the transcript might be read to the jury, his agreement did not extend to its admission as an exhibit.

The defense contends that had it been admitted, it could have been used by the jury in retirement in comparing his testimony on the stand with that given in the lower court. Had this been a legally taken deposition (as for instance under Sec. 19, Chap. 146, R. S. 1930) and as such had been received in evidence, the respondent could not then, as a matter of right, have had it "delivered to the jury on their retiring to consider of their verdict," for it would have been a matter of discretion, the exercise of which in the absence of its abuse would not have been a legal ground of exception. *Whithead* v. *Keyes*, 3 Allen 495, 498; also see *Burghardt et als.* v. *Van Deusen et als.*, 4 Allen 374, 378; *Farnum* v. *Pitcher*, 151 Mass.

470, 476, 24 N. E. 590; *Melanefy* v. *Morrison*, 152 Mass. 473, 476, 26 N. E. 36; *Krauss et al.* v. *Cope*, 180 Mass. 22, 61 N. E. 220; *Annawan Mills, Inc.* v. *Mangene*, 237 Mass. 451, 454, 130 N. E. 77.

In *State* v. *Caldwell*, 106 S. E. 139 (N. C.), it was held not error to exclude from the jury room statements of respondents made before a coroner.

In *People* v. *Dowdigan et al.*, 34 N. W. 411 (Mich.), a new trial was ordered, where the Court at the request of the jury permitted it to take into the jury room the written evidence of the deceased complaining witness.

In *State* v. *Lowry*, 24 S. E. 561, 564 (W. Va.), it was held improper to permit the jury to take out depositions in behalf of the accused but permissible to order any portions of such depositions re-read to it. Likewise, a signed dying declaration, which has been received in evidence, may not as a matter of right be taken into the jury room. *Dunn* v. *People*, 50 N. E. 137, 138. The Court said:

> "The written statement in question assimilated so nearly to a deposition that all of the reasons which have by text writers and courts been advanced in support of the view that depositions should not be taken by a jury in their retirement may well be invoked as reasons why this statement should not have been allowed to go into the jury room. . . . To deliver the written statement to the jury so that they might have it constantly before them during their deliberations, to operate on their sympathies as well as their memory, tended to give a manifest advantage to the People over the plaintiff in error, whose proof was but oral. No reason is suggested, nor is any perceived, why the one party should thus have been given an advantage over the other." See also *State* v. *Moody*, 51 Pac. 356, 359; *Territory of New Mexico* v. *Eagle*, 30 L. R. A. (N. S.) 391; *Smith* v. *State*, 39 So. 329, 334; In Re: *Barney's* Will, 44 A. 75 (Vt.).

In *State* v. *Kimball*, 50 Me. 409, 418, the trial court was upheld in refusing to allow the Revised Statutes to be taken into the jury room.

In *Sawyer* v. *Garcelon*, 63 Me. 25, 26, this Court said:

"Furthermore, it is inevitably, to some extent, a question of discretion with the Court, whether papers used at a trial, shall be taken to the jury room or not." Also see *Rich* v. *Hayes*, 97 Me. 293, 54 A., 724; *McPhee* v. *Lawrence*, 123 Me. 264, 122 A., 675.

So had the transcript been admitted, it was still within the discretion of the Court to deny the use of it in the jury room, and, unless there were compelling reasons, it were better in the exercise of that discretion to deny such use. Preferable practice is that which has obtained heretofore in our courts not to send out to the jury depositions but to grant the jury, when it desires refreshment of memory, the right to have them re-read in the open court room, as there it may have read oral testimony.

"It is certainly not the policy of the law, to give a superiority to depositions over oral proofs. With the oral proofs, given by witnesses on the stand, the jury must be content, and make up their minds upon it, some of which, important to be remembered, may be — such is the infirmity of the human memory — forgotten. The adversary, having no other than written testimony, contained in depositions, which the jury, taking with them, can read, discuss, dissect and, if disposed torture the words from their true meaning, and which are constantly before them, during their deliberations, to operate on them, has a most manifest advantage over him whose proofs are oral, which no rule of law or practice should accord to him." *Rawson* v. *Curtiss*, 19 Ill. 456, 480, 64 C. J., Page 1028, Foot Note (a).

"It is held in many states either with, or without, apparent statutory basis therefor that it is error to permit the jury to take to their room depositions which have been read on trial. Within this rule are affidavits or statements which have been read in evidence as the testimony of a witness, or which have been admitted to impeach a witness." 64 C. J., Sec. 818, Pages 1027, 1028.

Furthermore, the transcript having been read to the jury by consent of the State's Attorney, its contents were as much before

the jury as though it had been formally offered and admitted. The respondent was not prejudiced by the refusal of the Court to admit it as an exhibit.

The respondent also excepted to certain portions of the charge of the presiding Justice, dealing with the right of self-defense. His counsel in his argument has made no reference whatever to this exception. As a consequence, we have the right to and do consider this exception waived. *Hill* v. *Foss*, 108 Me. 467, 471, 81 A. 581; *Wight* v. *Mason et als.*, 134 Me. 52, 180 A. 917, 918; *Norwood* v. *Lathrop*, 178 Mass. 208, 211; 59 N. E. 650; *Hopperman* v. *Fore River Ship Building Co.*, 217 Mass. 42, 46, 104 N. E. 463; *Stevens* v. *Goodenough*, 83 Vt. 303, 75 A. 398; *Sunapee Dam Corporation* v. *Alexander et al.*, 181 A. 120, 124 (N. H.); *Williams* v. *Harriott*, 180 A. 851 (N. J.); 4 C. J., Sec. 3057, page 1067. Were the exception not waived, the respondent would avail nothing by its consideration, as the instructions given contained no error.

Exceptions overruled.

JOSEPH P. CONNELLAN

vs.

FEDERAL LIFE & CASUALTY COMPANY.

Cumberland. Opinion, December 10, 1935.

INSURANCE. CONTRACTS. PLEADING AND PRACTICE. R. S., CHAP. 96, SEC. 40.

A health and accident insurance policy like any other contract is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be construed together.

An accident and health monthly-payment insurance policy which provides that "this policy will continue in force, subject to its provisions, as long as the premiums shall be paid as agreed therein, unless it is sooner terminated in accordance with its terms" constitutes one continuing contract subject to the condi-

tion that the assured pay the monthly premium, and not a series of successive monthly contracts.

Under the provisions of R. S., Chap. 96, Sec. 40, "if the defendant relies upon the breach of any condition of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea at its election, and all other conditions the breach of which is known to the defendant and not so pleaded shall be deemed to have been complied with by the plaintiff."

In cases arising under the above statute the burden of proof is still upon the plaintiff, but only as to such matters as are put in issue under the pleadings.

In the case at bar, it was the contention of the defendant that at the time of the alleged injuries to the plaintiff there was no insurance contract in force as the payment due the first of the month had not been made. The breach of this condition, however, was not specifically pleaded. The brief statement setting up that there was no existing insurance contract in force, was not a compliance with the statute requirement. It added nothing to the general issue to inform the plaintiff as to the ground of defense, and did not, therefore, in view of the terms of the particular policy on which this action was brought, avail the defendant.

On exceptions by defendant. An action of assumpsit to recover on an accident insurance policy. The defendant pleaded the general issue, and for a brief statement of special matter of defense that "at the time of the alleged injury to said plaintiff there was no existing insurance contract in force." The issue relates only to the sufficiency of the pleading. Exceptions overruled. The case fully appears in the opinion.

Bernstein & Bernstein,

Wilfred A. Hay, for plaintiff.

Frank P. Preti, for defendant.

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

MANSER, J. This is an action of assumpsit upon an industrial accident and health monthly-payment insurance policy, issued to the plaintiff by the defendant company.

Accidental injury having been sustained by the plaintiff, indemnity was claimed for the disability caused. The case was heard by the presiding Justice at *nisi prius*, without a jury, and is before the Court upon exceptions to his ruling that, under the pleadings,

evidence was inadmissible tending to show that the policy had lapsed before the accident because of non-payment of premium. The point in issue relates only to the sufficiency of the pleadings.

The plaintiff brought his action under authority of R. S., Chap. 96, Sec. 40, upon an account annexed, with the allegation that he had complied with the conditions of the policy.

The same section prescribes the form and limits the scope of the defendant's pleadings, as follows:

> "If the defendant relies upon the breach of any condition of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea, at its election, and all conditions the breach of which is known to the defendant and not so specially pleaded shall be deemed to have been complied with by the plaintiff."

The defendant pleaded the general issue with the following brief statement: "At the time of the alleged injury to said plaintiff there was no existing insurance contract in force."

The policy was issued February 13, 1933, and required a payment of $2.50 on or before the first day of each succeeding month. The plaintiff sustained injury on August 18, 1933, and the evidence offered by the defendant was to the effect that the payment due August 1st was not made before the happening of the accident. It was by reason of this default in payment that the defendant claimed the insurance contract was not in force.

The position of the defendant is that the pleading was sufficient and evidence offered thereunder admissible, because the contract was a self-limiting or self-executing one; that it expired on the first day of each month unless payment for another month was made in advance; that such payment was optional with the assured, did not constitute a debt from him to the defendant, and if made and accepted created a new contract.

The contention turns upon the determination of the question, was non-payment of premium when due a breach of any condition of the policy by the plaintiff? If so, it must be set up specifically.

The particular contract in suit thus calls for construction with reference to this issue. Like any other contract it is to be construed in accordance with the intention of the parties, which is to

be ascertained from an examination of the whole instrument. All parts and clauses must be construed together. *Swift* v. *Insurance Co.*, 125 Me., 255, 132 A., 745.

The policy was issued on the thirteenth of the month. According to the contention of the defendant it expired on the first day of March, and it then depended upon the volition of both parties as to whether a new contract should be entered into.

The policy, however, insures the plaintiff from the date of issuance "until 12 o'clock midnight of the last day of February, 1933, and *for such time thereafter as the premiums paid by the insured as herein agreed will maintain this policy in force.*"

The policy purports to provide indemnity for both accident and illness. The illness indemnity, however, is not effective except for disability "which is contracted and begins *during the life of this policy* and after it has been maintained in continuous force for thirty days from its date."

Again, it is provided, "This policy *will continue in force,* subject to its provisions, as long as the premiums shall be paid as agreed herein, unless it is sooner terminated in accordance with its terms."

These provisions make it clear that the intention of the parties was to enter into a continuing contract subject to the condition that the assured pay the monthly premiums. The breach of this condition was not pleaded. The brief statement setting up that there was no existing insurance contract in force, was not a compliance with the statute requirement. It added nothing to the general issue to inform the plaintiff as to the ground of defense.

It remains to note the defendant's further claim that the plaintiff has not sustained the common law burden of proof which is still required under the statute; that as the contract was necessarily founded upon a consideration, the plaintiff must show affirmatively that the consideration has been paid.

The answer to this contention is that the policy had been delivered and was in force unless the plaintiff had failed to comply with the condition as to monthly payments. The statute makes it the duty of the defendant to plead the breach of this condition. If not so pleaded, the statute says in exact words, it "shall be deemed to have been complied with by the plaintiff." The common law burden

of proof is only as to "such matters as are *so* put in issue under the pleadings."

Many cases from other states are cited in defendant's brief. In none was the question of pleading involved. Their bearing is only upon the interpretation of the Court as to whether an existing contract had expired and a new one entered into. This required an examination of the terms of the particular contract.

For illustration, in *Crosby* v. *Vermont Ins. Co.*, 84 Vt., 510, 80 A., 817, the clause considered read: "The acceptance of any past-due premium is optional with the company, and shall not in any case be a waiver of the forfeiture of this contract, but shall be construed to have the same effect as if a new application had been made and a new policy issued on the day following such acceptance."

Such language is distinctly different from the contract in suit. It is undertaking to provide for a new contract after a default. It recognized, however, that payment was a condition the breach of which created a forfeiture.

Again, in *Coombs* v. *Charter Oak Life Ins. Co.*, 65 Me., 382, a life insurance policy was issued upon the express condition that, in case the premiums should not be paid on or before the several days mentioned for the payment thereof, the policy should "cease and determine." The plaintiff endeavored to avoid the forfeiture by evidence of a waiver. Here again was a condition which, if unfulfilled, constituted a forfeiture. The sense in which the word "forfeiture" is used by the Court in the foregoing case and in the policy in the Vermont case is made clear by the definition given in *Webster* v. *Insurance Co.*, 53 Ohio St., 79, 42 N. E., 546-7: "Forfeiture is deprivation or destruction of a right in consequence of the non-performance of some obligation or condition." This is what the express command of our statute required to be pleaded.

There is nothing in this case which takes it out of the purview of the decisions in *Russell* v. *Insurance Co.*, 121 Me., 248, 116 A., 554, and *Austin* v. *Insurance Co.*, 124 Me., 232, 127 A., 276.

Exceptions overruled.

GEORGIA ADAMS *vs.* NORRIS RICHARDSON.

Somerset. Opinion, December 23, 1935.

NEGLIGENCE. RES IPSA LOQUITUR. BURDEN OF PROOF. ANIMALS.

In the ordinary case no presumption of negligence arises from the mere happening of an accident. The burden rests on the plaintiff to fasten liability on the defendant.

Injuries to animals while lawfully on the highway are governed by the same rule. Common law principles of negligence control.

In the case at bar, the Court holds that the doctrine of *res ipsa loquitur* did not apply; the burden was on the plaintiff to show that some negligence of the defendant contributed to the accident; and in the absence of such proof there was no obligation on the part of the defendant to explain how the accident happened.

There was no evidence to show that the truck was going at an excessive rate of speed, nor anything to indicate that the driver saw or should have seen the horse in time to have stopped.

It might be conjectured that the driver of the truck was negligent, but conjecture is not proof. The nonsuit was properly ordered.

On exception by plaintiff. An action on the case by a bailor to recover damages for the alleged negligence of the defendant in killing bailor's horse. To the granting of a nonsuit plaintiff seasonably excepted. Exception overruled. The case fully appears in the opinion.

Gower & Eames, for plaintiff.

Merrill & Merrill, for defendant.

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

DUNN, C. J., STURGIS, J., dissenting.

THAXTER, J. This was an action based on negligence by reason of which it is alleged the plaintiff's horse was killed. The horse was lent by its owner to one Randall who left it at night in a pasture beside the highway which leads from Waterville to Skowhegan. The horse escaped from the pasture, and, while in the highway on a dark and foggy night, was struck and killed by the defendant's motor truck, which was proceeding northerly along the road toward Skowhegan. At the close of the plaintiff's evidence the defendant moved for a nonsuit which was granted. An exception taken to this ruling is now before us.

There was no eye-witness of the accident except the driver of the truck who was not called to testify. The negligence of the defendant must, therefore, be deduced from circumstances. These, according to the plaintiff's contention, are that the truck was travelling northerly on the right side of the road, that the left side of it hit the horse which weighed thirteen hundred pounds, that the headlight of the truck was bent, also the left mudguard and the axle, that there was a hole broken in the body of the truck, and that the horse was found dead in the ditch on the east side of the road seventy-five feet from the point where it was struck. The plaintiff apparently claims that these results of the impact indicate that the driver of the truck was proceeding at too high a rate of speed considering the darkness and the state of the weather.

Such facts do not in our opinion raise a presumption of negligence. They are perfectly consistent with the driver's freedom from blame. Whether the horse may have suddenly jumped in front of the truck from the left side of the road, or the driver was inattentive, we have no means of knowing. It is impossible to conclude from the physical facts that the truck was going at an unreasonable speed. The horse was found dead in the ditch at a point seventy-five feet from where glass and hair were found in the road, but there is nothing even to indicate that it was dragged that far by the truck. In fact, the evidence shows that the truck came to a stop at a point about halfway between the place of the impact and where the horse was found. There is proved merely a collision in the highway between a truck and a horse, of sufficient force to kill the horse and do considerable damage to the truck. There is nothing more.

Judge Holmes in his book on the "Common Law" says: "The general principle of our law is that the loss from accident must lie where it falls." This is but expressing the fundamental doctrine that the burden rests on the plaintiff to fasten liability on the defendant, or, as this Court has many times said, that, in the ordinary case, no presumption of negligence arises from the mere happening of an accident. *Leach* v. *French*, 69 Me., 389; *Pellerin* v. *International Paper Co.*, 96 Me., 388, 52 A., 842.

Injuries to animals while lawfully on the highway are governed by the same rule. As is said in *Radski* v. *The Androscoggin & Kennebec Railway Company*, 122 Me., 480, 120 A., 542, common law principles of negligence control. Conceding that the horse was not a trespasser and that the question of the plaintiff's contributory negligence may have been for the jury, yet the plaintiff here has not made out a prima facie case of negligence on the part of the defendant. The doctrine of *res ipsa loquitur* does not apply; the burden was on the plaintiff to show that some negligence of the defendant contributed to the accident; and in the absence of such proof there was no obligation on the part of the defendant to explain how the accident happened. 1 R. C. L., 1178-1179; Huddy: *Cyclopedia of Automobile Law*, 9 ed., 359; *Savannah, Florida and Western Railway Company* v. *Geiger*, 21 Fla., 668, 58 Am. Rep., 697.

We have here no evidence to show that the truck was going at an excessive rate of speed as in *Texeira* v. *Sundquist* (Mass. 1934), 192 N. E., 611, nor anything to indicate that the driver saw or should have seen the horse in time to have stopped as in *Radski* v. *The Androscoggin & Kennebec Railway Company*, supra. It may well be a question for a jury to determine whether the driver of a vehicle should see in time to avoid a collision a stationary object in the highway such as a parked automobile, or even a horse tethered to a post as in *Whitwell* v. *Wolf*, 127 Minn., 529, 149 N. W., 299. But the situation is quite different in the case of an animal roaming at large, which from an unknown position may come out of the darkness within the line of vision of an approaching automobile.

We could conjecture that the driver of the truck was negligent, but conjecture is not proof. *McTaggart* v. *Maine Central Railroad*

Co., 100 Me., 223, 60 A., 1027. The nonsuit was properly ordered.

Exception overruled.

DUNN, C. J. I dissent. There was, in my opinion, on the proposition of the negligence of the defendant, evidence sufficient to carry the case to the jury.

STURGIS, J. I concur in this dissenting opinion.

ISADORE KLIMAN *vs.* BEATRICE DUBUC.

York. Opinion, January 3, 1936.

RULES OF COURT. REFERENCE AND REFEREES. PLEADING AND PRACTICE.

In reference of cases by rule of court under Rule 42 of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final. A like finality attaches to his decision on questions of law unless the right to except thereto is specifically reserved and so entered on the docket.

Except as provided in the above rule and in Rule 21, the Court appointing a Referee, can not, on its own motion invest itself with a reviewing jurisdiction, nor can parties themselves, by mutual consent, confer jurisdiction. Judicial power must find its source in the law.

Parties, having submitted their cause without reservation to a tribunal of their own choosing, are bound by a decision of that tribunal and should not be permitted to afterwards return to the tribunal which they once abandoned and seek there a correction of the award on the ground that the Referee has made an erroneous decision.

In the case at bar, the parties were bound by the determination of the Referee and his report was properly accepted.

On exceptions by defendant. An action of replevin of an automobile. Hearing was had before a Referee, right of exceptions as to matters of law not being specifically reserved. The Referee found for the plaintiff, and his report was accepted by the Court. Excep-

tion was taken by defendant. Exceptions overruled. The case fully appears in the opinion.

Armstrong & Spill, for plaintiff.

Louis B. Lausier, for defendant.

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

MANSER, J. Action of replevin of an automobile. On exceptions to acceptance of the report of a Referee.

The case involves a primary proposition which is not presented by either party, but must receive consideration by the Court.

The action, by agreement of parties and under rule of reference from the Superior Court, was submitted to a Referee. The rule of reference required that the report of the Referee should be made as soon as may be and judgment thereon and execution to issue accordingly. There is nothing in the rule of reference and no record of any docket entry which shows that reservation was made of the right to except upon questions of law.

Court Rule 42, printed in 129 Maine at p. 519, reads as follows: "In references of cases by rule of court, the decision of the Referee upon all questions of law and fact shall be final unless the right to except as to questions of law is specifically reserved and so entered on the docket, but the Referee may find the facts and report questions of law for decision by the Court." The language of Rule 42 is clear and certain.

It is true that Court Rule 21 provides: "Objections to any report offered to the Court for acceptance, shall be made in writing and filed with the clerk and shall set forth specifically the grounds of the objections, and these only shall be considered by the Court."

The foregoing rule was in effect during all the years when under former Rule XLV no stipulation was allowed for review by the Court of the decision of the Referee on any question of law or fact submitted. It is not inconsistent with that rule or with the present Rule 42.

The Court in *Kennebec Housing Company* v. *Barton*, 122 Me., 374, 120 A., 56, points out the function of Rule 21 and also when objections to the acceptance of the report of the Referee may sur-

vive such acceptance and be brought to this Court on exceptions.

The case at bar does not come within the scope of any of the cases noted in the foregoing opinion which were held to be reviewable.

At the hearing before the Referee the plaintiff offered in evidence, and against objection the Referee admitted as a muniment of plaintiff's title to the replevied automobile, a certain chattel mortgage, interpreted by the Referee as descriptive of the automobile, ownership of which defendant had pleaded in herself. It is to the admission of this mortgage that the defendant objects.

The record shows that by agreement and stipulation of counsel the only matter at issue was whether the Referee erred in admitting this evidence. No other ground of objection is made. The Referee ruled as a matter of law that the evidence was admissible. He decided the whole case, facts and law alike, for the plaintiff, and reported such decision to the Court from which the appointment had come. He did not invoke the review of the Court nor report any questions of law for decision by the Court.

In such a situation the succinct statement of the Court in *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853, 854, is applicable: "In references of cases by rule of court under Rule 42 of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final. A like finality attaches to his decision on questions of law unless the right to except thereto is specifically reserved and so entered on the docket."

The briefs of counsel discuss radically different views of the law as interpreted and applied by the Referee, but overlook that the Court appointing a Referee, can not, on its own motion, invest itself with a reviewing jurisdiction, of the kind here insisted, nor can parties themselves, by mutual consent, confer jurisdiction. Judicial power must find its source in the law.

One obvious purpose of the rule is to expedite decisions in referred cases, and as stated in *Perry* v. *Ames*, 112 Me., 202, 91 A., 931: "The reason for the rule is that the parties, having submitted their cause without reservation to a tribunal of their own choosing, are bound by a decision of that tribunal and should not be permitted to afterwards return to the tribunal which they once aban-

doned and seek there a correction of the award on the ground that the Referee has made an erroneous decision."

The parties were therefore bound by the determination of the Referee and his report was properly accepted.

Exceptions overruled.

ROMEO LIBERTY *vs.* EMMA POOLER.

Kennebec. Opinion, January 7, 1936.

MORTGAGES. ASSIGNMENT. CONTRACTS.

A contract which is too personal for assignment may on its breach give rise to an assignable action for damages. Damages for breach of a contract to support have been held assignable.

Anyone who has an interest in mortgaged premises, and who would be a loser by foreclosure, is entitled to redeem.

While a mortgagor in a mortgage conditioned upon support of the mortgagee cannot assign or convey any right to perform the conditions in the mortgage; yet, even before breach, he might convey, and his grantee acquire the property, in subordination to the mortgage.

In the case at bar, the plaintiff acquired rights in connection with the land his deed purported to convey in fee. He was entitled to redeem upon payment of the sum requisite for redemption. Upon redemption, the mortgage will be extinct, as of the time of the final decree.

On exception by defendant. A bill in equity to redeem real estate from mortgage. The bill was sustained and plaintiff decreed the right to redeem upon compliance with certain conditions. To this decree, defendant reserved exception. Exception overruled. Final decree affirmed. The case fully appears in the opinion.

Joly & Marden, for plaintiff.

Manley O. Chase, for defendant.

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

DUNN, C. J. This is a suit to redeem certain real estate from a mortgage for a life-support, and eventual burial of the one to be supported. The case is presented for review, not on a general appeal, which would open all issues, legal and factual alike, but upon exception to part of the final decree, raising in this wise a question of law only. Procedure is authorized by the equity act. R. S., Chap. 91; (Sec. 35 et seq.) *Emery* v. *Bradley*, 88 Me., 357, 34 A., 167.

Exception was taken by defendant. The mortgage was assigned to her, subsequent to breach of the condition for support. Somewhat more recently, plaintiff was named grantee by the mortgagor in a deed of the realty. Of this, further will be said presently.

Contention of the defendant is that performance of the conditions of the mortgage, limited to the mortgagor personally, being in default, the transaction of the deed, to which the mortgagee had not assented, did not invest redemptory right.

The mortgage was given by Adolphe Cloutier, to Obeline Gaboury Caron, February 8, 1930, in reconveyance of the same premises which she, that very day, in consideration of his promise that he, individually, would care for and support her for the rest of her life, and bury her when she should be dead, had conveyed to him.

The judge below did not file findings of fact; but a finding, as the decree reflects, that the mortgagor kept his agreement until April 18, 1933, would have basis in substantial evidence, and not be at variance with a preponderance of the whole evidence.

On that day, there was material breach.

The mortgagor did not turn round and utterly refuse to go on with his contract. What he did was to assume, without the prior consent of the mortgagee, to substitute the defendant, Mrs. Pooler, and her husband, to serve for him and in his stead. Apparently, the mortgagor, so far as duty or service in person was concerned, thereupon withdrew.

Upon that, the mortgagee assigned the mortgage to the woman whom the mortgagor had, on his own initiative, introduced to render the care and furnish the support he himself was bound to do. The instrument of assignment, dated in blank, 1933, was acknowledged April 18, 1933, and recorded April 20, 1933. Assignment of the mortgage drew after it, and carried with it, to the

assignee, the breached obligation. No language, however definite or explicit, could have been used more effectually to make over a chose. A contract which was too personal for assignment may on its breach give rise to an assignable action for damages. *Williston on Contracts*, Sec. 413. Damages for breach of a contract to support were held assignable in *Byrne* v. *Dorey*, 221 Mass., 399, 109 N. E., 146.

On April 21, 1933, Adolphe Cloutier, the mortgagor, made his warranty deed, before mentioned, to Romeo Liberty, plaintiff herein, of that real estate the latter seeks to redeem. The deed was deposited in escrow; delivery to the grantee was to be withheld while Miss Caron lived; she died June 4, 1933.

Meantime, the assignee had, by newspaper notice, begun foreclosure.

The mortgage was redeemable. *Bryant* v. *Erskine*, 55 Me., 153. Anyone who has an interest in mortgaged premises, and who would be a loser by foreclosure, is entitled to redeem. *Frisbee* v. *Frisbee*, 86 Me., 444, 29 A., 1115; *Batchelder* v. *Bickford*, 117 Me., 468, 104 A., 819.

Plaintiff acquired rights in connection with the land his deed purports to convey in fee. Granted, that the mortgagor could not assign or convey any right to perform the conditions in the mortgage; yet, even before breach, he might convey, and his grantee acquire the property in subordination to the mortgage. *Bodwell Granite Co.* v. *Lane*, 83 Me., 168, 170, 21 A., 829.

February 9, 1934, an accounting was requested of defendant, but not given. The instant bill, wherein plaintiff offered to pay the amount of the loss due to failure to carry out the life-support and burial agreement, and all else which should be shown payable, for redemption, was filed March 20, 1934. The sum requisite was the same as it would have been in a suit by the mortgagor to foreclose. *Eugley* v. *Sproul*, 115 Me., 463, 466, 99 A., 443. That sum the trial court determined.

Defendant takes nothing by her exception.

The case of *Mitchell* v. *Burnham*, 44 Me., 286, tends to support conclusion. See, also, same case, 57 Me., 314.

Upon redemption, the mortgage will be extinct, as of the time of the final decree.

No other point is open for discussion. *Trask* v. *Chase*, 107 Me., 137, 77 A., 698.

Exception overruled.
Final decree affirmed.

THE UNITED COMPANY AND FAY & SCOTT

vs.

GRINNELL CANNING COMPANY.

Kennebec. Opinion, January 14, 1936.

REFERENCE AND REFEREES. CONTRACTS. FINDINGS OF FACT.

Questions of fact once decided by a Referee are finally determined if the finding is supported by any evidence.

In the case at bar, the evidence was conflicting on the issue whether there was a parol modification of the second contract. The Referee's decision that there was such modification was therefore final.

In return for the promise of the Grinnell Canning Company not to make any effort to sell the corn husking machines until after June 15, 1930, the plaintiffs on their part agreed to supply to the defendant a list of those to whom the defendant should not sell, and also to accept as liquidated damages for the breach of the second contract the sum of $1125.00. The agreement to do either constituted a valid consideration for the new promise by the defendant.

On exceptions by defendant. An action for breach of a contract for the sale by the plaintiffs and purchase by the defendant of corn husking machines. A second contract was subsequently entered into between the parties. The case was referred with right of exception as to matter of law reserved. The defendant filed an account in set-off to recover monies which had been paid under the second contract, and which plaintiff claimed the right to hold as liquidated damages for its breach. The Referee found that the plaintiffs had the right to retain the amount paid under the second contract as liquidated damages, and that there was an accord and satisfaction of the first contract. The defendant filed written objections to the

acceptance of the Referee's report, and on its confirmation excepted. Exception overruled. The case fully appears in the opinion.

The United Company, Per Se.

Goodspeed & Fitzpatrick, for Fay & Scott et al.

Andrews, Nelson & Gardiner, for defendant.

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

THAXTER, J. This is a suit for damages for the breach of a contract under the terms of which the plaintiffs agreed to sell and the defendant to buy six corn husking machines. The case was referred with a reservation of a right to except in matters of law. The defendant filed written objections to the acceptance of the Referee's report and on its confirmation by the presiding Justice excepted. The second count of the declaration sets forth the breach of another agreement, but with respect to this no objections were noted to the Referee's decision.

The facts, which have been reported by the Referee with great care, show a very involved course of dealing between the parties. Because of its peculiar complexity the cause was most properly referred; and the parties in thus selecting their own tribunal were of course aware of the oft repeated admonition of this Court that questions of fact once decided by a Referee are finally determined, if the finding is supported by any evidence. *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171.

From the Referee's report the following facts appear. Under the terms of a written order of the defendant dated April 16, 1929, which was duly accepted by the plaintiffs on May 13, 1929, the defendant agreed to purchase of the plaintiffs six corn husking machines at a price of $4560. This order was subject to cancellation on or before April 23, 1929, and it is admitted that this time was extended by oral agreement to April 30th. The defendant claimed that there was a further extension of this time and a subsequent revocation, but the Referee found otherwise and counsel concede in their brief that such ruling is final. The defendant in two letters dated respectively June 1 and June 6 notified the plaintiffs that it cancelled the order. The plaintiffs nevertheless shipped the ma-

chines which the defendant refused to accept. The Referee ruled that such refusal was a breach of the contract.

In April, 1930, the plaintiffs brought suit against the defendant in the United States District Court for the Southern District of Iowa, Central Division. While this suit was pending, a second contract was entered into dated April 24, 1930, under the terms of which the plaintiffs agreed to sell and the defendant to buy three machines at a price of $2250, one-half of which was payable in cash and the balance on time. The cash was paid and a note given for the balance, and the suit which had been started in the United States Court was dismissed. This second contract contained the following provision: "Machines shall not be used during 1930 by any canner now owning Tuc huskers or who now has any contract with the United Company or who shall have such contract prior to June 15, 1930." The plaintiffs claim that there was an oral modification of this second contract to the following effect: "That the Grinnell Canning Company would not make any effort to sell these three machines until after June 15th." Also they contend that it was orally agreed that, in case there was any breach of the second contract, the cash payment of $1125 should be treated as liquidated damages.

The Referee found that this second contract was so modified and that there was a breach of it by reason of an attempt by the defendant to sell the machines on May 15, 1930. The defendant objects to the ruling as to the modification of the contract, but concedes that there was a breach, if it was in fact modified as claimed.

The plaintiffs retained the payment of $1125, and also brought this action to recover damages for the breach of the first contract. The defendant filed an account in set-off seeking to recover back the $1125 which it had paid under the second contract.

The Referee found that the plaintiffs had the right, in accordance with the agreement of the parties, to retain the sum of $1125 as liquidated damages for the breach of the second contract, that such contract then stood as though it had been performed, and that there was thereby an accord and satisfaction of the first contract.

The defendant is now in the anomalous position of supporting the correctness of the Referee's ruling that there can be no re-

covery on the first contract, and yet seeks to recover back the payment made on the second, the retention of which by the plaintiffs constituted the bar to recovery on the first contract.

But two of the contentions of the defendant need be considered, first that there is no evidence to support the Referee's finding that there was a parol modification of the second contract, and secondly that there was no consideration to support such modification, if it was in fact attempted. If these two questions are decided adversely to the defendant, as we feel they must be, other objections raised are immaterial.

Was there any evidence to support the Referee's finding that the second contract was modified as alleged?

Ralph Cover, the president of The United Company, testified that after the contract was signed it was agreed that the defendant would make no effort to sell these machines until after June 15th, that thereafter the plaintiffs would furnish a list of the names of those people to whom the defendant could not sell, and that for a violation of the contract by the defendant the money paid could be retained by the plaintiffs. Mr. Cover was corroborated by Mr. McRobie. Mr. Kelley, the president and manager of the defendant, testified that no such conversation took place. Counsel for the defendant have argued as to the reasonableness of the testimony of Cover. Such argument was properly addressed to the Referee, not to this Court. We have here conflicting testimony. The Referee's decision with respect to it is final. *Staples* v. *Littlefield,* supra; *Jordan* v. *Hilbert,* 131 Me., 56, 158 A., 853.

Was there consideration to support the parol modification of the second contract?

Counsel cite the well-known rule that a promise to do what one is already bound to do under a contract can not constitute a valid consideration for a new promise by the other party. *Wescott* v. *Mitchell,* 95 Me., 377, 50 A., 21; 4-*One Box Machine Makers* v. *Wirebounds Patents Company,* 131 Me., 70, 159 A., 496. The rule has, however, no application to the present case. In return for the promise of the Grinnell Canning Company not to make any effort to sell these machines until after June 15th, the plaintiffs on their part agreed to supply to the defendant a list of those to whom the defendant should not sell, and also to accept as liquidated dam-

ages for the breach of the second contract the sum of $1125. The agreement to do either constituted a valid consideration for the new promise by the defendant.

Exception overruled.

ALBERT B. CHASE, ADMINISTRATOR

vs.

INHABITANTS OF TOWN OF LITCHFIELD.

Kennebec. Opinion, January 21, 1936.

DEATH STATUTE (LORD CAMPBELL'S ACT). CONSTRUCTION OF STATUTES.

TOWNS. WORDS AND PHRASES.

At common law, loss of life is remediless.

In statutory construction, the common law is not to be changed by doubtful implication, be overturned except by clear and unambiguous language, and a statute in derrogation of the common law will not effect a change thereof beyond that clearly indicated, either by express terms or by necessary implication.

Towns act in two capacities, one corporate, for its own private benefit, and the other governmental.

At common law, a town acting in the latter capacity is not liable.

The words "person" and "corporation" as used in R. S. 1930, *Chap.* 101, *Sec.* 9, *known as "The Lord Campbell's Act" do not include a town when the town charged with wrongful act, neglect or default is engaged in its governmental rather than corporate capacity.*

On exceptions by plaintiff. An action on the case under R. S. 1930, Chap. 101, Secs. 9 and 10 (known as the Lord Campbell Act, or General Death Statute) brought against the defendant to recover damages for the instant death of plaintiff's intestate, which resulted from injuries received because of defects in the highway. Defendant filed a general demurrer. To the sustaining of this de-

murrer, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Currier C. Holman,
Willard and Willard, for plaintiff.
Goodspeed & Fitzpatrick, for defendants.

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

HUDSON, J. By his declaration, the plaintiff alleged that the intestate decedent, Albert B. Chase, on August 11, 1934, while in an automobile driven by one Dixon on a State-aid highway in the Town of Litchfield, received injuries, proximately resulting from acts of negligence upon the part of the "municipal officers, the road commissioners and the man having charge of the highway at the authorization of the municipal officers" by not removing or safeguarding against or warning of certain large rocks in and by the highway then under construction, with which rocks the automobile collided and overturned, causing the immediate death of Mr. Chase without conscious suffering. The defendant by general demurrer to the declaration challenged its sufficiency in law. The case now is before this Court on exceptions to the sustaining of the demurrer.

It is to be noted at the outset that this action is not based on the "life lost" clause in our "defective highway" statute (R. S. 1930, Chap. 27, Sec. 94) but rather upon our "general death" statute, (Lord Campbell's Act,) originally enacted in this State in 1891, (Chap. 124, P. L. 1891) and now appearing in R. S. 1930 in Secs. 9 and 10, Chap. 101. Section 9, (originally Section 1 in the first enactment and unchanged since then) reads as follows:

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death

shall have been caused under such circumstances as shall amount to a felony."

While much else has been argued, we think that the ruling of the Court below may be justified by consideration and interpretation of the following words in the statute, viz: "the person who, or the corporation which,".

It could not be and is not claimed that at common law there was liability for the death itself. *Nickerson* v. *Harriman*, 38 Me., 277; *Lyons* v. *Woodward*, 49 Me., 29; *State* v. *Grand Trunk Ry. Co. of Canada*, 58 Me., 176; *Frazer* v. *Inhabitants of Lewiston*, 76 Me., 531; *McKay, Admr.* v. *New England Dredging Co.*, 92 Me., 454, 43 A., 29; *Bligh* v. *Biddeford & Saco R. R. Co.*, 94 Me., 499, 48 A., 112; *Anderson, Admx.* v. *Wetter, Receiver*, 103 Me., 257, 69 A., 105; *Perkins, Admr.* v. *Oxford Paper Company*, 104 Me., 109, 71 A., 476; *Hammond, Admx.* v. *L. A. & W. Street Railway*, 106 Me., 209, 76 A., 672; *Curran, Admr.* v. *L. A. & W. St. Ry. Co.*, 112 Me., 96, 90 A., 973; *Danforth, Admr.* v. *Emmons*, 124 Me., 156, 126 A., 821; *Ames, Admr.* v. *Adams*, 128 Me., 174, 146 A., 257.

The purpose of this statute was to make possible recovery for death in certain cases; not all. A "*person*" or "*corporation*" whose "wrongful act, neglect or default" has resulted in death (immediate and without conscious suffering) is by the statute made liable to the personal representative of the deceased, if the act, neglect or default were such as would, if death had not ensued, have entitled the party injured to maintain an action.

This is an action against a town. The statute does not *expressly* make the State or any sub-division of it, as a county, a city, a town, or a plantation, liable. A town may be liable under it only if it be held that the Legislature by use of the words "person" or "corporation" intended to include a town.

Whether or not the word "person" as here used includes a town raises no difficulty.

> "Where these two words occur together," ("person" or "corporation") "'corporation' is the only word which can be contended to include a city or town notwithstanding R. L.

c. 8, Sec. 5, cl. 16." *Donohue, Admr.* v. *City of Newburyport*, 211 Mass., 561, 566, 98 N. E., 1081, 1082.

The Massachusetts statute cited corresponds to our rule of statutory construction that "the word 'person' may include a body corporate." R. S. 1930, Chap. 1, Sec. 6, Par. XIV.

Did the Legislature intend by the use of the word "corporations" to include towns?

> "New England towns are public corporations and were either original, constituent parts of the state, or have been incorporated by the legislatures of the states in which they are situated. The oldest of them long antedate the states themselves to which they belong." *Garland on New England Town Law*, Page 17.
>
> Corporations "is a word which in our statutes and decisions has not been used generally to include cities and towns. In a certain sense they are bodies corporate. But in common speech it is rarely that a city or town is referred to merely as a corporation. Towns in New England differ in their nature from trading, manufacturing or public service corporations, and even from municipal corporations elsewhere. They are created primarily for political purposes and the convenient administration of government. They possess few of the characteristics which distinguish the ordinary corporation." *Donohue* v. *Newburyport*, supra, page 566.
>
> "In common parlance, towns, cities and other municipal organizations are not known as corporations; they are spoken of not uncommonly by text writers in the law as quasi corporations." *Linehan* v. *City of Cambridge*, 109 Mass., 212, 213.

In the case just cited, the Massachusetts Court held that the word "corporation" in a statute authorizing the interrogating of officers of corporations did not include a municipal corporation.

> "It has been a general rule in our legislation that statutes passed for the regulation of the rights and liabilities of corporations are to be applied only to private or moneyed corporations and not to public or municipal corporations or quasi

corporations." *O'Donnell, Admr.* v. *Inhabitants of North Attleborough*, 212 Mass., 243, 245, 246, 98 N. E., 1084, 1085.

In *Franklin Savings Bank* v. *Inhabitants of Framingham*, 212 Mass., 92, 98 N. E., 925, it was held that the word "corporation" in the Negotiable Instrument Act did not include cities and towns.

Of all the actions that have been brought in Maine under the Lord Campbell Act, we have discovered none against a town; so the question before us is novel in this State.

In *Linehan* v. *City of Cambridge*, supra, and in *O'Donnell* v. *Inhabitants of North Attleborough*, supra, considerable emphasis is laid upon the fact that the laws pertaining to towns are collected and classified by themselves in the statutes. In the three revisions of our statutes since the enactment of this law in 1891, it has been inserted under "Title" "Civil Rights and Remedies" and the particular chapter in which it has appeared is entitled "Actions by or Against Executors and Administrators." Nothing in this chapter relates to municipalities, nor anything in the other twenty-nine chapters under this "Title" save one, Chapter 97, which has to do only with municipal and police courts and trial justices. On the other hand, the statutes relating to towns are properly segregated in "Title One" entitled "The State; Its Sovereignty and Government; Citizenship; Voting; Taxes." Quite apart, private corporation statutes are found in "Title Four" together with Banking, Insurance, Railroad, Telegraph, Telephone, Water, Navigation and Public Service Company statutes. Such separation and segregation are not accidental. Their utter dissimilarity accounts for it. It is so marked that leading authors and commentators (vide Dillon and Morawetz; McQuillan and Thompson) have dealt with each as a separate and independent subject. In Law Schools these subjects are taught in separate courses. Widely different and separate statutes provide for their organization and dissolution. Their reasons for being are unlike, the one to serve the public and its interest, the other its private owners, its stockholders. The conduct of business of the one and the other differs materially as well as the manner of election of their officers and the performance of their duties.

"It is true that all cities and towns must possess for the discharge of municipal duties certain limited corporate powers,

coextensive with the duties imposed. But the main purpose of their organization is political, and that organization always embraces the inhabitants who for the time may be within the territorial limits into which the Legislature, according to its own views of public convenience, may have divided the Commonwealth. The inhabitants do not, like the members of a private corporation, derive private or personal rights under the act of incorporation, the sole office and object of which is to regulate the manner of performing public and political duties. While exercising corporate powers to the extent indicated, they yet differ distinctively and widely from private and moneyed corporations, both in organization, government and mode of action." *Linehan* v. *City of Cambridge*, supra, page 212.

In *Eames* v. *Savage*, 77 Me., 212, 218, Justice Emery said:

"Towns, however, are not full corporations. They have no capital stock, and no shares. They are only quasi corporations,—created solely for political and municipal purposes, and given a quasi corporate character for convenience only. They remain still an aggregation of individuals dwelling within certain territorial limits, and under the direct jurisdiction of the Legislature."

Town and cities as municipal corporations, in Maine decisions, have been referred to, as: "Quasi corporations." *Mitchell* v. *City of Rockland*, 52 Me., 118, 123; *Small* v. *Inhabitants of Danville*, 51 Me., 359, 361; *Eames* v. *Savage*, supra, page 218; *Hooper* v. *Emery, et al.*, 14 Me., 375, 377; "Public corporations for public purposes." *Opinions of Justices*, 58 Me., 590, 597; *Inhabitants of North Yarmouth* v. *Skillings*, 45 Me., 133, 141; *Bradford* v. *Cary*, 5 Me., 339, 343; "Part of governments." *Opinions of Justices*, supra, page 596; "Institution of the state, established for certain public purposes." *Inhabitants of Westbrook* v. *Inhabitants of Deering*, 63 Me., 231, 236; "Agencies of the Government." *Woodcock* v. *City of Calais*, 66 Me., 234, 235; "Auxiliaries of the government." *Inhabitants of Camden* v. *Camden Village Corp.*, 77 Me., 530, 534, 1 A., 689; "Political sub-divisions." *Carlton, et als.*

v. *Newman*, 77 Me., 408, 415, 1 A., 194; "Political organization." *Thorndike* v. *Inhabitants of Camden*, 82 Me., 39, 43, 19 A., 95; "Territorial divisions into which the territory of the state is divided by the Legislature for political purposes." *Lovejoy* v. *Inhabitants of Foxcroft*, 91 Me., 367, 369, 40 A., 141; "Sub-divisions of general government." *The Milbridge & Cherryfield Electric R. R. Co., Appellants*, 96 Me., 110, 115, 51 A., 818; "Not voluntary associations or business corporations but political agencies." *Hone et al.* v. *Presque Isle Water Co.*, 104 Me., 217, 225, 71 A., 769; "Agents of state." *City of Augusta* v. *Augusta Water District*, 101 Me., 148, 150, 63 A., 663; *Sawyer* v. *Gilmore, State Treasurer*, 109 Me., 169, 83 A., 673; "Instruments of government." *Inhabitants of Bayville Corporation* v. *Inhabitants of Boothbay Harbor*, 110 Me., 46, 51, 85 A., 300; "Hand of the State." *Inhabitants of Town of Frankfort* v. *Waldo Lumber Co.*, 128 Me., 1, 4, 145 A., 241.

If it be said and it is admitted that in a sense a town is a corporation and so comes within the strict letter of the law, yet "'a thing may be within the letter of the statute and not within its meaning, . . . The intention of the law maker is the law. *Smythe* v. *Fiske*, 23 Wall., 374.' . . . The real meaning of the statute is to be ascertained and declared even though it seems to conflict with the words of the statute." *Carrigan, Admr.* v. *Stillwell*, 99 Me., 434, 437, 59 A., 683, 684. It is not reasonable to believe that the Legislature intended the word "corporations" to embrace both towns and private corporations so dissimilar and with practically nothing in common. When the Lord Campbell Act was enacted, the members of the Legislature must have had in mind those dissimilarities. They appreciated the distinction between the State with its public rights and the private corporation. They knew that the town is simply a sub-division of the State. They understood the purpose of and recognized the necessity for *government* and knew that it could function only if it were properly and fitly financed only by taxations and was protected against and safeguarded from litigation except as permitted by the Legislature. They realized that the State itself did and had to function largely through the town, and delegated to it authority for action, not for the good and welfare

of those alone living within the confines of the town but for all citizens of the State. They knew towns were subservient to the State, must obey its commands and that in many acts they performed they had no choice or voice, except as through Legislature-created classes, of which the towns were members, they elected representatives to the Legislature. In the absence of express language in this "death statute," declaring a municipality to be such a corporation, it is not to be presumed that the Legislature so intended. It is not reasonably believable that it would permit only weak implication to raise the flood gates and let rush down previously precluded litigation to devastate the town whose prime purpose is only for the public good.

In *Palmer* v. *Town of Sumner*, 133 Me., 337, 340, 177 A., 711, this Court very recently gave effect to the well-established rules of statutory construction that the common law is not to be changed by doubtful implication, be overturned except by clear and unambiguous language and that a statute in derogation of it will not effect a change thereof beyond that clearly indicated either by express terms or by *necessary* implication.

True, towns act in two capacities, one corporate, for its own private benefit, and the other governmental in behalf of the State or the public.

> "In the absence of any special rights conferred or liabilities imposed by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belongs the discharge of duties imposed upon them by the Legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes." *Libby* v. *City of Portland*, 105 Me., 370, 372, 74 A., 805, 806. Also *Palmer* v.

Inhabitants of Town of Sumner, supra; *Bouchard* v. *City of Auburn*, 133 Me., 439, 179 A., 718.

In *Hughes* v. *City of Auburn*, 55 N. E. 389 (N. Y.), attempted recovery under a death statute similar to ours was denied. In that case the alleged default upon the part of the municipality was neglect of sanitary precautions in the construction or maintenance of a sewer system. The Court said:

> "The principle upon which the judgment in this case rests is that an individual who has suffered from disease, caused by the neglect of a city to observe sanitary laws with reference to its sewer system, may recover damages from the city. This principle, if sanctioned and applied generally to all cases coming within its scope, can not fail to produce evils much more intolerable than any that can possibly arise from such acts of omission or commission as the plaintiff states as the basis of this action. It must necessarily become the prolific parent of a vast mass of litigation which the municipality can respond to only by taxation, imposed alike upon the innocent and the guilty. The arguments to sustain such a principle are evidently based upon a misconception of the relations that exist between the individual and the city. The latter is but a creature of the state, engaged in exercising some of the functions of government in a limited locality, not for any private purposes, but solely for the public good. . . . A municipal corporation is nothing more than an instrumentality of the state for the purpose of local government, exercising delegated powers, which the state itself can exercise and may withdraw at pleasure. . . . The law in most cases must proceed upon the principle that it is wiser and better for the members of a political community, general or local, to endure some of the evils that they have, rather than fly to remedies such as are invoked in this case, that are certain in the end to bankrupt the treasury and involve them in endless strife and litigation."

Perhaps the leading, anyway a much cited, case, holding that the word "corporation" in a death statute does not include a town

or municipality, is *Donohue* v. *City of Newburyport*, supra. In that case the plaintiff's intestate, while a traveller upon a public way in the defendant city, received mortal injuries from the fall of a tree within the way, which the tree warden of the defendant was undertaking to remove. The statute provided recovery "if a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service." On the ground that the defendant city was acting as an agency of government and performing duties imposed upon it solely for the benefit of the public, that the duty thus being performed was sovereign and not private in its nature and was done for the common good without any element of private gain or special advantage to the municipality, the Court gave judgment for the defendant. It said on page 569:

> "It can not be presumed that the Legislature would intend to work such a radical change in the principles of liability for the performance of public benefit as would be wrought by construing the word 'corporation' to include cities and towns, without the use of plain and unequivocal language. A further confirmation of this view is found in the statute which has existed for more than a century imposing liability upon a municipality for death resulting to a traveller upon a public way from its defective construction. R. L. c. 51, Sec. 17."

Our highway statute above referred to (R. S. 1930, Chap. 27, Sec. 94) in which the "life-lost" clause appears, corresponds to the one mentioned in the last quotation. So here we have like confirmation; for when Maine by Legislative Act desired to change the common law and make recovery possible for loss of life from an accident on the highway, it specially legislated to that end by express language and with direct application.

The same interpretation of the word "corporations" in a death statute was given in *City of Dallas* v. *Halford, et al.*, 210 S. W., 725 (Texas). In his opinion, Chief Justice Rainey said:

> "Municipalities in a sense are corporations, but, as generally used, the term 'corporations' means private corpora-

tions, and does not include municipal corporations. Whether the term 'corporation,' as commonly used, includes only private corporations, or also embraces municipal corporations, is a disputed question, but we believe, when the courts of last resort have been called upon to decide the question, the great majority of the jurisdictions hold that it does not." Then follow many citations.

A reading of germane cases, almost without number, reveals three conclusions: First, that the word "corporations" does not include towns and municipalities; second, that it does; and, third, that where it does generally include them, it does not where the death is caused in the performance of governmental or public duties.

In the case at bar, the negligence complained of as the cause of the death was the failure to observe due care in construction or maintenance of a State-aid highway. Such construction or maintenance was governmental service, not corporate, and was performed by the Town as an agency of the State. At common law, the party, had he lived, could not have maintained this action. *Vide ut supra.*

"The power to locate, discontinue, make and repair highways is part and parcel of the political government of the State. For convenience, this power is confided in many cases to town officers. The duties of such officers are defined and imposed by public statutes, and not by their respective constituencies. . . . The officers thus chosen are public officers to all intents and purposes; as clearly so as higher officers of the State in their sphere. In legal contemplation they are not the servants, or agents of their respective towns, but public officers. Being public officers of a public corporation, acting in its capacity as a political division, the corporation is not liable for their unauthorized or wrongful acts, though done in the course and within the scope of their employment." *Small* v. *Inhabitants of Danville,* supra, on page 361.

In *Graffam* v. *Town of Poland,* 115 Me., 375, 99 A., 14, 16, Justice King stated:

"The work was being done under the instructions of the State Highway Commission and in accordance with plans and specifications furnished by it. That commission determined what improvements should be made and the manner of making them. But if Mr. Emery had been constructing the way in his capacity as road commissioner, without any interference or special direction by the town, he would then have been acting in the capacity of a public officer, and while so acting he would not have been in legal contemplation the servant or agent of the town, and the town would not be liable for his wrongful or negligent acts, though done in the course and within the scope of his employment." *Goddard* v. *Inhabitants of Harpswell*, 84 Me., 499, 24 A., 958; *Bryant* v. *Inhabitants of Westbrook*, 86 Me., 450, 29 A., 1109; *Bowden* v. *City of Rockland*, 96 Me., 129, 51 A., 815.

The exceptions in this case must be overruled if either one of two of the three "conclusions" above noted be adopted, namely, that the word "corporation" in our death statute does not include a town, or if it does in some instances, it does not when the town is acting in a governmental capacity. Herein we hold that the word "corporations" in our Lord Campbell's Act or death statute does not include a town when the town charged with wrongful act, neglect or default is engaged in its governmental rather than corporate capacity. For decision here, it is not necessary to indicate what our opinion would be in a case where such wrongful act, neglect or default had to do with the performance of a corporate or private act.

Exceptions overruled.

ELMER E. JAMESON *vs.* LILLIAN CUNNINGHAM.

Knox. Opinion, January 23, 1936.

MUNICIPAL CORPORATIONS. DRAINS AND SEWERS. R. S. 1930, CHAP. 25, SEC. 23.

By statute it is provided that "when a person at his own expense, lays a common drain or sewer, all who join or enter it shall pay him their proportion of such expense; and the expense of opening and repairing shall be paid by all benefited, to be determined in each case by the municipal officers, subject to appeal to the county commissioners."

When a statute provides entire regulation for relief it supersedes the common law, and furnishes the exclusive method of procedure.

In the case at bar, the sewer laid by the plaintiff became, through entrance of several parties, a common sewer within the meaning of the statute. The ruling of the Court granting a nonsuit was therefore correct, plaintiff's remedy, if any, being under the statute and not by assumpsit at common law.

On exceptions by plaintiff. An action of assumpsit to recover as a *quantum meruit* the sum of $33.67 for use by defendant of plaintiff's sewer for a period of eight years and five months. Defendant pleaded the general issue and the Statute of Limitations as to that portion of the account not within six years prior to the date of the writ. Trial was had at the February Term, 1935, of the Superior Court for the County of Knox. At the conclusion of the plaintiff's testimony the presiding Justice, on motion of the defendant, granted a nonsuit. Plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Elisha W. Pike, for plaintiff.

Frank S. Ingraham, for defendant.

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

BARNES, J. The cause in suit was begun by an action in assumpsit, at common law, plaintiff claiming to be the owner of the lower section of a sewer serving several households in the town of Warren.

In his declaration he demands $33.67 for use of the sewer by defendant, owner of one of the dwellings served, for eight years and five months "to March 25, 1934" at four dollars a year. After the plaintiff's testimony was concluded, defendant moved for nonsuit. The motion was granted and plaintiff perfected exceptions.

Since the first enactment of statutes in this state the existence and necessity for upkeep of sewers serving residences have been recognized and in increasing degree provided for, R. S. 1821, Chap. 121; and from that date continuously to the present, distinctions have been observed in classifying sewers, first called drains or shores, as privately owned and maintained, or as common sewers.

As their number increased, sewers and systems of sewers were recognized as public property and legislation exists for construction and maintenance of public sewers.

As distinguished from the latter, that with which we are concerned is a private sewer.

It was constructed by plaintiff at his sole expense in the year 1893; and so far as the record before us shows, without application to the local municipal authorities for any permit to extend it under the Warren-Thomaston road, a public highway which it crosses, to a vent in a mill pond below.

Subject to necessary control by the public, if it should become a menace, it was then a simple, private project, appurtenant to the building and lot which it served.

Ten years later a neighbor, one Mr. Perry, living about two hundred feet easterly of plaintiff's building, secured permission of the latter to connect his cellar drain with plaintiff's sewer; built a sewer from his property and made connection with plaintiff's sewer within the limits of the said highway.

The sewer laid by Perry was extended at intervals so that seven different dwellings were discharging sewage through it into that constructed by the plaintiff in 1905, before the defendant made connection therewith.

It was then a private, common sewer, *Bangor* v. *Lansil*, 51 Me., 521, and statutes enacted by different legislatures were in force, prescribing the rights and obligations of a person desirous of making connection with such a sewer.

The statute then applicable to contribution by one entering a common sewer, R. S. 1916, Chap. 22, Sec. 23, reads: "When a person at his own expense, lays a common drain or sewer, all who join or enter it shall pay him their proportion of such expense; and the expense of opening and repairing shall be paid by all benefited, to be determined in each case by the municipal officers, subject to appeal to the county commissioners."

The Statutes of 1930 carry this law in the same words, in Sec. 23, Chap. 25, while other sections of the same chapter prescribe rules of procedure.

From plaintiff's testimony we learn that about ten years ago, defendant, with her husband, called upon plaintiff and asked permission to "come and use" his sewer across the road. To the Court he stated that the request was "for the right to connect"; that he agreed to their proposal, the consideration to be payment of twenty-five dollars, and that sewer pipe was laid from defendant's house to and connected with the sewer built by Mr. Perry.

This sewer pipe has been maintained and used by defendant to the present time, its contents carried by the Perry sewer to the outlet of the 100 feet sewer constructed by plaintiff, the lower sixty feet of which are apparently claimed to be the property of the latter, but which became a common sewer when plaintiff allowed the connection of the Perry sewer with it.

Since we have had any state laws, provision has been made by statute to protect the owner of a private drain or sewer, and providing how and to what extent he may be reimbursed for expense of construction and repair as and when he permits another to connect with his sewer.

The statutes cover the field and, in conformity with the settled rule that when a statute provides entire regulation for relief it supersedes the common law, and furnishes the exclusive method of procedure, we conclude that the ruling of the court below was correct.

Exceptions overruled.

J. HERBERT WAKEM, RECEIVER *vs.* ADDIE B. DUFF, EXECUTRIX.

Aroostook. Opinion, January 29, 1936.

BANKS AND BANKING. EXECUTORS AND ADMINISTRATORS.

The obligation of a stockholder in a national bank, although arising from voluntary agreement, evidenced by becoming a stockholder, is statutory.

The liability does not altogether cease on the death of the owner, but, as limited and defined by the U. S. Code, attaches to his estate. The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living.

A cause of action for an assessment does not arise until the assessment.

As against a national bank stockholder's estate, liability terminates on valid assignment of the shares in final distribution of the estate if not by an earlier transfer.

There can be no liability on the part of a decedent's estate, where assessment is after entire administration of the estate, and distribution of all the property.

In the case at bar, when assessment was imposed, administration had come to an end; there was no estate to charge.

On report on an agreed statement of facts. An action by the receiver of an insolvent national bank to enforce stockholder's double liability. The cause was, by agreement of parties, reported on an agreed statement of facts to the Law Court for its determination. Case remanded for entry of judgment for defendant. The case fully appears in the opinion.

David Solman, for plaintiff.

Albert F. Cook, for defendant.

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

DUNN, C. J. The parties assenting, the trial court reported this case on an agreed statement of facts, for final decision.

The action is by the receiver of an insolvent national bank, The Caribou National Bank, against the executrix of the last will of a deceased stockholder, Lewis K. Duff, to enforce double liability, as assessed by the Comptroller of the Currency.

Mr. Duff died January 29, 1933; he owned twenty-nine one hundred dollar shares of stock. The bank suspended business March 4, 1933. A conservator was appointed.

The will of the decedent was admitted to probate, the executrix qualifying May 16, 1933.

On January 15, 1934, the bank went into the hands of a receiver. Plaintiff is receiver in succession; his duties began December 15, 1934.

The assessment had been previously levied, namely, on June 4, 1934; it was payable July 11, 1934. This suit, authorized February 15, 1935, was begun March 2, 1935; or more than twenty months later than the granting of letters testamentary. R. S., Chap. 101, Sec. 15.

On the assessment day, (June 4, 1934,) the statute barring claims against an estate, not presented to the executor, or filed in the registry of probate, within twelve months after the qualification of the executor, was, respecting the testator's estate, operative. R. S., *supra*, Sec. 14. Further, the estate itself had been fully settled, absent any notice for a liability, accrued or contingent, on the stock.

This action is based on Sections 64 and 66, of Title 12, of the United States Code. These sections, so far as relevant, read in substance as follows:

> "Section 64. The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock . . . ."
>
> "Section 66. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person inter-

ested in such trust funds would be, if living and competent to act and hold the stock in his own name."

The obligation of a stockholder, although arising from voluntary agreement, evidenced by becoming a stockholder, is statutory. *McDonald* v. *Thompson*, 184 U. S., 71, 46 Law ed., 437; *McClaine* v. *Rankin*, 197 U. S., 154, 49 Law ed., 702; *Forrest* v. *Jack*, 294 U. S., 158, 79 Law ed., 829. "The liability does not altogether cease on the death of the owner but, as limited and defined by section 66, attaches to his estate. The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living." *Forrest* v. *Jack*, supra.

The original receiver caused a demand to be presented to the executrix, for payment of the assessment upon the shares which her testate, in his lifetime, had owned. The executrix rejected such demand, assigning the time for claims over and the estate wholly administered.

The main question for decision is whether, the deceased stockholder's estate having been fully settled before the Comptroller laid the assessment, liability therefor continues unimpaired.

The cause of action did not arise until the assessment. *McDonald* v. *Thompson*, supra; *McClaine* v. *Rankin*, supra; *Forrest* v. *Jack*, supra. Administration had then been completed.

The Code charges the estate of a stockholder who is dead, with an equitable lien for assessments. *Zimmerman* v. *Carpenter*, 84 Fed., 747; *Forrest* v. *Jack*, supra.

In *Zimmerman* v. *Carpenter*, before cited, the court said that if liability did not arise, that is, if assessment was not made until the estate was fully distributed, there would be no estate to be charged.

Decision in *Blackmore* v. *Woodward*, 71 Fed., 321, is put on the ground that the widow, to whom the stock, bequeathed for life, with power of disposal, had been transferred, was the beneficial owner.

The estate of a deceased holder of state bank stock was held not liable where, in advance of assessment, the executor had transferred the stock to himself, as trustee for life. The court said that the stock then ceased to belong to the estate of the testatrix. *Carter* v. *Davis*, 174 Ga., 824, 164 S. E., 264.

As against a national bank stockholder's estate, liability terminates on valid assignment of the shares in final distribution of the estate if not by an earlier transfer. *Seabury* v. *Green*, 294 U. S., 165, 79 Law ed., 834.

There can be no liability on the part of a decedent's estate, where assessment is after entire administration of the estate and distribution of all the property. *Forrest* v. *Jack*, supra.

Whether the Maine statutes, touching presenting claims, and commencing actions, are here applicable, need not be adjudged. When assessment was imposed, administration had come to an end; there was no estate to charge.

The case may be remanded for the entry of judgment for defendant.

So ordered.

LUCY M. FRENCH, APPELLANT

FROM DECREE OF JUDGE OF PROBATE IN THE MATTER

OF ESTATE OF EBEN P. FRENCH.

Penobscot. Opinion, January 29, 1936.

PROBATE COURTS. R. S. 1930, CHAP. 75, SEC. 31.

WIDOW'S ALLOWANCE.

The first duty of an appellant from a decree of a Judge of Probate is to establish the right to appeal and unless this is made affirmatively to appear, the appeal will be dismissed without further examination. The right to appeal is statutory, and there must be compliance with all the requirements of the statute.

Within the meaning of R. S. 1930, *Chap.* 75, *Sec.* 31, *providing for appeal to the Supreme Court of Probate, only those are aggrieved who have rights which may be enforced at law and whose pecuniary interest might be established or divested wholly or in part by the decree appealed from.*

Where it does not appear that the estate being administered in Probate is insolvent, but, instead, it is evident that there are sufficient assets to pay all the indebtedness of the estate, as well as the allowance to the widow of the deceased

as granted by the Court, a creditor of the estate is not aggrieved by such allowance and may not appeal from the decree by which it is made.

On exceptions by appellant. To the ruling of the Supreme Court of Probate sustaining the decree of the Judge of Probate dismissing her appeal as claimant against a widow's allowance of the entire personal estate, appellant seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Arthur L. Thayer, for appellant.

Howard Cook, for appellee.

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

HUDSON, J. On exceptions by appellant.

The appellant, Lucy M. French, excepts to a decree of a Justice of the Superior Court, sitting as Supreme Court of Probate, whereby her appeal from the decree of the Judge of Probate (by which Annie French, widow of Eben P. French, late of Levant, was granted from his estate a widow's allowance of $659.00), was dismissed. The French estate inventoried $1,659.00, goods and chattels being valued at $659.00 and real estate $1000.00.

In her appeal, Lucy M. French alleges that she is "interested as a creditor." Her first duty is to establish her right to appeal and "unless this is made affirmatively to appear, the appeal will be dismissed without further examination." *Pettingill* v. *Pettingill*, 60 Me., 411, 419; *Deering et al., Aplts.* v. *Adams*, 34 Me., 41.

> "... any person aggrieved by any order, sentence, decree, or denial of such judges, ... may appeal therefrom to the Supreme Court of Probate ...." R. S. 1930, Chap. 75, Sec. 31.

The right to appeal is statutory and there must be compliance with all the requirements of the statute. *Bartlett, et al., Appellant*, 82 Me., 210, 19 A., 170; *Briard, Applt.* v. *Goodale, Gdn.*, 86 Me., 100, 29 A., 946; *Moore, Aplt.* v. *Phillips et al.*, 94 Me., 421, 47 A., 913; *Abbott, Appellant*, 97 Me., 278, 54 A., 755.

Within the meaning of the statute only those are aggrieved "who have rights, which may be enforced at law, and whose pecuniary interest might be established or divested wholly or in part by

the decree," appealed from. *Briard* v. *Goodale*, supra; *Abbott, Appellant*, supra; *Swan, et als., Appellants*, 115 Me., 501, 99 A., 449.

Here, factual proof is lacking to show that the appellant is aggrieved as a creditor of this estate. In the appeal appears no allegation of insolvency of the estate, nor does the record even tend to prove such to be the fact. The total amount of the estate in personal and real property, as above stated, is one thousand six hundred and fifty-nine dollars ($1,659.00). Its total indebtedness, including the debt of the appellant but exclusive of expenses of administration, is only two hundred eighty-five dollars and ninety-two cents ($285.92). While the widow's allowance exhausts the personal estate, on special license for sale therefor, the real estate is available for payment of this indebtedness. R. S. 1930, Chap. 85, Sec. 1, § I.

Thus it is apparent that the widow may receive her allowance in full and yet there remain a sufficiency of the estate from which this creditor, the appellant, may be paid in full. Consequently, she is not aggrieved by the decree from which she appealed.

True, the evidence shows that the appellant is the mother of a minor child, a grandchild and heir at law of the intestate. As mother she might have appealed as the next friend of the child (*Moore* v. *Phillips*, 94 Me., 421), but she did not. This appeal, both in form and substance, was her own as creditor only, not that of the child.

For failure both of allegation and establishment of the required statutory aggrievance, the entry must be,

Exceptions overruled.

FRED PENDEXTER *vs.* JOHN H. SIMONDS.

Cumberland. Opinion, January 29, 1936.

CONTRACTS. INSURANCE.

In determining the legal meaning of a written contract, its stipulations, limitations, or restrictions should be read together, and construed as a whole.

In the case at bar, Article 21 of the contract, interpreted with Article 26 of the same instrument, was intended to, and did relate to employees of the principal contractor exclusively.

Plaintiff, an employee of a subcontractor, declared on Article 21 claiming the right to avail himself thereof. His evidence did not correspond with or support his declaration. He could not recover, since the proof did not tend to substantiate a cause of action, either stated or attempted to be stated, in any count.

On exceptions by defendant. Plaintiff, an employee of a subcontractor of the defendant, who had entered into a contract with the United States Government to erect a building at South Portland, was injured while in the course of his work. Provisions of the defendant's contract called for the carrying of compensation insurance, both on the part of the contractor and subcontractor. The issue involved the right of the plaintiff to recover under the contract. Trial was had before the sitting justice of the Superior Court for the County of Cumberland without jury. The verdict was for the plaintiff in the sum of $654.69. To the court's finding defendant seasonably excepted. Exception sustained. The case fully appears in the opinion.

Reginald H. Harris,

Wilfred A. Hay, for plaintiff.

Cook, Hutchinson, Pierce & Connell, for defendant.

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

DUNN, C. J. An employee, as to whom his employer, a subcontractor, did not have industrial accident insurance, received injury. The workman brought this action against the principal contractor, alleging, in essence, as here pertinent, breach of contractual duty to provide a policy of insurance affording him (plaintiff) money relief and benefits, according to the scale established by the Workmen's Compensation Act. R. S., Chap. 55, Sec. 2, *et seq.*

Plea was the general issue; brief statement thereunder specially denied liability to procure such insurance. Issue was joined.

The trial court, sitting without a jury, found, on the whole case,

for the plaintiff; awarded damages; and rendered judgment accordingly. To the finding, exception was noted.

The contract, breach of a provision of which was averred, was a simple one, evidenced by writing. It had been entered into, under date of November 22, 1933, between the United States of America, on the one part, and John H. Simonds, trading as John H. Simonds Co., on the other, for the erection of a large shed at the Lighthouse Depot in South Portland, Maine.

Thomas H. Skinner Co., Inc., was the subcontractor. While at work for that concern, plaintiff fell from a staging, and broke an arm and leg. On the trial, causal connection between employment and accident was not in dispute.

These paragraphs, in the contract with the United States, are to be considered:

> "Art. 21. COMPENSATION INSURANCE.—The contractor will furnish compensation insurance for employees on this work and comply with the workmen's compensation laws of the State, Territory or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer."

> "Art. 26. SUBCONTRACTORS.—(a) The contractor shall cause appropriate provisions to be inserted in all sub-contracts relating to this work to insure the fulfillment of all provisions of this contract affecting such subcontractors, particularly articles 7 (b), (c) and (d), 11, 18-24."

Plaintiff declared on Article 21, relying on it as inclusive of himself; he alleged violation of the promise therein contained, to his resultant loss.

Upon opening this case, plaintiff offered the contract; objection that he was not a party to it was overruled; the document was admitted into the evidence. Exception taken does not, as the case turns, call for consideration.

The decisive exception, that to the court's finding, raises whether Article 21 was made, or intended to be made, to inure to plaintiff as third party beneficiary.

In determining the legal meaning of a written contract, its

stipulations, limitations, or restrictions should be read together, and construed as a whole.

Article 21 of the contract, interpreted with Article 26 of the same instrument, was intended to, and did, relate to employees of the principal contractor, exclusively.

Article 26 pertains to subcontractors' employees; this article, by reference to the earlier one, ("18-24"), declares in effect that every subcontract shall expressly require the subcontractor to provide compensation insurance coverage for his own employees.

Plaintiff, as has been seen, declared on Article 21, his interpretive premise being accrued right to avail himself thereof. His evidence did not correspond with nor support his declaration. He could not recover, since the proof, which lay with him, did not tend to substantiate a cause of action, either stated or attempted to be stated, in any count. *Kidder* v. *Flagg*, 28 Me., 477, 480; *Swanton* v. *Lynch*, 58 Me., 294, 298.

Exception sustained.

SAMUEL L. MILLER *vs.* LOUIS F. FALLON.

Kennebec. Opinion, February 3, 1936.

CONSTRUCTION OF STATUTES. STATUTE OF LIMITATIONS. MALPRACTICE.

The legislature has full power and authority to regulate and change the form of remedies in actions if no vested rights are impaired or personal liabilities created. There is no constitutional inhibition against the enactment of retroactive legislation which affects remedies only.

Statutes of Limitation are laws of process and, where they do not extinguish the right itself, are deemed to operate on the remedy only.

Statutes of Limitation may be made applicable to existing rights and causes of action provided a reasonable time is allowed for the prosecution of claims thereon before the right to do so is barred.

Barren of express commands or convincing implications, however, the limitation in such case can not be deemed to have been intended to be retroactive. It must be construed by the fundamental rule of statutory construction strictly followed by the Maine court that all statutes will be considered to have a pro-

spective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used.

In the case at bar, the language of Chapter 62, P. L. 1931, is general, makes no reference to causes of action which had already accrued, and is thus barren of express command or convincing implication that it was intended to be retroactive.

The time for commencement of the action for malpractice in the case at bar, was limited, therefore, only by the provisions of the general statute of limitations as set forth in R. S. 1930, Chapter 95, Section 90. It was not barred by P. L. 1931, Chapter 62.

On report on an agreed statement and stipulation. An action on the case to recover damages suffered as a result of the alleged malpractice of the defendant, a practicing physician and surgeon. The defendant pleaded the Statute of Limitations. In accordance with the stipulations of the report the cause was remanded to the Superior Court for trial. The case fully appears in the opinion.

Carleton & Donovan,
Clifford & Clifford, for plaintiff.
Locke, Campbell & Reid, for defendant.

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

STURGIS, J. This is an action on the case to recover compensation for losses suffered by the plaintiff as a result of alleged malpractice by the defendant, a practicing physician and surgeon. The defendant having seasonably pleaded the statute of limitations, by consent of the parties the case is reported on an agreed statement of facts.

The report shows that on November 18, 1929, the defendant operated on the plaintiff for hemorrhoids and, until January 9, 1930, following, continued with post-operative treatment. It is agreed that the acts and omissions of alleged malpractice charged in the writ occurred between November 18, 1929, and January 15, 1930, which confines the accrual of the plaintiff's cause of action, if any, to that period. This suit was begun on August 15, 1935, and duly entered at the return term.

The general statute of limitations in force when this malpractice is alleged to have been committed barred the maintenance of any action of assumpsit or upon the case founded upon any contract or liability, express or implied, and all other actions on the case except for slanderous words and for libel, if not commenced within six years after the cause of action accrued. R. S. 1916, Chap. 86, Sec. 85. Actions for assault and battery, and for false imprisonment, slander and libel, were then barred unless commenced within two years after the cause of action accrued. R. S. 1916, Chap. 86, Sec. 87. These limitations upon personal actions were embodied without change in the next revision of statutes. R. S. 1930, Chap. 95, Secs. 90, 92.

By Public Laws 1931, Chap. 62, approved March 20, 1931, and effective July 2, 1931, the time allowed for the commencement of action for malpractice, which had previously been governed by the general law, was reduced to two years by an amendment adding this class of actions to R. S., Chap. 95, Sec. 92, which now reads:

> "Actions for assault and battery and for false imprisonment, slander and libel, *and malpractice of physicians and all others engaged in the healing art*, shall be commenced within two years after the cause of action accrues."

The defendant invokes this statute and, on the brief, argues that it should be construed as retroactive, barring the plaintiff's suit upon this cause of action which accrued prior to the passage of the law and upon which suit was postponed until after the new limitation had expired.

There can be no well-grounded dissent from the settled rule that the legislature has full power and authority to regulate and change the form of remedies in actions if no vested rights are impaired or personal liabilities created. There is no constitutional inhibition against the enactment of retroactive legislation which affects remedies only. *Soper* v. *Lawrence Bros. Co.*, 98 Me., 268, 56 A., 908; *MacNichol* v. *Spence*, 83 Me., 87, 21 A., 748; *Berry* v. *Clary*, 77 Me., 482, 1 A., 360; *York* v. *Goodwin*, 67 Me., 260; *Sampson* v. *Sampson*, 63 Me., 333; *Proprs. Ken. Purch.* v. *Laboree*, 2 Me., 293. Statutes of limitation fall within this rule. They are laws of process and where they do not extinguish the right

itself, are deemed to operate on the remedy only. *Lamberton* v. *Grant*, 94 Me., 508, 518, 48 A., 127; *Lunt* v. *Stevens*, 24 Me., 537; *Mason* v. *Walker*, 14 Me., 166; *Proprs. Ken. Purch.* v. *Laboree*, supra. It is equally well settled that statutes of limitation may be made applicable to existing rights and causes of action provided a reasonable time is allowed for the prosecution of claims thereon before the right to do so is barred. *Carpenter* v. *Hadley*, 118 Me., 440, 108 A., 679; *Soper* v. *Lawrence Bros. Co.*, supra, affirmed 201 U. S., 359; *MacNichol* v. *Spence*, supra; *Sampson* v. *Sampson*, supra; *Proprs. Ken. Purch.* v. *Laboree*, supra; *Cooley's Const. Lim.* (7th Ed.), 523; *Lewis' Sutherland Stat. Const.* (2nd Ed.), Vol. II, Sec. 706; *Wood on Lim. of Action*, Vol. 1, Sec. 11.

It does not follow, however, that, because the legislature possessed the power to enact a retroactive statute of limitations, that it did so in the passage of the amendment under consideration. The language of that act is general and makes no reference to causes of action which had already accrued. It contains no provision expressly embracing causes of action which had accrued prior to its passage as in the statute construed in *Quimby* v. *Buzzell*, 16 Me., 470. There is no saving clause expressly exempting such causes of action from its operation, indicating a legislative intent to make it apply only to future actions, as in *Weymouth* v. *Gorham*, 22 Me., 385. Nor is a period provided for the presentation of accrued claims after the passage of the act, clearly demonstrating an intention to make the new limitation effective upon such claims, as in *Sampson* v. *Sampson*, supra, and *Soper* v. *Lawrence Bros. Co.*, supra.

Barren of such express commands or convincing implications, the limitation can not be deemed to have been intended to be retroactive. It must be construed by the fundamental rule of statutory construction strictly followed by this Court that all statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used. *Carpenter* v. *Hadley*, supra; *Dyer* v. *Belfast*, 88 Me., 140, 33 A., 790; *Deake, Appellant*, 80 Me., 50, 12 A., 790; *Rogers* v. *Greenbush*, 58 Me., 397; *Cooley's Const. Lim.*, 455; *Endlich on Inter. of Stat.*, 271, 279; *Wood on Lim. of Action* (2nd Ed.), Vol. 1, p. 41.

In *Hathaway* v. *Merchants' Trust Co.*, 218 Ill., 580, 75 N. E., 1060, that Court said:

"While it is undoubtedly within the power of the legislature to pass a statute of limitations or to change the period of limitation previously fixed and to make such statute or changes applicable to existing causes of action, yet such a statute is not to be readily construed as having a retroactive effect, but is generally deemed to apply merely to causes of action arising subsequent to its enactment, and the presumption is against any intent on the part of the legislature to make the statute retroactive. . . . The statute will only be given a retroactive effect when it was clearly the intention of the legislature that it should so operate. . . . And even where this intention clearly appears, it will not be given effect if to do so would render it unreasonable or unjust. If a reasonable time is given for bringing a suit or filing claims after the amendment takes effect, it may be valid and binding. . . .

"The plaintiffs in error contend that as there were about eight months after the act was approved and six months and thirteen days after it took effect within which the defendant in error could have filed its claim, this was a reasonable time, and that the new limitation should prevail. The act must be applied generally to all claims and to all estates. A single claim or a single estate can not be pointed out in which the act applies, and then say it does not apply to any other claim or to any other estate. It an estate had been pending for more than one year at the time the amendment went into effect, then all outstanding claims which had not been filed in the probate court would be entirely cut off, as far as the statute is concerned, without any opportunity to recover against the estate unless an equitable rule was applied. If an estate had been pending less than a year at the time the amendment went into effect, then the time within which claims might be filed would be cut down all the way from one day to one year. Applying the rule of uniformity to this amendment, we can not say that a reasonable time was left creditors in which to file claims or that it was the intention of the legislature that the amendment should be retroactive."

The application of this last observation to the limitation we are considering is obvious. Giving the limitation a retroactive effect would bar actions of malpractice which had accrued more than two years before it went into effect and cut down the time in which actions had accrued within two years could be begun all the way from one day to two years. *Hathaway* v. *Merchants' Trust Co.* is affirmed in *George* v. *George*, 250 Ill., 251, 95 N. E., 167. The principles there enunciated are reviewed and adopted in *Adams & Freese C.* v. *Kenoyer, et al.*, 17 N. D., 302, 116 N. W., 98.

In *Casto* v. *Greer*, 44 W. Va., 332, 30 S. E., 100, 101, that Court said:

> "A cardinal rule in interpreting statutes is to construe them as prospective in operation in every instance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively. In doubt it should be resolved against, rather than in favor of, retrospective operation. Statutes of limitations are no exceptions to the rule that statutes are prima facie to be given only prospective operation. . . .
>
> "The provisional relied on in this case is contained in chapter 4, acts 1895, re-enacting section 2, chapter 123, Acts 1891, being section 2, chapter 74, Code, and is in these words: 'But if such transfer or change be admitted to record within eight months after it is made, then such suit to be availing must be brought within four months after such transfer or charge was admitted to record.' Nothing is contained in the enactment indicating in any way that this provision was to apply to transfers or charges made prior to the passage thereof, nor could it so apply without being made to bar all such prior preferences recorded four months prior to the passage of the act. The circuit court meets this difficulty by amending the act so as to make it read that, to avoid any such preferences now in existence, suit must be brought within four months after the passage thereof. *This is a good suggestion, and it would probably have been adopted by the legislature*

had it been presented in time, but the courts are not authorized to supply the omissions of the legislature, even though such omissions do produce confusion. It is the duty of the courts to construe, and not to legislate."

It is the rule also in Michigan that statutes of limitation must be construed to operate prospectively only, unless their terms clearly indicate a different intent, and legislation in general terms not indicating a contrary intent, must be deemed to have a prospective operation only. *McKisson* v. *Davenport*, 83 Mich., 211, 47 N. W., 100, and cases cited. And in respect to lack of uniformity in the operation of such a statute, in *Ludwig* v. *Stewart*, 32 Mich., 26, 28, it is said:

"It is very evident that there is no definite time fixed by this statute within which actions shall be commenced, in so far as it is intended to have a retroactive operation. Under it cases will arise where the time within which the action must be commenced would be so short that it would be held unreasonable and void, while in others the time would be ample. Whether the time allowed in a given case would be sufficient or not must depend altogether upon the question as to the time when the cause of action accrued. And it is doubtful whether any two cases would be found alike. A decision under such a statute, while applicable to all cases coming within the time passed upon in such case would have but little, if any application in most others likely to arise. The effect of such a statute is to compel every man to decide for himself and at his peril, what will be considered a reasonable time within the judgment and opinion of the court of last resort. Again, cases must necessarily arise so near the dividing line that it would become a difficult matter for the court to say, under all the circumstances, whether the time allowed was sufficient and reasonable or not. And in all these cases it would still remain a matter of doubt whether the legislature would have come to the same conclusion and would have passed a statute fixing the same time which the court did. Indeed, it is evident that the limitation would be one fixed by the court, and not by the legislature. This court assumes no such power."

The doctrine of the cases just cited is upheld in *Bonfils* v. *Public Utilities Com.*, 67 Col., 563, 189 P., 775; *Thoeni* v. *Dubuque*, 115 Iowa, 482, 88 N. W., 967; *Boyd* v. *Barrenger*, 23 Miss., 269; *Nichols* v. *Briggs*, 18 S. C., 473; *Day* v. *Pickett*, 4 Munf. (Va.), 104.

We are fully aware that in Massachusetts a different rule prevails. It is there held that, inasmuch as statutes of limitation relate only to the remedy, they may control future procedure upon existing causes of action where they contain no language clearly limiting their application to causes arising in the future. *Mulvey* v. *Boston*, 197 Mass., 178, 83 N. E., 402. But, as is pointed out by that Court, the adoption of this rule is a direct repudiation of the principle that statutes are presumed to be prospective and not retroactive in operation. This is the interpretation put upon *Mulvey* v. *Boston* in the recent case of *E. S. Parks Shellac Co.* v. *Jones*, 265 Mass., 108, 112, 163 N. E., 883.

Nor have we overlooked the Federal rule, as it is termed, that such a statute is deemed to affect existing causes of action only from the time they are first subjected to its operation. *Sohn* v. *Waterson*, 17 Wall. (U. S.), 596. See *Carson* v. *Railroad Company*, 128 N. C., 95, 38 S. E., 287; *Culbreth* v. *Downing*, 121 N. C., 205, 28 S. E., 294. This rule is also in direct conflict with the presumption that statutes of limitation operate prospectively. Under it, the Court, of its own volition, extends the period of limitation prescribed by the legislature. The rule is founded on the hypothesis that, if the new limitation be made to apply only to causes arising after the passage of the act, all existing actions would be without limitations, a result not intended by the legislature. *Sohn* v. *Watterson*, supra. No such result would follow in the case at bar. The old statute of limitations still applies to existing causes of action.

Counsel for the defendant urge this Court to construe Chapter 62, P. L. 1931, as applying to such existing causes of action *only* as have already run out a portion of the original statutory time but which still have a reasonable time left for prosecution before the bar of the new statute attaches, thus leaving all other actions accruing prior to the passage of the law unaffected by its provisions. We find no support for this rule. It has been adverted to by law writers, but its general acceptance is not recorded. It was re-

jected as arbitrary and unsound in *Sohn* v. *Watterson*, supra. It violates the rule of uniformity of *Hathaway* v. *Merchants' Trust Co.*, supra, and *Ludwig* v. *Stewart*, supra. Under it, the statute would be unconstitutional as to actions which had accrued two years or more before its passage, or at a time which did not allow a reasonable period for their prosecution thereafter. This rule is not accepted in the opinions of this Court in *Sampson* v. *Sampson*, supra, or in *MacNichol* v. *Spence*, supra. There is nothing in the opinions in those cases to support that argument advanced on the brief.

We are of opinion, therefore, that the time for the commencement of this action for malpractice here in suit is limited only by the provisions of the general statute of limitations in R. S. 1930, Chap. 95, Sec. 90. It is not barred by P. L. 1931, Chap. 62. In accordance with the stipulations of the report, the cause must be remanded to the Superior Court for trial.

So ordered.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY

vs.

HOTEL AMBASSADOR.

Cumberland. Opinion, February 5, 1936.

FIXTURES. MORTGAGES.

A chattel does not become a fixture and is not merged in the realty on which it is placed unless (1) *it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof,* (2) *it is adapted to and usable with that part of the realty to which it is annexed, and* (3) *it was so annexed with the intention, on the part of the person making the annexation, to make it a permanent accession to the realty.*

In applying these tests, the intention with which an article is annexed to the realty is recognized as the cardinal rule and most important criterion by which to determine its character as a fixture.

In determining the intention with which a chattel is attached to realty, it is not the secret intention which controls, but the intention indicated by the proven facts and circumstances, including the relations and conduct of the parties.

Whether in a given case there was this intention to make the chattel a part of the realty is a mixed question of law and fact.

In the case at bar, the facts stated warrant a finding that there was at least constructive physical annexation of the refrigerator to the defendant's apartment house. It is also clear that it was adapted to and usable in the household apartment in which it was installed.

Upon the question of intention, it is significant that in the case stated the refrigerators in controversy were not designed or made for the particular apartment house in which they were installed or for any other particular place. They were already made for the general market and each was separately by itself an object of sale and purchase with a market value after removal as well as at the time of installation. They were not used in the apartment house in any particular place, but from time to time moved from one apartment to another.

The fact that the purchaser of these refrigerators, as owner of this apartment house, prior to their installation joined in the execution of a conditional sales contract which characterized the refrigerators as chattels and provided for a retention of title by the vendor, tends to prove that the purchaser did not intend that the articles should immediately become a part of the realty. The force of this evidence is not destroyed by the provision for the assumption of the conditional sales contract by the purchaser of the building.

Neither the type of the refrigerator in suit nor the facts and circumstances attending its installation in the defendant's apartment house, as stated in the report, clearly indicates an intention on the part of the original purchaser to permanently annex it to his building and make it a part of the realty. Lacking this element, conversion of the chattel into realty is not here established.

On report on an agreed statement. An action of replevin brought for the recovery of one electric refrigerator from the defendant. Plea was the general issue with a brief statement setting up that the refrigerator was a fixture and as such, part of the real estate owned by the defendant. The sole issue was that of title. Judgment for the plaintiff with damages assessed at $21.00 and costs. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Harry S. Judelshon, for defendant.

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

STURGIS, J. Action of replevin to recover one General Electric refrigerator. The plea was the general issue with brief statement that the chattel had been annexed to and become a part of an apartment house which the defendant owned. The case is reported on an agreed statement of facts.

On or about January 1, 1925, Ambassador Apts. Inc., a corporation, constructed an apartment house at 37 Casco Street in Portland. The property was originally encumbered by a first mortgage to the Union Trust Company, Trustee, which was dated January 1, 1925, and originally written for the sum of one hundred thirty-five thousand ($135,000) dollars. On June 10, 1927, one Philip Blumenthal was given a second mortgage for thirty-seven thousand ($37,000) dollars on the same property. Both these mortgages were duly recorded in the Registry of Deeds.

On August 10, 1931, the Cumberland County Power and Light Company, the plaintiff in this action, by a conditional sales contract of that date and recorded on December 21, 1931, following, sold the Ambassador Apts. Inc. eighty-seven S-42 General Electric all steel Monitor-top refrigerators, the price to be paid therefor being $13,267.50, payable $221.12 on the signing of the agreement, and a like sum on the tenth day of each month thereafter until the purchase price was fully paid. The contract provided that "title to all of which articles shall remain in the seller until full payment of the aforesaid sum, and shall then vest in the buyer," and "In case of sale of the premises by the buyer, the buyer agrees to include as a term of said sale, the assumption by the purchaser of said premises of this contract." The conditional sales vendor was also given the right on default in payment of any installment when due, or other breach of the agreement, to enter and repossess said property without legal process and retain all moneys already paid thereon without responsibility for damage to the property of the vendee or obligation to restore the premises from which the removal was made to their original condition.

It is stated that the apartment house contained eighty-seven

apartments, seventy being family household or so-called permanent apartments, and seventeen used for transient guests. The household apartments originally had been furnished with ordinary ice chests, but those let to transients were not refrigerated. Between September 14, 1931, and January 5, 1932, seventy refrigerators, each a unit complete in itself, resting on the floor of its own weight and in no way physically attached to the building except by the insertion of a plug connected to the refrigerator into a base socket in the wall, were delivered to Ambassador Apts. Inc., and placed in the seventy household apartments. The owner of the building removed the ice chests from the household apartments and plugged the drains provided for them. The plaintiff company had put in base plug outlets in all of the apartments, both household and transient, which were available for a refrigerator connection. In the first instance, it was left optional with the tenants of the household apartments as to whether they would use electric refrigerators at an additional rent charge or continue to use an ice chest. Eventually, by reletting, all of such apartments were rented furnished with one of the electric refrigerators. It is also stated that "from time to time, refrigerators were moved from one apartment to another."

On June 21, 1934, Philip Blumenthal, having foreclosed his second mortgage and taken possession of the apartment house, including the refrigerators in the apartments, sold his interest in the property to Hotel Ambassador, a new corporation organized under the laws of the State of Maine and the defendant in this action. Shortly thereafter, the plaintiff company demanded possession of the seventy refrigerators which it had delivered to Ambassador Apts. Inc. under the conditional sales contract, and the demand being refused, seized one of the refrigerators under the writ of replevin in this action, which is prosecuted as a test case. It is agreed that the vendee in the conditional sales contract under consideration was in default in its installment payments for the refrigerators when this action was begun. It does not appear that its successors in title have made any payments or assumed responsibility therefor.

The only issue raised by the plea is that of title. *Cate* v. *Merrill*, 109 Me., 424, 84 A., 897; *McLeod* v. *Johnson*, 96 Me., 271, 52 A., 760. The question presented is whether the refrigerator has become

a part of the realty. If the chattel is a fixture, its ownership is governed by the settled rule in this State that an agreement between a mortgagor and a conditional sales vendor preserving the chattel character of property added to the mortgaged real estate as a fixture during the life of the mortgage is ineffective as against the mortgagee unless he is a party to the transaction, title to the fixture vesting in the mortgagee as against the mortgagor and his vendor. *Gaunt* v. *Allen Lane Company*, 128 Me., 41, 45 A., 255; *Vorsec* v. *Gilkey*, 132 Me., 311, 170 A., 722. The rule necessarily extends to persons acquiring title to the premises from the mortgagee after the chattel has become a part of the realty. It does not appear in the agreed statement filed in this case that the mortgagee, from whom the Hotel Ambassador purchased the refrigerator in suit, consented to or was a party to the conditional sales transaction by which it was sold.

The inviolability of the old test of the physical character of the annexation is now generally denied and it is held that a chattel is not merged in the realty, unless (1) "it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to and usable with that part of the realty to which it is annexed, and (3) it was so annexed with the intention, on the part of the person making the annexation, to make it a permanent accession to the realty." *Hayford* v. *Wentworth*, 97 Me., 347, 54 A., 940; *Young* v. *Hatch*, 99 Me., 465, 59 A., 950; *Roderick* v. *Sanborn*, 106 Me., 159, 76 A., 263; *Squire & Co.* v. *Portland*, 106 Me., 234, 76 A., 679. And, in applying these tests, "the intention with which an article is annexed to the freehold has come to be recognized as the cardinal rule and most important criterion by which to determine its character as a fixture." *Portland* v. *N. E. T. & T. Co.*, 103 Me., 240, 68 A., 1040; *Roderick* v. *Sanborn*, supra.

In order to meet the first of the conditions enumerated, it is not necessary that the chattel be physically fastened to the realty at all times. The annexation may be constructive or actual. If the owner's intention to make the chattel a part of the realty is duly manifested, "the article is dedicated to the realty and its status as personalty has ceased." This is deemed to be constructive annexation. *Farrar, et al.* v. *Stackpole*, 6 Me., 154; *Roderick* v. *Sanborn*,

supra. It may be here found that there was at least constructive annexation. So, too, with the question of the utility of the refrigerators. They were undoubtedly adapted to and usable in and with the household apartments in which they were installed. They were used there for a long time and, so far as it here appears, proved satisfactory and sufficient for the purposes for which they were designed.

As to the intention, the all-important element to be established in order to prove that a chattel has been merged into a fixture, it is well settled that it is not the secret intention that controls, but that indicated by the proven facts and circumstances, including the relations and conduct of the parties. The "controlling intention is not the initial intention at the time of procuring the article in question, nor the secret intention with which it is affixed, but the intention which the law deduces from all the circumstances of the annexation." *Portland* v. *N. E. T. & T. Co.*, supra; *Roderick* v. *Sanborn*, supra. It is "the intention that should be inferred from all these. . . . Whether there was such an intention is a question of fact, or at least of mixed law and fact, for the jury in an action at law where there is any conflict of evidence or more than one possible logical inference from undisputed facts." *Hayford* v. *Wentworth*, supra.

On the question of intention, it is significant, as was noted in *Hayford* v. *Wentworth*, supra, that the refrigerators were "not annexed in the construction, enlargement or repairs" of the building or any of the apartments in it. They were "not designed or made for this particular (building) or place, nor for any particular place." Each "was a chattel already made for the general market, and kept in stock and separately by itself an object of sale and purchase in the general market. It could be placed and used in any room, or building, and transferred from building to building and from place to place in the same building. It had a market value before annexation and a market value after removal." The agreed statement of facts filed in this case shows that the refrigerators were not used exclusively in any particular apartments, but "from time to time refrigerators were moved from one apartment to another."

Weight also must be given to the fact that the purchaser of these refrigerators, before installing them in its apartment house, joined in the execution of a conditional sales contract which characterized the refrigerators as chattels and provided for a retention of title by the vendor. This evidence tends to prove that the mortgagor did not intend that the refrigerators should immediately become a part of the realty. *Hayford* v. *Wentworth*, supra; *Ames* v. *Trenton Brewing Co.*, 57 N. J. Eq., 347, 45 A., 1090; *Jennings* v. *Vahey*, 183 Mass., 47, 66 N. E., 598; *Medford Trust Co.* v. *Garage Co.*, 273 Mass., 349, 354, 174 N. E., 126. The provision for assumption of the contract by the purchaser of the building does not destroy the force of this evidence.

Roderick v. *Sanborn*, supra, relied upon by the defendant, rests upon entirely different facts. There, the plaintiff procured outside windows and doors to be "made for (her) house and especially fitted to it," and the agreed statement furnished convincing evidence that the doors and windows there in controversy were "obviously adapted and intended to be used with it (the house)." The facts here are more closely analogous to those in *Hayford* v. *Wentworth*, supra, a case involving the respective rights of a landlord and a tenant in a wash-down syphon water closet and its appurtenances, but decided on principles fully applicable to transactions between mortgagor and mortgagee. The same questions have arisen in other jurisdictions under substantially similar circumstances. A consideration of some of these cases seems profitable.

In *Jennings* v. *Vahey*, supra, a vendor sold the owner of an apartment house twenty-four kitchen ranges under a conditional sales contract. The defendant claiming a right to repossess the ranges for default in payments, the mortgagee of the premises sought an injunction to restrain the repossession on the ground that the ranges had become a part of the real estate. Noting that the funnels of the ranges passed into holes in the chimneys and the hot water pipes were connected to removable hot water boilers, but the ranges could be bought at any stove store, used in any other place where there was a chimney hole for a funnel and could be removed without damage to the premises, in holding that the ranges were not fixtures, that Court said:

> "The ranges seem to have been such as in most parts of the State tenants take with them from house to house when they change their residence, and set up as a part of their furniture as they carry a bureau or a table. The fact that the owner of the building placed one in each of his twenty-four apartments, gives a suggestion of permanence which furnishes some ground for an argument in behalf of the plaintiff; but the contract which he made with the defendant shows that he did not intend immediately to make them his property as a part of the real estate."

It was held that the ranges were not fixtures and title had not passed to the mortgagee.

In *Commercial Credit Corp.* v. *Gould*, 275 Mass., 48, 175 N. E., 264, subsequent to the giving of a mortgage upon an apartment building, the owner purchased on conditional sale refrigerating equipment therefor, consisting of a compressor installed in the basement connected by pipes in the walls with boxes or refrigerators located in the apartments, the latter being of ordinary stock pattern and easily removable without damage to the building, and it was held that the refrigerating equipment was property the nature of which depended upon the intention of the landowner as manifested by his acts, and that the physical facts did not compel a finding that the conditional vendee intended that the equipment should become a part of the realty. The further fact that the refrigerating equipment was "bought on conditional sale, even if unknown to the mortgagee, had some tendencies to show that the landowner did not intend it to remain permanently," and was sufficient to sustain a finding that the equipment had not become a fixture. To the same effect, see *Stiebel* v. *Beaudette & Graham Co.*, 275 Mass., 108, 175 N. E., 267.

In the *Walker Dishwasher Corp.* v. *Medford Trust Co.*, 279 Mass., 33, 180 N. E., 517, thirty-two dishwasher sinks were installed in the apartments of an apartment house then under mortgages to the defendant, one of which was afterwards foreclosed. The sinks were suspended from brackets screwed into the wall, drain pipes were screwed into them and the hot and cold water pipes were screwed into the faucets. The Court said:

"In determining the question of fact whether or not the sinks were personal property, the judge could properly consider the way in which they were attached to the building, the intention of the parties, and the nature and purpose of the articles. All that was required to remove the sinks would be to unscrew the 'tail-piece' and faucets and lift the sink from the lugs which were attached to the brackets. It thus appears it could be found from the physical facts that as installed the articles easily could be removed from the apartments without any damage whatever to the building. It also could be found from the giving by the purchaser to the plaintiff of a chattel mortgage covering the thirty-two sinks that the parties intended that they were to be regarded as personal property."

In *Anderson* v. *Southern Realty Co.*, 176 Ark., 752, 4 S. W., 27, kitchen cabinets, refrigerators and gas kitchen cook stoves installed in the apartments of an apartment building, were held not to be fixtures. A finding below that the gas stoves had become fixtures because they were attached to gas supply pipes by a screw was set aside.

In *Madfes* v. *Beverley Development Corp.*, 251 N. Y., 12, 166 N. E., 787, title to gas ranges installed in an apartment house was at issue between a vendor and vendee in a conditional sales contract. Argument was advanced and deemed persuasive in a dissenting opinion that gas ranges are the universal equipment of every apartment in apartment houses and should be deemed, as a matter of law, a part of the realty. This contention was not sustained in the majority opinion, it being pointed out that such an installation was not an innovation in the equipment of apartment houses and was not convincing, much less conclusive, proof of annexation.

In *Dunn* v. *Assets Realization Co.*, 141 Ore., 298, twenty-one electric ranges were purchased on a conditional sales contract and installed in an apartment house subsequently mortgaged to the plaintiff's assignor. The defendant acquired the vendee's title. Applying the tests of (1) annexation; (2) adaptation; and (3) intention, that Court found that the ranges had not been merged into the realty and become fixtures.

Reason and the clear weight of authority convince us that the defendant's claim should be denied. Neither the type of the refrigerator in suit nor the facts and circumstances attending its installation in the defendant's apartment house clearly indicates an intention to permanently annex the chattel to the building and make it a part of the realty. Lacking this element, conversion of the chattel into realty can not be predicated on the annexation and adaptation shown in this case. According to the terms of the report, judgment must be for the plaintiff with damages assessed at twenty-one ($21) dollars and with costs.

Case remanded to Superior Court for entry of judgment, assessment of damages and allowance of costs in accordance with this opinion.

PRISCILLA OUELETTE *vs.* REBECCA MILLER ET AL.

Kennebec. Opinion, February 5, 1936.

NEGLIGENCE. SNOW AND ICE. MUNICIPAL ORDINANCES.

PLEADING AND PRACTICE. HIGHWAYS. JUDICIAL NOTICE.

At common law private individuals are not liable for injuries to others occasioned by natural causes.

Our statutes make it the duty of public authority to keep highways safe and convenient for travelers, and when blocked and encumbered with snow to render them passable.

Notwithstanding this obligation, towns are exempted by statute from liability for damages to pedestrians on account of snow and ice on any sidewalk. The statutes further authorize towns to make by-laws or ordinances providing for the removal by abutters of snow and ice from sidewalks and to enforce such by-laws by suitable penalties.

Unlike public statutes, municipal ordinances are not a matter of judicial notice.

A person, by virtue of the ordinance, may be charged with a public duty but non-performance gives no cause of action to a private individual.

A good declaration in an action for negligence ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others.

If the pleader merely alleges the duty in his declaration, he states a conclusion of law, whereas the elementary rule is that the facts from which the duty springs must be spread upon the record so that the Court can see that the duty is made out.

In the case at bar, the defendant alleged the existence of an ordinance in Augusta requiring the removal of snow and ice, and setting forth that failure of compliance therewith created a cause of action in favor of travelers injured thereby. This contention not being maintainable she then contended that the defendant had violated his common law duty to prevent artificial accumulations of snow and ice on his sidewalk detrimental to travelers.

The Court holds that the essential facts necessary to create a common law liability were not affirmatively stated, the declaration negatived any inference of common law liability. The last clause therein was a mere statement of legal conclusion. It could not be set apart from insufficient allegations of fact to which, by express reference it applied. General demurrer properly lies to such a declaration.

On exceptions by defendant. An action on the case to recover for personal injuries sustained by the plaintiff from a fall on the sidewalk adjoining premises owned by the defendant. Plaintiff alleged that the icy and slippery condition of the sidewalk, caused by the failure of the defendant to remove ice and snow, as required by a virtue of an ordinance of the City of Augusta, constituted actionable negligence, also argued at the trial that the defendant violated his common law duty to prevent artificial accumulations of snow and ice on his sidewalk. A general demurrer to the plaintiff's declaration was filed by the defendant. To the overruling of this demurrer defendant seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Robert A. Cony, for plaintiff.

Andrews, Nelson & Gardiner, for defendant.

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

MANSER, J. On exceptions by defendant to the overruling of a general demurrer to the declaration in the plaintiff's writ.

The plaintiff received personal injuries from a fall on the sidewalk in front of premises owned by one of the defendants and occupied by the other.

The first count in the declaration is concededly bad and it is unnecessary to consider it.

The second count sets forth: "That the plaintiff was on the second day of January, A. D. 1935, a pedestrian on the sidewalk on the westerly side of Water Street in said Augusta, which said sidewalk abutted on property and premises owned by the said defendant, Rebecca Miller, and occupied by the said defendant, Charles S. Wong, and which said sidewalk was required by virtue of the ordinances of the said City of Augusta to be kept clear of ice and snow by the said defendants, and the plaintiff says that the said sidewalk was then and there not free of ice and snow but was icy and slippery; and that the said defendants by their negligence and failure to comply with the said ordinance and in disobedience to the ordinance aforesaid, negligently omitted to perform their duty in that respect, owed to the plaintiff, and the said plaintiff, then and there in the exercise of due and proper care, had the right to expect and did expect the defendants to keep the said sidewalk free from ice as was hereinbefore described; and the plaintiff says that she slipped and fell and suffered a broken arm and other grievous bodily injuries . . . all of which is because of the negligence of the said defendants in not caring for the ice and snow on said sidewalk as required by law and in their negligence in the performance of their duty owed to the plaintiff, to the damage," etc.

At common law private individuals are not liable for injuries to others occasioned by natural causes. Snow may fall and rain descend and thereby hazardous conditions be created upon our streets and highways, but the traveler who sustains an accident solely by reason thereof has no cause of action against the owner of land which may happen to abut the locus of the accident. *Greenlaw* v.

Milliken, 100 Me., 440, 62 A., 145; *Kirby* v. *Boylston Market Association*, 80 Mass., 249.

Our statutes make it the duty of public authority to keep highways safe and convenient for travelers, and when blocked and encumbered with snow, to render them passable. R. S., Chap. 27, Secs. 65 and 72. Under certain restrictions and limitations, whoever suffers bodily or property damage through any defect or want of repair in a highway may have an action against the county or town obliged by law to repair the same. R. S., Chap. 27, Sec. 94.

Since 1879 the statute has provided that "No town is liable to an action for damages to any person on foot, on account of snow or ice, on any sidewalk or cross-walk, nor on account of the slippery condition of any sidewalk or cross-walk." R. S., Chap. 27, Sec. 97.

While municipalities are thus exempted from liability under such conditions, their obligation to remove accumulations of snow and ice still remains.

By R. S., Chap. 5, Sec. 136, VI, towns, cities and village corporations may make by-laws or ordinances, not inconsistent with law, and enforce them by suitable penalties, providing for the removal of snow and ice from sidewalks to such extent as they deem expedient. Non-compliance with such ordinance results in a penalty exacted by the municipalities.

The declaration alleges the existence of such an ordinance in Augusta. Its provisions are not set forth. Unlike public statutes, they are not a matter of judicial notice. *Neallus* v. *Amusement Co.*, 126 Me., 469, 139 A., 671.

Dillon: *Mun. Corp.*, 5th Ed., Vol. II, Sec. 630, says: "No implied power to pass by-laws, and no express grant of the power, can authorize a by-law which conflicts with the statutes of the State, or with the general principles of the common law adopted or in force in the State."

Yet it is evident that the declaration under consideration undertakes to set up that failure to comply with a by-law of the City of Augusta to remove snow and ice from the sidewalk created a cause of action in favor of travelers injured thereby which did not exist by statute or common law.

In *Kirby* v. *Boylston Market Association*, supra, the Court clearly states the principles applicable to such a situation, as follows: "The defendants, as owners and occupants of the land and building abutting upon Boylston Street, are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalk, or by means of snow and ice accumulated by natural causes thereon, although, by ordinances of the city, it is made the duty of abutters, under prescribed penalties, to keep the sidewalks adjoining their estates in good repair, and seasonably to remove all snow and ice therefrom. Such ordinances are valid, and the work which is enforced upon them relieves, to the extent of its cost or value, the city from charges which otherwise it would be necessarily, in discharge of its municipal duties, subjected to."

Again, in *Dahlin* v. *Walsh*, 192 Mass., 163, 77 N. E., 830, the Court said: "Certainly he (the defendant) owed no duty to the plaintiff to keep the sidewalk clear of ice and snow coming thereon from natural causes, or to guard against the risk of accident by scattering ashes or using other like precautions, whether or not any public duty was imposed upon him by the ordinances of the city."

Conceding the legal principles above noted, and that the plaintiff has no cause of action against the defendants for natural accumulations of snow and ice or for failure to comply with the provisions of the ordinance, whatever they may have been, the plaintiff, however, contends that the declaration is broad enough to admit evidence and proof thereunder of *artificial* accumulations created by the *negligent* act of the defendants, and relies upon the concluding clause, "All of which is because of the negligence of the said defendants in not caring for the ice and snow on said sidewalk as required by law and in their negligence in performance of their duty owed to the plaintiff."

The well-established applicable principles of pleading have been concisely stated in *Chickering* v. *Power Company*, 118 Me., 414, 108 A., 460: "Actionable negligence arises from neglect to perform a legal duty. . . . By direct averment a pleader must *at least state facts* from which the law will raise a duty, and show an omission of the duty, with injury in consequence thereof. . . . Reasonable cer-

tainty in the statement of essential facts is required to the end that defendant may be informed as to what he is called upon to meet on the trial. Facts showing a legal duty, and the neglect thereof on the part of the defendant, and a resulting injury to the plaintiff, should be alleged."

The Court in *Boardman* v. *Creighton*, 93 Me., 17, at 24, 44 A., 121, 123, quotes the requisites of a good declaration in an action for negligence, as follows: "It ought to *state the facts* upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing *in what respect* he was negligent, and how he became bound to use care to prevent injury to others."

Also, citing with approval the opinion of *Kennedy* v. *Morgan*, 57 Vt., 46, the Court in the same case says: "If the pleader merely alleges the duty in his declaration, he states a conclusion of law, whereas the elementary rule is that the *facts* from which the duty springs must be spread upon the record so that the court can see that the duty is made out."

Again, "The principal rule as to the mode of stating the facts is, that they should be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action."

Applying these principles to the case at bar, we find the only allegation of fact constituting liability is that the defendants failed to remove snow and ice from their sidewalk, in disobedience to an ordinance requiring such removal.

After setting forth the physical injury sustained, the plaintiff concluded the identical paragraph of the declaration in which the facts are alleged, with the summation that "*all of which* is because of the negligence of the said defendants in not caring for the ice and snow on said sidewalk as required by law and in their negligence in the performance of their duty owed to the plaintiff."

Finding that failure to remove snow and ice and violation of the ordinance concerning such removal do not constitute a cause of action, the plaintiff is forced to contend that she is entitled to a cause of action evidently not contemplated at the time the suit was

brought, and that she can introduce under such a declaration evidence of facts showing that the accumulation of snow and ice was collected artificially through the negligence of the defendants, and the duty owed the plaintiff was not because of the requirement of the ordinance, but arose from a common law obligation.

The essential facts necessary to create a common law liability are not affirmatively stated. They must be. *Bean* v. *Ayers*, 67 Me., 482.

The case of *Brown* v. *Rhoades*, 126 Me., 186, 137 A., 58, is relied upon by the plaintiff. The declaration in that case was held to be good. It did present facts sufficient to justify a recovery, which is in accordance with the rule there laid down. In this case the declaration does not. It negatives any inference of common law liability. The last clause therein is a mere statement of legal conclusion. It can not be set apart from insufficient allegations of fact, to which by express reference it applies. The ruling below must be reversed.

Exceptions sustained.

JOHN H. EDDY

vs.

BANGOR FURNITURE COMPANY AND

LUMBERMEN'S MUTUAL CASUALTY COMPANY.

Penobscot. Opinion, February 10, 1936.

WORKMEN'S COMPENSATION ACT. ASSENT OF EMPLOYER.

SCOPE OF EMPLOYMENT.

In order for an employee to recover compensation under the Workmen's Compensation Act (R. S. 1930, Chap. 55), it must appear that the employer assented to the Act as well as that the injury arose out of and in the course of the employment. Without assent, the Commission has no jurisdiction.

It is incumbent upon the employee to prove that the injury received was within the scope of the employer's acceptance.

The assent of the employer is not to be extended beyond what in the usual course of a specified business is necessary, incident or appurtenant thereto.

The Commission's decision upon all questions of fact, in the absence of fraud, is final and may not be disturbed if there is any competent substantive evidence or reasonable inferences therefrom to warrant it.

It may or may not be the usual, the regular, the customary thing for a furniture company to construct inside rooms for exhibition purposes. The Court can not take judicial notice that it is.

Without evidence to that effect, one employed as a carpenter in such construction does not come within the scope of the assent of the employer engaged in the wholesale and retail furniture business.

On appeal by defendant from decree of a sitting Justice of the Superior Court affirming a decision of the Industrial Accident Commission awarding plaintiff compensation. Appeal sustained. The case fully appears in the opinion.

Fellows & Fellows, for petitioner.

James M. Gillin, for appellants.

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

HUDSON, J. Appeal by defendants from a *pro forma* decree of a Justice of the Superior Court, affirming a decision of the Industrial Accident Commission, by which the plaintiff was awarded compensation.

On February 26, 1934, The Bangor Furniture Company conducted a wholesale and retail furniture business in the City of Bangor. The plaintiff, a carpenter by trade, having a shop at his home in Bangor, in which were installed certain motor driven machines (among which was a buzz saw), was hired by the Furniture Company to do some carpenter work on the third floor of its four-story building, consisting of "general repairs and changing rooms, *making some rooms for showing furniture* and putting up shelves and such things to show their furniture." He had nearly completed the construction of a model suite of three inside rooms, comprised of dining room, bedroom and kitchen, when, on the day mentioned, he was engaged in putting a box casing into a window in one of these rooms. Not having been supplied with sufficient material of

the right dimension, he took some seven-eighths inch thick pine boards (odds and ends) to his shop, (about one mile from the furniture store) to saw them down to a thickness of three-eighths of an inch and a width of two and a half inches. To do this, he used his power driven buzz saw and while so engaged one of the boards caught and dragged his hand onto the saw, cutting off the end of his right thumb. For this injury, he was awarded compensation.

In his petition, Mr. Eddy alleged his employment, the receiving of the injury, and that it arose out of and in the course of his employment. In denial of liability, the defendants alleged "that the injury which the above named employee alleges he sustained on February 26, 1934, was sustained by him in an occupation and a place not covered by, or within the purview of, or assent to the Workmen's Compensation Act filed by said employer, nor by the terms of the policy of industrial accident insurance issued by Lumbermen's Mutual Casualty Company, which was filed by said employer in connection with his assent to the Workmen's Compensation Act of Maine." They also denied that the injury arose out of and in the course of his employment, as well as set up other matter of defense not now necessary to state.

In order for one to recover compensation under this Act, it must appear that the employer assented to it, as well as that his injury arose out of and in the course of his employment. R. S. 1930, Chap. 55, Sec. 8. Unless there be such assent, the Commission has no jurisdiction. Even though it be assumed, without so holding, that the plaintiff were an employee rather than an independent contractor, and that his injury arose out of and in the course of his employment, he is not entitled to recover compensation without showing that his employers assent "under the compensation act for the work" in which he received his injury. *Paradis Case*, 127 Me., 252, 142 A., 863, 864.

> "The assent of the employer is not to be extended beyond what in the usual course of the specified business is necessary, incident or appurtenant thereto." *Ibid.*

It is incumbent upon him to prove that the injury received was within the scope of acceptance of the employer. *John B. Fournier's*

Case, 120 Me., 191, 113 A., 27. If he comes not within the terms of the assent or of the policy, he may not recover compensation. *Simon Michaud's Case*, 121 Me., 537, 118 A., 425.

In the case at bar, the assent filed with the Commission described the business as "furniture and the installation of House Furn." The insurance policy states, "furniture dealer—wholesale or retail . . . ." In the policy-stated classification of employees, the word "carpenters" does not appear.

The question, then, is whether or not the building of this inside exhibition suite was "in the usual course" of the defendant's business "necessary, incident or appurtenant thereto." *Paradis Case*, supra. If not, the plaintiff can not recover; if so, he may by proving it and the additional requirements of the Act.

The Commission found as a fact that "building in the show rooms for the purposes of exhibiting furniture and thereby increasing sales was an important and usual part of the employer's regular business."

> "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. This has been declared repeatedly." *Kilpenen's Case*, 133 Me., 183, 185, 186, 175 A., 314.
>
> The Act itself provides:
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> "His decision, in the absence of fraud, upon all questions of fact shall be final." R. S. 1930, Chap. 55, Sec. 36.
>
> "Whether the finding of fact is supported by legal evidence is the limit of passing in review. Thus is the declaratory fiat of the Legislature. . . . The finding by the Commissioner shall not be disturbed if any competent substantive evidence, or reasonable inferences therefrom, warrant it. . . . Should the ultimate conclusion that an injured employee was within the operation of the Act be based on probative facts found which fail utterly to establish the ultimate facts found, the finding could be annulled." *Noe Gagnon's Case*, 125 Me., 16, 17, 19, 130 A., 355.

". . . there must be some competent evidence to support a decree. It may be slender but it must be evidence, not speculation, surmise, or conjecture. *Mailman's Case*, 118 Maine, 172; *Butts' Case*, 125 Maine, 245"; *Mamie Taylor's Case*, 127 Me., 207, 208, 142 A., 730.

A decision of the Commissioner will not be reversed where the finding is supported by rational and natural inferences from proved facts. *Mailman's Case*, supra; *Patrick* v. *Ham*, 119 Me., 510, 111 A., 912; *Hull's Case*, 125 Me., 135, 131 A., 391.

A careful examination of the record in this case discloses no evidence whatever that the building of these show rooms was "in its usual course necessary, incident or appurtenant" to the business of the defendant as described in its assent, nor do there appear therein any proven facts from which such conclusion may be rationally and naturally inferred.

"When it is sought to establish a case by inferences drawn from facts, such inferences must be drawn from the facts proven. They can not be based upon mere probabilities." *Bennett* v. *Thurston*, 120 Me., 368, 371.

It may or may not have been the usual, the regular, the customary thing for a furniture company to build such rooms for exhibition purposes. On this evidence is wanting. It can not be supplied by judicial notice.

Furthermore, the Act expressly excludes from its beneficence "any person whose employment is not in the usual course of the business, profession, trade or occupation of his employer." R. S. 1930, Chap. 55, Sec. 2, §11.

"Although an employee may be in the employment of the insured, he is not entitled to compensation under the Act if, at the time of his injury, he is not engaged in the usual course of the trade, business or occupation of the employer." *Van Deusen's Case*, 253 Mass., 420, 421, 149 N. E., 125. (The Massachusetts Act is identical with ours in this exclusion clause.)

". . . Under such statutes" (those having this exclusion clause) "it is an indispensable condition to recovery under the

Act that claimant bring himself within the statute, it being held that the employment must come within the normal operations of the usual and ordinary business of the employer." 71 C. J., Sec. 180, page 441.

In *Uphoff* v. *Industrial Board of Illinois*, 271 Ill., 312, 111 N. E., 128, it was held that an injury received by a workman hired by a farmer to erect a broom corn shed on his farm was not received in the usual course of business of the employer.

"It is clear that the law contemplates that there may be an employment of labor, not in the usual course of the business of the employer, in which employment the risks of injury not occasioned by the employer's fault, are assumed by the workman. It would seem that occasionally renovating the rooms of a building, or the building itself, owned and occupied by the owner as a home, with paint or paper or both, is not in the usual course of the trade, business, profession or occupation of the owner, unless he is himself in the business of painting and decorating." *Holbrook* v. *Olympia Hotel Co., et al.*, 166 N. W., 876, 878 (Mich.).

In *Bargey* v. *Massaro Macaroni Co., et al.*, 218 N. Y., 410, 113 N. E., 407, Bargey, the employee, a carpenter, while working upon a partition, was killed by the collapse of the building. The Court, in denying compensation, stated:

"It was a specific act, for which Bargey was specially employed, which had no relation to the hazardous employment, except that it made more useful, within the contemplation of the employer, the building in which the employment was carried on. He was not engaged in the preparation of macaroni, even as in partitioning off a part of the residence of a physician as a professional office he would not be engaged in the occupation of practicing medicine. He was not, within the intendment of the law, an employee of the company."

In *McNally* v. *Diamond Mills Paper Company*, 164 N. Y. S., 793, the Court, in reversing the award for the claimant, said:

"Assuming that the claimant was in the employ of the paper company, I am of the opinion that he is not within the protection of the Workmen's Compensation Law. The business of manufacturing paper is a hazardous employment, and falls within group 15 of section 2 of the act. But the claimant was not exposed to the hazards of that business. His employment was of a special character. Installing this engine had no relation to the hazards of paper making, except that it increased the facilities for that purpose."

In *Dose* v. *Moehle Lithographic Company, et al.*, 165 N. Y. S., 1014, the Court, referring to the Bargey case, supra, said:

"Bargey was a carpenter, and was employed specially to do work of that character on the building wherein the hazardous business was conducted. He had no connection with that business. So here the claimant was a bricklayer, employed specially to make specific repairs to the building, and had no connection whatever with the hazardous employment conducted therein. His injury arose, not out of and in the course of the work of lithographing and printing, but of bricklaying."

For failure of proof that, at the time he received his injury, his employment was in the usual course of his employer's business and that he was doing work in the business for which his employer had assented, the plaintiff is not entitled to receive compensation.

Appeal sustained.

LIVIA STEVENS ET AL

vs.

REUEL W. SMITH, EX'R,

ESTATE OF JENNIE E. HAYFORD ET AL.

Androscoggin. Opinion, February 13, 1936.

WILLS. CHARITABLE TRUSTS. CY PRES.

When, to carry out the clearly expressed intention of a testator, it is found that the organization named to administer a general charitable trust can not accept the gift and execute the trust, it does not fail.

Methods prescribed for the administration of a trust may be changed to meet exigencies which may be disclosed by a change of circumstances, and the trust thereby relieved of a condition which endangers the charity itself.

The doctrine of cy pres *is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which can not be followed, the words shall be so construed as to give effect to the general intention.*

In the case at bar, the decree alloting the trust fund, after provision for certain payments, to the Auburn Home for Aged Women, and the Young Women's Christian Association of Lewiston, was proper.

Appeal from a decree in equity authorizing and directing the division and transfer of a trust fund, the residue under a will. Appeal dismissed. Decree in accordance with the opinion. The case fully appears in the opinion.

Seth May, for plaintiffs.

George C. Wing, for Auburn Home for Aged Women.

Reuel W. Smith, pro se.

Frank T. Powers, for heirs of Jennis R. Hayford.

Carl Getchell, for Young Women's Christian Association.

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

BARNES, J. Appeal from decree in equity to authorize disposition of trust funds, the residue under a will.

The will contains the following provisions: (1) "I give and devise my dwelling-house and land appurtenant thereto, situated on Pleasant Street, in said Auburn, together with the furniture and household goods of all kinds therein, to my sister ————, of South Boston, in the Commonwealth of Massachusetts, to use and enjoy during her lifetime, and from and after her decease to the Auburn Branch of the Woman's Christian Temperance Union, to be used by said Union as a home for girls and women. Authority is hereby expressly given to said Union to sell any or all of said property, and to invest the proceeds thereof in other property, real or personal, to be used for the same purpose and no other.

"Whatever other property I may die possessed of, I direct my Executor to pay the income thereof to my said sister, ———— as long as she may live, and upon her death, to turn the residue of my estate over to said Auburn Branch of the Woman's Christian Temperance Union, to be used by said Union in maintaining said home."

The questions at issue are whether a valid charitable trust was created under the terms of the will; whether under its terms the devisee named is the Auburn Woman's Christian Temperance Union; whether the said Union is such a charitable organization as may accept under the the terms of the will; whether the Auburn Home for Aged Women and the Lewiston-Auburn Young Women's Christian Association, Inc., may be substituted for the Auburn Women's Christian Temperance Union; for allowance of costs and for necessary instruction under the disposition authorized herein.

From the terms of the will it seems that the testatrix assumed her executor would find the homestead of his testatrix with furniture and household goods to become the property of the devisee named, and a residue of property, the income of which was to be used in maintaining the home of the testatrix when it should come into the possession of the trustee.

At the probate of the will it was evident that the funds of the testatrix had been so depleted that her personal estate was approximately $75.00, and that there were debts and expenses of about $1450.00, rendering it necessary for the executor to obtain license to sell, and to sell the real estate for the payment of debts. It ap-

pears that this was done, and the residue amounted to $2261.07.

The life tenant named in the will outlived her sister, and the executor of the will was appointed trustee for the life tenant. Payment of income was made to the life tenant until her death in 1920, when the trustee was directed to pay the principal sum aforesaid to the Auburn Branch of the Woman's Christian Temperance Union, this payment being made August 12, 1920, since which date the income has been added to the principal fund, the sum amounting to $4138.90 as of January, 1935.

The record shows that for more than forty years testatrix had been an active member of the Auburn W. C. T. U. and that she was interested in the welfare of girls and women and active in providing sufficient housing at reasonable expense for those needing assistance.

It seems not in contention that the Auburn W. C. T. U. was the intended trustee, and that an unincorporated association may receive and administer a charitable trust.

Counsel for the defendant heirs of the testatrix only "claim that the provisions of the Hayford will do not disclose a general charitable trust justifying the application of the *cy pres* doctrine."

That the trust set up in the will is a valid charitable trust is settled law in this state. *Drew* v. *Wakefield*, 54 Me., 291-298; *Smith* v. *Relief Association*, 128 Me., 417, 149 A., 23.

Finally, can this Court declare that the fund now held in trust by the Auburn W. C. T. U. be divided into equal shares, the one to be paid to the Auburn Home for Aged Women, the other to the Lewiston-Auburn Young Women's Christian Association, Inc., and so the fund be administered in the manner and for the purposes prescribed by the donor of the trust.

It is in evidence that the Auburn W. C. T. U. is not in condition to own or rent and operate a home for girls and women, but among the departments of work operated by them are what they term Child Welfare, and Aid to Mothers.

It is not questioned that the Auburn Home for Aged Women has and operates a Home, and that the Young Women's Christian Association, Inc., does likewise. Both these, proposed recipients, apparently do now conduct these wholly admirable undertakings.

That one is located in Auburn and the other in Lewiston, one

community, though separated by a river for political purposes, is not urged in defense.

When, to carry out the clearly expressed intention of a testator, it is found that the organization named to administer a general charitable trust can not accept the gift and execute the trust, it does not fail.

The trustee is not the beneficiary.

Under the will before us girls and women in need of homes are the beneficiaries, and a court of equity has power to name a trustee to carry out the intent of the testatrix, to provide the means to effectuate the desired end.

"It is a natural and necessary branch of the jurisdiction over charitable trusts that the means or details prescribed for the administration of such a trust should be subject to be molded so as to meet any exigency which may be disclosed by a change of circumstances, and to relieve the trust from a condition which imperils or endangers the charity itself, or the funds provided for its endowment and maintenance." *Lackland* v. *Walker*, 151 Mo., 210, 52 S. W., 414-425.

This is the doctrine of *cy pres*, "a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which can not be followed, the words shall be so construed as to give effect to the general intention." *Lynch* v. *Congregational Parish*, 109 Me., 32-38, 82 A., 432, 435.

Its scope and limit, as a rule of judicial construction adopted and administered by this Court are exhaustively stated in *Doyle* v. *Whalen*, 87 Me., 414, 32 A., 1022; *Brooks* v. *Belfast*, 90 Me., 318, 38 A., 522; *Snow and Clifford* v. *Bowdoin College*, 133 Me., 195, 175 A., 268.

Cases cited in the brief for the heirs are not in point. In *Bancroft* v. *Maine State Sanatorium*, where a trust was created in favor of a particular tuberculosis sanatorium association, for a specific purpose, to be used "at Hebron in its present location," by a declaration of trust providing for a forfeiture of the trust under certain conditions, with remainder over in the event of forfeiture to specified persons, *cy pres* was held inapplicable upon the failure of the trust by reason of the association turning over the sana-

torium to the state, the gift being to a particular association, without evidencing a general charitable intent.

In *Allen* v. *Nasson Institute*, 107 Me., 120, 77 A., 638, no general charitable intent was manifest, and the specific purpose failed.

In *Dupont* v. *Pelletier*, 120 Me., 114, 113 A., 11, where the purpose of a gift in trust for the establishment of a carmelite monastery was to administer to the spiritual interests of the French population of a given city, it was held there was no occasion for the application of the doctrine of *cy pres* which is based upon the non existence of a precise beneficiary, and the consequent diversion of the fund to the same general charitable purpose for which the trust was created, even though the trustees renounced.

In *Doyle* v. *Whalen*, supra, the gift was to a class, to donors definitely ascertainable, which if properly applied would be exhausted, within a few years, and had no permanency.

In *Brooks* v. *Belfast*, 90 Me., 318, 331, 38 A., 222, 226, where the beneficiary was the Central School District, of Belfast, the taxpayers therein, the District was abolished before the trust vested and the Court say, "If now, any proper authority existed in the Court to substitute the City of Belfast for the Central District, as the object of the donor's bounty, no scheme could be devised whereby the taxpayers residing on the territory comprised within the limits of Central School District could enjoy the exclusive benefit of the gift. All other taxpayers in the city would necessarily receive their ratable share of the fund in common with those of Central District."

The decree appealed from is confirmed, but requires modification in one regard.

It made provision for certain payments out of the fund, before division.

To these directions for payments should be added amounts properly due each side for expenses and services of counsel in appeal, all to be deducted from the fund, after allowing proper credit to said fund for income from the date of the original decree.

Appeal dismissed.
Decree in accordance with this opinion.

CITY OF BATH *vs.* INHABITANTS OF BOWDOIN.

Sagadahoc. Opinion, February 19, 1936.

PAUPERS AND PAUPER SETTLEMENT. NOTICE. WAIVER.

A defect in a notice may be waived by the town upon which notice is served. Waiver may be implied. An answer denying liability upon other grounds waives the defect.

Overseers of the poor are the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns with reference to claims, including those for pauper supplies. Their authority extends to the adjustment of all claims of this sort and to all preliminary proceedings.

In the case at bar, while the notices given to the town of Bowdoin were unquestionably defective, the overseers of the poor of Bowdoin by their answer effectively waived the defect in the notices.

On exceptions. An action of assumpsit for pauper supplies against town of derivative settlement. The sole question at issue was whether or not a defective notice given by the plaintiff had been waived by the defendant. The jury found for the plaintiff. Exceptions to rulings were seasonably filed by the defendant. Exceptions overruled. The case fully appears in the opinion.

Edward W. Bridgham, for plaintiff.

Frank T. Powers, for defendants.

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

BARNES, J. This is an action to recover for pauper supplies furnished by the plaintiff city to Arthur R. Douglass, his wife, Catherine M. Douglass, and his infant child, Roberta E. Douglass, and comes up on exceptions.

The case was heard in the Superior Court in vacation, without oral testimony, with right of exceptions reserved; plea—the general

issue, with allegation that "notices" were not legal nor sufficient.

The Court ruled that the notices were defective but that the single defect was waived by the overseers of the poor of the town of Bowdoin and found for the plaintiff in the sum of $504.72, with interest from the date of the writ. Exceptions were reserved by defendant; and the bill of exceptions is made up of an agreed statement of facts, with such particulars of the genealogy of Arthur R. Douglass as may be of common knowledge in the locality where his mother has lived, the notices sent and received, the findings and rulings of the Court, with some other matters.

No issue is raised as to the amount charged for the supplies or that they were furnished and accepted as pauper supplies, the sole question argued being on the ruling of the Court that while the notices were of themselves defective, "there was a waiver of the defect by the Overseers of the Poor of the Town of Bowdoin."

From the statement of facts we glean that Oscar Douglass established his residence in the town of Bowdoin in 1908; that he married Margaret in 1914, and that he lived in Bowdoin without receiving pauper supplies until 1916; that Margaret deserted Oscar on or about April 1, 1914, and went to live in Brunswick; that she never again lived with Oscar; that Arthur R. Douglass was born to her in Brunswick on February 9, 1915; that there is no evidence of marital relations between Oscar and his wife, Margaret, from April 1, 1914, to February 9, 1915; that Oscar had no knowledge of the birth or existence of Arthur R. Douglass until 1923 when it was brought to his knowledge with his arrest for neglect of the child; that after his acquittal on the charge aforesaid Oscar was divorced, upon an uncontested libel, in which no child was mentioned; that Margaret married soon after and has resided in Bath with her second husband from her marriage to the time of the hearing on the case at bar; that Arthur R. Douglass lived with Margaret in Bath until he married, at 17 years of age, and continually since in the same city with his wife and the daughter named in the pauper notices.

It is the contention of the defendant that the pauper notices were legally defective; that there was no waiver of the defect and that the defendant town is not estopped to set up such defect in defense.

The notice and denials were as follows:

"CITY OF BATH

OFFICE OF THE OVERSEERS OF THE POOR

Bath, Maine, December 8, 1932.

To the Overseers of the Poor, of the town of Bowdoin Center, in the County of Sagadahoc, in the State of Maine:

Gentlemen: You are hereby notified that Arthur R. Douglas, his wife Catherine M., and infant child, Roberta E., aged 2 months, inhabitant of your town, having fallen into distress, and in need of immediate relief in the City of Bath, the same has been furnished by said City on the account and at the proper charge of the town of Bowdoin Center where said Arthur R. Douglass, his wife Catherine M., and child have legal settlement.

You are requested to remove said Arthur R. Douglass, his wife and child or otherwise provide for them without delay, and to defray the expense of their support in said City of Bath. The sums expended for their support to this date are fuel, groceries, clothing, and doctor.

Dated at Bath this 8th day of December A. D. 1932.

Remarks: Douglas is only 17 years old so he takes his settlement from his father, Oscar M. Douglas, who had settlement in your town at time of separation and divorce. Young Douglas' mother took charge of the child, so he would follow mother's settlement which was Bowdoin Center.

SIDNEY L. EATON.
Superintendent Overseers of the Poor of Bath.

PAUPER DENIAL

To the Overseers of the Poor in the City of Bath, in the County of Sagadahoc, in the State of Maine:

Gentlemen:—Your Notice of the Dec. 8, 1932 instant, stating that Arthur R. Douglas, his wife Catherine M., and infant child, Roberta E., aged 2 mo., having fallen into distress and been furnished relief by your City, at the charge of the town of Bowdoin was duly received.

Upon inquiry, we are satisfied that this town is not the place

of the lawful settlement of the said Arthur R. Douglas, his wife Catherine M., and infant child, Roberta E., aged 2 mo.

We therefore decline to remove them or to contribute towards their support.

Dated at Bowdoin, this 24th day of Dec., A. D. 1932.

Yours respectfully,

NORMAN E. CURTIS,
OSCAR E. HATCH,
W. R. ALLEN,
Overseers of the Poor of Bowdoin.

CITY OF BATH

OFFICE OF THE OVERSEERS OF THE POOR

Bath, Maine, April 28, 1933.

To the Overseers of the Poor, of the Town of Bowdoin Center, in the County of Sagadahoc, in the State of Maine:

Gentlemen: You are hereby notified that Arthur R. Douglas, and his wife Catherine M., inhabitant of your Town having fallen into distress, and in need of immediate relief in the City of Bath, the same has been furnished by said City on the account and at the proper charge of the town of Bowdoin Center, where said Arthur R. Douglas, and wife Catherine M., have legal settlement.

You are requested to remove said Arthur R. Douglas and wife Catherine M., or otherwise provide for them without delay, and to defray the expense of their support in said City of Bath. The sums expended for their support to this date are for fuel, groceries, clothing and doctor.

Dated at Bath this 28th day of April, A. D. 1933.

SIDNEY L. EATON,
Superintendent Overseers of the Poor of Bath.

PAUPER DENIAL

To the Overseers of the Poor in the City of Bath, in the County of Sagadahoc, in the State or Maine:

Gentlemen:—Your Notice of April 28, 1933, stating that

Arthur R. Douglass, and his wife Catherine M., have fallen into distress and been furnished relief by your town, at the charge of the town of Bowdoin was duly received.

Upon inquiry, we are satisfied that this town is not the place of the lawful settlement of the said Arthur R. Douglass, and his wife, Catherine M.

We therefore decline to remove them or to contribute towards their support.

Dated at Bowdoin, this 5th day of May, A. D. 1933.

Yours respectfully,

NORMAN E. CURTIS,
W. R. ALLEN,
Overseers of the Poor of Town of Bowdoin."

There being no town in Maine bearing the name "Bowdoin Center" the defect in the notices is self-evident. But it is said to be quite generally the law that, "A defect in a notice may be waived by the town upon which the notice is served. The waiver may be implied. And an answer denying liability upon some grounds other than the defect in the notice waives the defect." 48 C. J., 531.

Decisions of this Court are controlling. "It is perfectly clear that of itself, and unconnected with the answer of January 8th, the notice must be considered as insufficient, and if no reply had been made by the overseers of Penobscot, or if such insufficiency had been objected to, the defect in this particular would be fatal to the action. But . . . the conduct of the defendant's overseers has cured the defect in the notice. We must consider them by their answer of January 8th, as waiving all objections to form and placing the claim of the plaintiffs on its merits; or else of practicing duplicity on purpose to deceive and injure, which we are not disposed to do." *York* v. *Penobscot*, 2 Me., 1.

Overseers of the poor are "the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns in reference to claims of this description. . . . Their authority extends to the adjustment of all claims of this sort and to all preliminary proceedings. . . . They (overseers of the poor of plaintiff town) were advised by the answer, that the overseers of Thorndike stood upon their rights, and denied

the settlement of the pauper to be in their town." *Unity* v. *Thorndike*, 15 Me., 182.

"The demand was certainly very informal and perhaps of itself was insufficient. But the overseers of the poor of the town of Gorham treated the plaintiff's letter as a legal demand, and returned an answer thereto, stating that they had received the bill, and refused payment, . . . (showing) that the objection, which might otherwise have been taken, was waived." *Weymouth* v. *Gorham*, 22 Me., 385, 390.

"A notice was given to the defendant town that Benton L. Blackwell had fallen into distress, when the true name was 'Bennetto' and not 'Benton.' The defendants need not have answered the erroneous notice. They were not required to investigate in order to find out whether Bennetto was intended by Benton or not. They were not required to respond, even if they believed an error had been committed. A want of response might have led the notifying town to see and correct the error. But if the defendant town understood that Benton meant Bennetto, and made an answer, taking no exception to the notice on account of the error in it, then the notice should be regarded as a good one. The conduct of the overseers in such a case would be a waiver of the defective notice." *Auburn* v. *Wilton*, 74 Me., 437.

A notice stated "that 'Frank M. Moody and wife and children' have fallen into distress, etc. It fails to give either the names or the number of the children, and in that respect is obviously an insufficient compliance with the statute as interpreted by the Court. But as the authorized agents of the town, the overseers of the poor may waive any objection arising from such an informality, or defect in the notice." *Wellington* v. *Corrina*, 104 Me., 252, 257, 71 A., 889, 891.

Such being the law, we conclude that by their answers the overseers of the poor of Bowdoin effectively waived the defect in the notices.

Exceptions overruled.

WALTER E. REID, GUARDIAN OF EUGENE W. FREEMAN

vs.

EUGENIA A. CROMWELL AND THOMAS E. CROMWELL

Sagadahoc. Opinion, March 5, 1936.

EQUITY. STOCKS. CONFLICT OF LAWS. GIFTS INTER VIVOS. JOINT TENANCY.

Equity has jurisdiction both under R. S. 1930, *Chap.* 91, *Sec.* 36 § XI, *and under its general equity powers, to compel a surrender to a guardian of a stock certificate owned by his ward but issued in the name of the ward, his stepdaughter and survivor, when detained and withheld from the owner so that it can not be replevied.*

A finding by the trial court that fraud as alleged in the bill in equity has not been proven, does not oust the court of equity jurisdiction in such an action, for in it there is need neither to allege nor prove fraud to confer such jurisdiction and such allegation of fraud may be regarded as surplusage.

Stock certificates come within the meaning of "goods and chattels," as used in said statute.

Although the transactions attending an alleged gift originate and are perfected in another state, the law in such state, in the absence of proof to the contrary, is presumed to be that of the forum.

To constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given.

In a valid joint tenancy, the four elements of unities of time, title, interest and possession are essential.

This Court does not adopt "the contract theory" employed in some states as a justification for the establishment of a joint tenancy but affirms the principles in that regard enunciated in Garland, Appellant, 126 *Me.,* 84.

On appeal. A bill in equity brought by plaintiff as guardian of an adult ward against the defendants to obtain possession of a certificate for eighteen shares of a certain capital stock claimed as the property of the ward, and asking for a lien on certain real estate

standing in the name of one of the defendants alleged to have been bought with funds fraudulently obtained from the said ward. The sitting Justice found for the plaintiff as to the possession of the certificates of stock. From his decree the defendants appealed. Appeal dismissed. The case fully appears in the opinion.

Arthur J. Dunton, for plaintiffs.

John P. Carey,

Marjorie Nowell, for defendants.

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

HUDSON, J. On appeal in equity. Claiming ownership in his ward of eighteen shares of the capital stock of the American Telephone and Telegraph Company and of two deposit books in Boston banks, the plaintiff, as guardian of Eugene W. Freeman, by bill in equity, seeks surrender of the certificate of said stock by the defendant, Eugenia A. Cromwell, as well as relief on the book accounts. The sitting Justice relieved only as to the certificate, decreed that the shares of stock evidenced by it were the property of the ward and ordered that the defendant, Eugenia A. Cromwell, endorse and deliver the certificate to the plaintiff, from which decree the defendants appealed.

They say that the statement in the decree: "I find no fraud as alleged in the allegations contained in the plaintiff's bill of complaint," ousted the Court of equity jurisdiction and consequently it had no right to order the surrender of the stock certificate. This requires an examination of the allegations in the bill. The plaintiff, having set up in paragraph 2 of his bill, ownership of the certificate in his ward, alleged in paragraph 5 that Eugenia (step-daughter of the ward) "designing and intending to get control of said property for her own selfish ends, persuaded the said Eugene W. Freeman to have said shares of stock registered in her name jointly with his own, and also to have said deposits made in their joint names, payable to either or to the survivor, which the said Eugene W. Freeman did." This language contains no direct and specific allegation of fraud. If the word "designing" carries an implication of

fraud, it may be disregarded as surplusage, for, as hereinafter stated, there was no need to allege fraud in order to obtain an order for the surrender of this certificate.

In Paragraph 7, the allegation is that Eugenia "now holds possession of the certificate of the eighteen shares of telephone stock, above mentioned, which she refuses to surrender, and the said Eugenia A. Cromwell and Thomas E. Gromwell refuse to return said sum of Eleven Hundred and Fifty Dollars so fraudulently converted to their own use." Therein does appear the word "fraudulently" but we think it refers only to the $1150.00 which it is claimed the defendants received from the bank deposits and, receiving, converted; but if this be error and the word "fraudulently" were in fact intended to and does refer to the certificate of stock, as well as the money, still it, too, may be rejected as surplusage, as far as the certificate is concerned.

Neither allegation nor proof of fraud is essential to the granting of the equitable relief herein sought. The Court found that the ward was the owner of the stock evidenced by the certificate and that he had never lawfully parted with that ownership; in other words, that what took place between him and his step-daughter, Eugenia, did not constitute a valid gift inter vivos. The evidence shows that the Justice was fully justified in reaching that conclusion. The ward derived his ownership from his sister, who lived and died in Massachusetts. After her death (he was the sole beneficiary in her will), the certificate of this stock, which had been in his name and hers or survivor, was supplanted by the one, now in question, in the names of "Eugene W. Freeman and Eugenia A. Freeman and the survivor." This substitution on the facts in this case did not effect a valid gift inter vivos.

> "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 the ownership of it." *Norway Savings Bank* v. *Merriam, et als.*, 88 Me., 146, 33 A., 840, 841.
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> "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." *Rose* v. *Osborne*, 133 Me., 497, 501, 180 A., 315, 317.

Need be simply to quote the evidence of the ward, that: "She was to own it after I died"; and that of Eugenia herself, in which, in answer to this question by the Court: "Do I understand that this Telephone stock was to become yours at your father's death?" she answered: "Yes; and then I was supposed to put it in my sisters' names and divide with them." This testimony, supplemented by other evidence in the case, sufficiently warranted the conclusion reached by the court that the ward as owner never intended to and did not part with "all present and future dominion" over this stock.

Then was presented a situation where Eugenia had taken possession of and withheld from the guardian a stock certificate covering the shares of stock that belonged to the ward. Such possession and withholding, though not fraudulent, are enough to give the Equity Court the right to compel the surrender of the certificate. Equity has jurisdiction, both under the statute, (R. S. 1930, Chap. 91, Sec. 36, § 11) and under general equity jurisdiction. *Farnsworth, Admx.* v. *Whiting, et als.*, 104 Me., 488, 72 A., 314.

True, the statute states that "in suits for re-delivery of *goods or chattels* taken or detained from the owner, and secreted or withheld, so that the same can not be replevied, . . ." but in *Farnsworth* v. *Whiting*, supra, it was held that bonds, notes and *stock certificates* were goods and chattels within the true meaning of this statute. There is sufficient proof herein that this stock certificate could not be replevied. Thus the assumption of equity jurisdiction by the Justice as to the certificate, even without proof of fraud, was proper. *Farnsworth, Admx.* v. *Whiting, et als.*, supra, on page 494.

The defendants also contend that this transaction as to the stock certificate is governed by Massachusetts and not Maine law and that under the former, there is no relief; but the record shows no proof of the Massachusetts law and in absence of such proof, the common law of Massachusetts is presumed to be the same as that of Maine, the forum. *Rose* v. *Osborne*, supra, on page 505, and cases therein cited.

They contend, also, that although there were not a gift inter vivos, there was established a valid joint tenancy (disfavored in this State), because Mr. Freeman for the benefit of himself and his step-daughter "purchased a contract right against the Telephone Company to be held jointly by himself and the defendant" step-daughter. *Chippendale, Admr.* v. *North Adams Savings Bank*, 222 Mass., 499, 111 N. E., 371, and other Massachusetts cases are cited as sustaining the contract theory.

But in Garland, Appellant, 126 Me., 84, 136 A., 459 decided in 1927, Chief Justice Wilson at some length and very ably discussed the contract theory (dealing with the Chippendale case), and our Court, without dissent, rejected that doctrine. Mr. Chief Justice Wilson said, on page 96:

> "But we can not assent to the doctrine, that where the party to whom the fund belonged retains full control over it during his lifetime, and no actual gift inter vivos either of the fund or the chose in action is shown, though made payable to him or another or to the survivor, any title passes to the survivor by virtue of a contract between the bank and the owner and the survivor.
>
> "An intended gift can no more pass after death by contract than by a simple order to pay. If the donor retains control for his own uses during his lifetime there can be no gift inter vivos, and the theory of a post mortem transfer by contract is as clearly of the nature of a testamentary disposition as a gift to take effect after death without such contract."

The Chief Justice demonstrated how the four essential elements of joint tenancy, viz: unities of time, title, interest and possession, did not exist in such a transaction, and said, on page 97:

> "Therefore, both the doctrine of a joint interest thus created with a right of survivorship, or of a right of survivorship by contract, appear to violate well-settled principles of law of this state as to the creation of joint tenancies, and the transfer of property by gift, as well as the Statute of Wills, especially when the right of control for his own uses is not surrendered by the donor during his lifetime. . . .

"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."

This Court does not now choose to overrule the Garland case. Although here we are concerned with a certificate of stock as the chose in action rather than bank deposits, we see no essential distinction.

Appeal dismissed.
Decree below affirmed.

GARDINER TRUST COMPANY *vs.* AUGUSTA TRUST COMPANY.

R. P. HAZZARD COMPANY AND NORMAN H. TRAFTON,

INTERVENORS AS PARTIES PLAINTIFF.

Kennebec. Opinion, March 6, 1936.

BANKS AND BANKING. CORPORATIONS. ULTRA VIRES. ESTOPPEL.

As a general principle an enumeration of specific powers excludes all others except such as are reasonable and necessary to carry into effect those expressly given. Such is the rule with respect to corporations generally, but, in the case of a bank, which is in a sense a public institution, which holds itself out as qualified to care for the money of others, it is more than ever important that its charter should be strictly construed, and that those members of the public who entrust their property to its care should have assurance that it will act only within those limits which the legislature has defined.

Because of the direct interest in a bank of all those who may become depositors in it and the vital concern of the general public in its proper management, the state has interposed its authority in order to define its power, to supervise its management, and in case of trouble to take over and distribute its assets.

The bank commissioner of the state is required by statute to examine every bank to determine whether it is able at all times to meet its obligations, and he must publish a statement of its condition. Every bank is required to keep a cash reserve of at least fifteen per cent of its demand deposits. The amount which it

may loan is restricted to a certain percentage of its capital, unimpaired surplus, and net undivided profits. The capital stock of a bank must be kept unimpaired, and assessments provided for, when it appears insufficient in amount to secure adequately the claims of depositors.

Except to protect an investment of its own, or as an incident to the transfer of commercial paper, or to effectuate a merger with another institution, a bank has no implied power to become a guarantor, and any contract by which it seeks to do so is void.

Nor can an ultra vires contract be held valid because of the supposed indirect benefits which may accrue from its performance.

There can be no possible doubt of the right of a corporation to raise the defense of ultra vires against the enforcement of a contract foreign to the purposes of its charter.

No estoppel arises to deny the validity of an ultra vires and unlawful contract because it has been executed, but the remedy of the aggrieved party is to disaffirm it and recover on a quantum meruit *the value of what the defendant has actually received the benefit of.*

No rights arise on the ultra vires contract, even though the contract has been performed; and this conclusion can not be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised.

In the case at bar, the manifest purpose of the whole scheme was to keep the Gardiner Trust Company open by giving assurance to its depositors that their claims would be met in full. The finding of the sitting Justice that the arrangement entered into by the Augusta Trust Company was intended to be a guaranty of the deposits of the Gardiner Trust Company seems fully justified.

Nowhere however, in the charter of the Augusta Trust Company was expressed authority given to the corporation to lend its credit to another bank, or to guarantee the deposits therein.

The contract in question not only is opposed to fundamental principles of sound banking, but violates the spirit of those statutes designed to safeguard the money of the depositors in our banks. It is against public policy and void. The receiver of the Gardiner Trust Company should be directed to pay to the Augusta Trust Company such dividend as it is entitled to receive.

On appeal. A bill in equity brought by the receiver of the Gardiner Trust Company against the receivers of the Augusta Trust Company seeking to subordinate in favor of the depositors of the Gardiner bank a claim of the Augusta bank of $236,500, representing money deposited by it in the Gardiner Trust Company.

The issue involved the right to hold this sum of money by the Gardiner Trust Company until all of its own depositors had been paid in full, on the ground that there was a guaranty of its deposits by the Augusta Trust Company. The sitting Justice found in favor of the Gardiner Trust Company. Appeal sustained. Ordered that the receiver of the Gardiner Trust Company be directed to pay to the Augusta Trust Company such dividend as it is entitled to receive. The case fully appears in the opinion.

Lee M. Friedman,
Will C. Atkins,
Carlton W. Spencer,
Friedman, Atherton, King & Turner, for plaintiff.
John E. Nelson,
James B. Perkins, for defendants.

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

THAXTER, J. This case involves a controversy between the receivers of two closed banks, the Gardiner Trust Company and the Augusta Trust Company, formerly known as the Augusta Safe Deposit and Trust Company. It has been brought before the court by a bill in equity filed by the conservator, now the receiver of the Gardiner Trust Company, who seeks to subordinate in favor of the depositors of his bank a claim of the Augusta Trust Company of $236,500, represented by certificates of deposit of the Gardiner Trust Company. The plaintiff bank claims that there was a guaranty of its deposits by the defendant, and asks that it be permitted to apply the deposit of the defendant in so far as necessary to satisfy in full the claims of its own depositors. Norman H. Trafton and R. P. Hazzard Company, depositors in the Gardiner Trust Company, were granted leave to intervene. Several amendments to the bill were allowed; a demurrer to the amended bill was overruled; and an exception was taken by the defendant. The court then proceeded to a hearing, during the course of which a number of exceptions were noted to rulings of the sitting Justice, who finally entered a decree sustaining the bill and directing that the defendant's deposit be applied in so far as might be necessary to pay in full the

depositors of the plaintiff bank. From this decree an appeal was entered by the receivers of the Augusta Trust Company. It is unnecessary in this opinion to consider the exceptions, for the fundamental issue is raised by the appeal.

The two banks were located in near-by cities, the Augusta Trust Company being much the larger. In the fall of 1930, the Gardiner Trust Company was in financial difficulties. An audit made on October 16, 1930 showed that its capital, surplus, and undivided profits had been wiped out and that it would be unable to meet the demands of its depositors and other creditors in an amount of at least $60,000. Its deposits at this time were approximately $760,000 and its other indebtedness about $190,000 more. Hurried conferences were held, and on October 21, 1930, the R. P. Hazzard Company, a large depositor in the bank, and the Augusta Trust Company entered into a contract under the terms of which it was provided that, conditional upon not less than nine hundred shares of the total capital stock of one thousand shares of the Gardiner Trust Company being transferred to the Augusta Trust Company not later than October 25th following, all the officers and directors of the Gardiner Trust Company were to resign; all stockholders so transferring shares to the Augusta Trust Company were to be relieved of statutory liability for assessment by reason of stock ownership; the Augusta Trust Company would pay an assessment of $53.00 per share to the Gardiner Trust Company on the shares acquired; "in consideration of the foregoing agreements on the part of said Augusta Trust Company and the deposit of said shares by said stockholders the said R. P. Hazzard Company agrees that it will, to the extent of $28,000, and no more, assist the Augusta Trust Company in caring for the liabilities of said Gardiner Trust Company and to make it possible for all depositors in said Gardiner Trust Company to draw on their accounts."

Pursuant to this agreement 967 shares of the capital stock were transferred into the name of the Augusta Trust Company, or its nominees. The officers and directors of the Gardiner Trust Company resigned, and the vacancies were filled by the Augusta Trust Company electing its nominees, several of whom were its own officials. Its own treasurer became president. The Augusta Trust Company paid to the Gardiner Trust Company the assessment of

$53 per share on the stock which it had taken over, and R. P. Hazzard Company, in accordance with the contract, paid to the Augusta Trust Company the sum of $28,000. On October 25, 1930 the Augusta Trust Company caused the following advertisement to be inserted in the *Kennebec Journal*, a newspaper which had a large circulation in and around Gardiner:

ANNOUNCEMENT

AUGUSTA TRUST CO.

has taken over control and management of

GARDINER TRUST CO.

and is fully responsible for both its checking and savings deposits.

AUGUSTA TRUST COMPANY

Hiram L. Pishon, *Pres.*
Milton S. Kimball, *Treas.*

A similar pronouncement was posted in the banking rooms of the Gardiner Trust Company and displayed in its windows.

Depositors, however, continued to demand their money, and these withdrawals were met by loans of credit and by advances from the Augusta Trust Company, both of which finally took form in the obligation of $236,500 which is in issue in this case. The Gardiner Trust Company closed its doors June 28, 1933, and the Augusta Trust Company followed with similar action five days later.

The sitting Justice found that the acts of the Augusta Trust Company constituted a standing offer to each and every depositor, who continued his deposit in the Gardiner Trust Company, or made a new one, to be responsible that the same would be repaid, and that this offer ripened into a contract with each and every depositor as he accepted it by continuing his deposit or by making a new one. He also ruled that, irrespective of the application of the law of contracts, the principle of estoppel held the Augusta Trust Company to a guaranty of the deposits of the Gardiner Trust Company.

By the defendant's appeal three issues are now presented to this court: first, was the contract entered into by the Augusta Trust Company properly construed as a guaranty of the deposits of the Gardiner Trust Company; second, if so, did the Augusta Trust Company have power to make such a contract; third, if it was without such power, does an estoppel prevent it from now asserting its want of authority. These questions will be considered in their order.

Was the contract of October 16, 1930 *intended as a guaranty of the deposits of the Gardiner Trust Company?*

Nothing is said specifically about a guaranty, but one was clearly intended. The manifest purpose of the whole scheme was to keep the Gardiner Trust Company open by giving assurance to its depositors that their claims would be met in full. There would have been no point at all to the plan, if it had not been the intention of the Augusta Trust Company to stand as sponsor for the other bank. The shares of stock were certainly not taken over as an investment. It was an arrangement devised during conditions of storm and stress to prevent the closing of a bank with resultant repercussions on other banks and evil effects on the community in general. The so-called advertisement is compelling evidence that the officials of the Augusta Trust Company regarded the agreement as a guaranty, and for a period of nearly three years they supplied from their bank the necessary cash to meet all withdrawals from the other. The finding of the sitting Justice that the arrangement entered into by the Augusta Trust Company was intended to be a guaranty of the deposits of the Gardiner Trust Company seems fully justified.

Did the Augusta Trust Company have the power to make such a guaranty?

The Augusta Trust Company was incorporated in 1893 by special legislative act. Priv. & Special Laws 1893, Chap. 410, as amended by Priv. & Special Laws 1899, Chap. 138. The powers granted to it are contained in the first three sections of the enactment as amended, which read as follows:

"Sect. 1. J. Manchester Haynes, Orville D. Baker, George E. Macomber, J. F. Hill, Ira H. Randall, H. R. Sturgis, C. H.

White, or such of them as may by vote accept this charter, with their associates, successors and assigns, are hereby made a body corporate and politic, to be known as the Augusta Safe Deposit and Trust Company, and as such shall be possessed of all the powers, privileges and immunities, and subject to all the duties and obligations conferred on corporations by law, except as otherwise provided herein.

"Sect. 2. The corporation hereby created shall be located at Augusta, Kennebec County, Maine.

"Sect. 3. The purposes of said corporation and the business which it may perform, are: first, to receive on deposit, money, coin, bank notes, evidences of debt, accounts of individuals, companies, corporations, municipalities and states, allowing interest thereon, if agreed, or as the by-laws of said corporation may provide; second, to borrow money, to loan money on credits or real estate or personal security, and to negotiate loans and sales for others, to guarantee the payment of the principal and interest of all obligations secured by mortgages of real estate running to said Augusta Safe Deposit and Trust Company, to issue its own bonds or obligations based upon real or personal property conveyed to it in trust, to secure the payment of such bonds or obligations and the interest thereon; third, to hold for safe-keeping all kinds of personal or mixed property, and to act as agents for the owners thereof, and of real estate for the collection of income on the same, and for the sale of the same, and to act as agent for issuing, registering and countersigning certificates, bonds, stocks and all evidences of debt or ownership in property; fourth, to hold by grant, assignment, transfer, devise or bequest any real or personal property or trusts duly created, and to execute trusts of every description; fifth, to act as assignee, receiver, executor, and no surety shall be necessary upon the bond of the corporation, unless the court or officer approving such bond shall require it; sixth, to hold and enjoy all such estates, real, personal and mixed, as may be obtained by the investment of its capital stock or any other moneys and funds that may come into its possession in the course of its business and dealings,

and the same sell, grant, mortgage and dispose of except as provided in section ten; seventh, to do in general all the business that may lawfully be done by a trust or banking company; eighth, to erect, construct, own, maintain and operate safety deposit and storage vaults for the safe-keeping of valuables, and to rent and hire boxes, safes and space in the same, to purchase, lease, acquire, hold, sell, and dispose of real estate and all other property, and to do all and every act incident to said business, and to guarantee titles to real estates, and the legality and regularity of corporate stocks and bonds."

It is obvious that nowhere is express authority given to the corporation to lend its credit to another bank or to guarantee any deposits therein. It may "guarantee the payments of the principal and interest of all obligations secured by mortgages of real estate" running to it, and it may "guarantee titles to real estates, and the legality and regularity of corporate stocks and bonds." Beyond that nothing is said. Counsel for the plaintiff contend in their brief that the first section of the charter, which provides that the corporation "shall be possessed of all the powers, privileges and immunities, and subject to all the duties and obligations conferred on corporations by law, except as otherwise provided herein," gives to this bank general powers in addition to those enumerated in section 3. If this claim were sound, there would seem to be no need of setting forth the specific powers in section 3. Nor does the final clause of section 3, which grants to it authority "to do all and every act incident to said business," extend its authority into any new field.

The truth of the matter is that in determining what implied authority a corporation may have we are met at the threshold with the general principle that an enumeration of specific powers excludes all others except such as are reasonable and necessary to carry into effect those expressly given. *Hyams* v. *Old Dominion Company*, 113 Me., 294, 93 A., 747; *Franklin Company* v. *Lewiston Institution for Savings*, 68 Me., 43; *Davis* v. *Old Colony Railroad Company*, 131 Mass., 258; *De La Vergne Refrigerating Machine Company* v. *German Savings Institution*, 175 U. S., 40;

Thomas v. *West Jersey Railroad Company*, 101 U. S., 71; Fletcher, Cyclopedia Corporations (Per. Ed.), Vol. 6, Page 372.

Such is the rule with respect to corporations generally. But, in the case of a bank, which is in a sense a public institution, which holds itself out as qualified to care for the money of others, it is more than ever important that its charter should be strictly construed, and that those members of the public who entrust their property to its care should have assurance that it will act only within those limits which the legislature has defined. *County of Divide* v. *Baird*, 55 N. D., 45, 212 N. W., 236. See also the general discussion of the relations between a bank and its depositors in *Craughwell* v. *Mousam River Trust Company*, 113 Me., 531, 534, 95 A., 221.

Because of the direct interest in a bank of all those who may become depositors in it and the vital concern of the general public in its proper management, the state has interposed its authority in order to define its power, to supervise its management, and in case of trouble to take over and distribute its assets. As we consider the intent back of all this restrictive legislation, we can not escape the conclusion that the plaintiff's contention with respect to the powers of the Augusta Trust Company is opposed to the general purposes which the legislature has had in mind in its enactments concerning banks.

The bank commissioner of the state is required by statute to examine every bank, to determine whether it is able at all times to meet its obligations, and he must publish a statement of its condition. Every bank is required to keep a cash reserve of at least fifteen per cent of its demand deposits. The amount which it may loan is restricted to a certain percentage of its capital, unimpaired surplus, and net undivided profits. The capital stock of a bank must be kept unimpaired, and assessments are provided for, when it appears insufficient in amount to secure adequately the claims of depositors.

Of what use is an examination of a bank if the succeeding day it may incur an obligation to the depositors of another institution of undetermined amount? The very publication of a bank statement, which clearly would not show such contingent liability, would be

but a sham, the effect of which would be to deceive rather than to make known to the general public its condition. No information at all is better than misinformation. How are the depositors protected by the maintenance of a cash reserve, if overnight a bank may, without any addition to its own assets, assume the liabilities of one or more other banks? Is there any reason in restricting the amount which a bank may loan, and at the same time permitting it to assume an unrestricted liability as a guarantor? Of what efficacy is it to require the maintenance of a capital and reserve to protect its own depositors, if it is to be allowed indiscriminately to assume obligations to the depositors of other institutions?

A mere casual consideration of these questions would compel us to conclude that the contract here in question, not only is opposed to fundamental principles of sound banking, but violates the spirit of those statutes designed to safeguard the money of the depositors in our banks. It is against public policy and void. Making all due allowances for the stress under which the arrangement was made, it is hard to understand how it could have been viewed in any other light. Be that as it may, to refuse to condemn it today would be proof that we have learned nothing from the tragedies of the last few years.

A review of the authorities leaves no doubt as to the general opinion on this question.

Except to protect an investment of its own, or as an incident to the transfer of commercial paper, or to effectuate a merger with another institution, a bank has no implied power to become a guarantor, and any contract by which it seeks to do so is void. *In re Bankers Trust Co.*, 27 F. (2 ed.), 912; *Ward* v. *Joslin*, 186 U. S., 142; *Dewey Column & Monumental Works* v. *Ryan*, 206 Ia., 1100, 221 N. W., 800; *Norton* v. *Derry National Bank*, 61 N. H., 589; *Cottondale State Bank* v. *Oskamp Nolting Co.*, 64 Fla., 36; *First National Bank of Tallapoosa* v. *Monroe*, 135 Ga., 614, 69 S. E., 1123; Morse on Banks & Banking (6 ed.), Sec. 65; Michie on Banks and Banking (Per. Ed.), Sec. 44. See also *Ellis* v. *Citizens' National Bank of Portales*, 25 N. M., 319, 323, 183 P., 34. Nor can an ultra vires contract be held valid because of the supposed indirect benefits that may accrue from its performance. *In re Bank-*

ers Trust Co., Supra; *Davis* v. *Old Colony Railroad*, supra.

In support of their contention counsel for the plaintiff have cited numerous cases, which are not, however, in conflict with the principles here enunciated.

It is claimed that *Batchelder & Snyder Company* v. *Saco Savings Bank*, 108 Me., 89, 79 A., 13, is an authority in point. This case holds that a bank lawfully owning a summer hotel may guarantee the performance of a contract for its operation in order to protect its investment therein. From this counsel argue that the Augusta Trust Company may guarantee the deposits of the Gardiner Trust Company, in order to safeguard the purchase which it has made of the capital stock. But the two cases are entirely different. The Saco Savings Bank was permitted to enter into such a contract to protect an investment which it had already made. Such power was a mere incident of its right to protect and hold that property. In the case before us, the purchase of the stock and the guaranty were parts of one transaction. It is specious to claim that the guaranty was to protect a lawful investment in the stock. The stock was worthless when bought. The giving of the guaranty was the main purpose of the whole scheme, and the holding of the stock merely incidental. There is likewise a very wide difference between a guaranty of the deposits of another bank, a liability which may expand indefinitely, and assuming a responsibility, the extent of which is fixed. Similar cases are cited by counsel, a discussion of which is unnecessary.

It is important to remember that this is not a case of one bank taking over the assets and assuming the liabilities of another. Such an arrangement, when carried through on reasonable terms, has been held proper. *Hightower* v. *American National Bank of Macon*, 263 U. S., 351. The distinguishing characteristics of such a scheme are that there is a consideration in the transfer of tangible property for the assumption of the obligation and that the extent of the liability is fixed when the agreement is made.

Counsel contend, rather feebly to be sure, that only the state can raise the defense of ultra vires. In some special cases this may be true. *Farrington* v. *Putnam*, 90 Me., 405, 37 A., 652. *Oakland Electric Company* v. *Union Gas and Electric Company*, 107 Me.,

279, 78 A., 288. The rule is, however, otherwise in the ordinary case, and there can be no possible doubt of the right of a corporation to invoke such defense against the enforcement of a contract foreign to the purposes of its charter. Such a contract is void. *Brunswick Gas Light Company* v. *United Gas, Fuel and Light Company*, 85 Me., 532, 27 A., 525.

Is the Augusta Trust Company estopped from claiming that this contract is void?

We are in accord with the views expressed by plaintiff's counsel on the general question of estoppel. It is, however, important to bear in mind that the problem may be a very different one in the case of a natural person, whose power to act is limited only by the prohibitions of the common or statute law, and of a corporation which derives its authority solely from the statutes under which it has been created. If a corporation is without power to bind itself by an express contract, it is difficult to see how it can do so by a representation acted on by a third party. In fact, the doctrine of estoppel has a very limited scope, when applied to the ultra vires acts of corporations. We are not concerned with those cases where a recovery of benefits received under an ultra vires contract has been permitted on a *quantum meruit*, *Brunswick Gas Light Company* v. *United Gas, Fuel and Light Company*, supra, nor with those which involve the enforcement by the innocent holders of notes of an endorsement by a corporation which was in fact made for accommodation. *Johnson* v. *Johnson Brothers*, 108 Me., 272, 80 A., 741. The Augusta Trust Company received from this contract no benefit which it is inequitably retaining for itself, nor is this a case which relates to the law governing commercial paper. Broadly speaking, the issue is whether a contract, patently beyond the powers of a corporation and clearly against public policy, can be enforced because of an estoppel. In other words, can the corporation by its representations to third persons do that which the law has in effect forbidden? There can be but one answer.

In *Franklin Company* v. *Lewiston Institution for Savings*, 68 Me., 43, the defendant bank subscribed $50,000 for stock in the Continental Mills. The bank was not in a position to make immediate payment, which was taken care of for it by the plaintiff

which took notes of the bank secured by the stock as collateral. A claim was presented to the receiver of the bank, which was rejected by commissioners. In affirming such ruling, the opinion holds that the acts of the bank were ultra vires, unlawful and void. The claim that there could be an estoppel would seem to be effectually disposed of by the following language of the court, page 45: "As corporations are created by public acts of the legislature, and all their powers, duties and obligations are declared and clearly defined by public law, parties dealing with them must take notice of those powers and the limitations upon them, at their peril; and will not be allowed to plead ignorance of those powers and limitations in avoidance of the defense of ultra vires."

In the case of *Pittsburg, Cincinnati and St. Louis Railway Company* v. *The Keokuk and Hamilton Bridge Company,* 131 U. S., 371, cited with approval in *Brunswick Gas Light Company* v. *United Gas, Fuel and Light Company,* supra, Justice Gray, at page 389, lays down the rule that no estoppel arises to deny the validity of an ultra vires and unlawful contract merely because it has been executed, but that the remedy of the aggrieved party is to disaffirm it and to recover on a *quantum meruit* the value of what the defendant has actually received the benefit of.

This same question has recently been before the United States Supreme Court. In *Texas & Pacific Railway Company* v. *Pottorff,* 291 U. S., 245, the question was as to the right of a bank to pledge a part of its assets to secure a private deposit. The court in its opinion holds that such a power is, not only not given to a national bank in its charter, but to permit the exercise of it, is opposed to good banking practice and inconsistent with many provisions of the National Bank Act. Justice Brandeis, speaking for the court, page 260, disposes of the claim that there was an estoppel in these words: "It is the settled doctrine of this Court that no rights arise on an ultra vires contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised."

Exactly the same question was raised in *County of Divide* v. *Baird,* supra. With reference to estoppel, the court said, page 61:

"As between the creditors and depositors of an insolvent bank, whose contractual relation with the corporation was created lawfully—intra vires—and the plaintiff, whose contract of pledge was ultra vires of the bank and unlawful, the former must be preferred, and the rule is that they are not estopped to assert the want of power."

See also to the effect that no estoppel arises to plead that a contract is ultra vires and unlawful, *Smith* v. *Baltimore & O. R. Co.*, 48 F. (2d), 861, and cases therein cited; *Ward* v. *Joslin*, supra; *Commercial Casualty Insurance Company* v. *Daniel Russell Boiler Works, Incorporated*, 258 Mass., 453, 155 N. E., 422; *First National Bank of Tallapoosa* v. *Monroe*, supra; *Globe Indemnity Co.* v. *McCullom*, 313 Pa., 135, 169 A., 76; *Western Maryland Railroad Company* v. *Blue Ridge Hotel Company*, 102 Md., 307, 62 A., 351; *Ellis* v. *Citizens' National Bank of Portales*, supra, page 323; *In re Bankers Trust Co.*, supra.

The bill in equity in the present case in effect asks that the receiver of the Gardiner Trust Company be instructed as to his right to hold the deposit of the Augusta Trust Company. He is clearly withholding it without right, for the contract under which he claims a lien on it for the benefit of the depositors of his bank is against public policy, unlawful and void. He should be directed to pay to the Augusta Trust Company such dividend as it is entitled to receive. The appeal is sustained and the case remanded for a decree in accordance with this opinion.

So ordered.

ETHEL M. HUTCHINS *vs.* LINWOOD J. EMERY.

York. Opinion, March 6, 1936.

MOTOR VEHICLES. NEGLIGENCE. PROXIMATE CAUSE.

It is not necessary that a defendant's negligence be the sole cause of injury; it is enough if such negligence is a contributing cause.

Each of two independent torts may be a substantial factor in the production of injury. There may be two judgments, but only one satisfaction.

A wrongdoer is liable for all natural and probable consequences of his act.

It is a question of fact and not of law, as to what was the proximate cause of an accident.

In the case at bar, the defendant in operating his car owed to the plaintiff, as to all travelers on the street, whether of the highway portion or the sidewalk, the duty of exercising reasonable care, so that, from the operation of his car, there might result no probability of harm to them. He negligently, as the jury found, breached that duty, with injury to the plaintiff, who was walking, herself in the exercise of due care, where she had a right to be. Between the act of negligence, and the injury, the jury determined, there was causal connection, or "proximate cause."

The verdict in the case at bar was supported by evidence in every essential particular.

On general motion for new trial by defendant. An action on the case to recover for personal injuries sustained by the plaintiff who, while walking on a sidewalk, was hit by an automobile. The issue involved the question of proximate cause. Trial was had at the May Term, 1935, of the Superior Court, for the County of York. The jury rendered a verdict for the plaintiff in the sum of $3,125.00. A general motion for new trial was thereupon filed by the defendant. Motion overruled. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

Waterhouse, Titcomb & Siddall, for defendant.

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

DUNN, C. J. On November 13, 1933, at quarter past five o'clock in the afternoon, the plaintiff, who had made a social call, was walking homeward, in Sanford. She was proceeding northerly, on a sidewalk on the east side of School Street in that town. She walked to, and across, an intersecting street known as Mousam Street, and was continuing her way on the School Street sidewalk, when an automobile operated by one Claude O. Prime struck her; the resultant injuries were grievous.

Seeking damages, plaintiff brought this action, wherein Linwood J. Emery, the driver of a second automobile, is sole defendant. Allegation is that Emery's acts, alone or as a contributory source, in forcing Prime's automobile onto the sidewalk, to plaintiff's harm, was not wilful and intentional, but negligent, in the actionable sense of that word.

The jury determined liability, and assessed damages at $3,125.00. The defendant presents the case on general motion for a new trial. No other question than that of liability upon the theory of proximate cause is pressed.

The issue, therefore, is whether the case is one in which, on the single ground mentioned, the motion can be sustained.

The day was misty; witnesses testify that it was dark at the time of the accident; automobile headlights were being used. The tarvia surface of the streets was wet and slippery.

The course of the Prime vehicle (that inflicting damage) was north, in the east lane of School Street, the same direction plaintiff was traveling; the path of defendant's car, south in the west lane of the same street. The approaching motor vehicles were driven without incident, on their respective sides of the road, to where Mousam Street opens laterally to the eastward.

The facts from here on are in dispute.

The declaration in the writ, to recur to it, consists of two counts. One alleges negligence of the defendant, which in and of itself was the only cause of hurt; the other that defendant's negligence and negligence of the other driver both operated at the same time, and both contributed to produce the injury.

Plaintiff claims to recover because of the negligence of defendant, in turning his machine to the left, or wrong, side of the road, in

front of the Prime car, then on its right side of the road, half over Mousam Street, and ongoing. Being swerved, as its driver testifies, to avert colliding head on, the Prime car ran onto the sidewalk, there striking the pedestrian.

There was evidence from which is was fairly to be inferred that, to hasten his arrival in Mousam Street, where he lived, defendant, in violation of the law of the road, veered his car diagonally to the left, athwart passage of the Prime car.

Contention of plaintiff is that defendant, coming down School Street, and intending to turn into Mousam Street, did not, as in obedience to statute provision he ought to have done (R. S., Chap. 29, Sec. 74), pass beyond the meeting point of the median lines of the intersecting streets, but "cut the corner," thereby creating an emergency.

It is not necessary that a defendant's negligence be the sole cause of injury; it is enough if such negligence is a contributing cause. *Rohrman* v. *Denzinger*, 208 Ky., 832, 272 S. W., 16; *Meech* v. *Sewall*, 232 Mass., 460, 461, 122 N. E., 447; *Lake* v. *Millikin*, 62 Me., 240; *Cleveland* v. *Bangor*, 87 Me., 259, 32 A., 892; *Maine Water Company* v. *Knickerbocker, etc., Company*, 90 Me., 473, 485, 59 A., 953; *Neal* v. *Rendall*, 100 Me., 574, 62 A., 706; *Janilus* v. *Paper Company*, 112 Me., 519, 92 A., 653; *Banville* v. *Field Brothers, etc., Company*, 128 Me., 541, 147 A., 40. Each of two independent torts may be a substantial factor in the production of injury. *Mahoney* v. *Beatman*, 110 Conn., 184, 147 A., 762; *Bowden* v. *Derby*, 99 Me., 208, 58 A., 993. There may be two judgments, but only one satisfaction. *Cleveland* v. *Bangor*, supra.

Insistence by defendant, on his own testimony, and that of witnesses called by him, is that he was attempting, as an ordinarily prudent man, to steer his automobile in a reasonably safe and proper manner; that even though the jury were warranted in finding him negligent, yet his conduct, whatever it might have been, did not set in motion a train of events which, without the intervention of any new and independent source, brought about the injury; that it was not an element aiding in the production of the result.

The defendant, in operating his car, owed to the plaintiff, as to all travelers on the street, whether of the highway portion or the

sidewalk, the duty of exercising reasonable care, so that, from the operation of his car, there might result no probability of harm to them. He negligently, as the jury has found, breached that duty, with injury to the plaintiff, who was walking, herself in the exercise of due care, where she had a right to be. Between the act of negligence, and the injury, the jury has determined, there was causal connection, or "proximate cause." The original wrong persisted down to the moment of the force which produced the damage. *Mahoney* v. *Beatman*, supra. A wrongdoer is liable for all natural and probable consequences of his act.

It is a question of fact and not of law, as to what was the proximate cause of an accident. *Bowden* v. *Derby*, supra.

The verdict in the instant case is supported by evidence in every essential particular.

A new trial cannot be granted.

Motion overruled.

THE HINCKS COAL COMPANY

vs.

CHARLES H. MILAN AND FRANK H. TOOLE.

Penobscot. Opinion, March 17, 1936.

DAMAGES. EVIDENCE.

While it is true that damages can not be assessed by guess or mere conjecture, nevertheless where there is credible evidence showing substantial damage a finding of nominal damages only is not proper.

In the case at bar, there was evidence to establish considerable damage, and it was error to conclude that there was no evidence justifying more than "nominal damages only."

On exceptions by plaintiffs. An action of tort for damages growing out of an alleged conspiracy, whereby the plaintiff was defraud-

ed of its coal and injured in its business. The case was heard by the sitting Justice without the intervention of a jury, and with right of exceptions reserved. The Justice found for the plaintiff for nominal damages in the sum of One Dollar only. Exceptions were thereupon taken. Exceptions sustained, on damages only.

The case fully appears in the opinion.

William S. Cole, for plaintiff.

Michael Pilot,

E. Donald Finnegan, for defendant.

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

BARNES, J. This is an action on the case, to charge a conspiracy over a period of fourteen years to defraud the plaintiff of great quantities of fuel coal, and for damages.

Frank H. Toole confessed guilt, and default was entered against him before trial.

In the preliminary proceedings Ralph O. Brewster testified that he called to his office defendant Milan, stated to him there were irregularities at the Hincks Coal Company in connection with the deliveries of coal which seemed to involve him, as well as Frank Toole; that Milan said, "I have been getting my coal there for some time, from year to year, without paying for it." " . . . you let me know how much it is and I will fix it up."

Some coal was paid for, but the total value, at minimum prices, of coal claimed to have been delivered to Milan and not paid for is set out as $41,110.25.

Defendant Toole, in his affidavit of November 14, 1934, stated that he had at various times directed the delivery of loads of coal to Milan, and that such loads were not charged to him; that Milan would give him $5.00 or $10.00 at a time.

Upon stipulation and agreement of the parties the case was heard by a Justice of the Superior Court without the intervention of a jury and with rights of exceptions reserved to both parties. When the plaintiff rested, the defendant declined to introduce evidence.

The writ alleged that the two defendants entered into a conspiracy to defraud and did defraud the plaintiff, over a period of fourteen years, of a quantity of coal as valued above.

Defendant Milan pleaded the general issue with a brief statement denying all the allegations in the plaintiff's writ, and the plaintiff perfected a bill of exceptions.

The first exception is to the exclusion of hearsay evidence and is of no effect.

In the findings the Justice below held as follows: "The inference may fairly be drawn from the testimony that the defendants entered into a conspiracy to defraud the plaintiff. Plaintiff, however, produces no evidence from which the amount of its damage can be even approximately ascertained. An attempt to fix the correct amount under evidence in this case would be futile. Damages cannot be assessed by guess or mere conjecture, under the evidence the plaintiff is entitled to recover nominal damages only. Entry may be 'Judgment for Plaintiff for One Dollar ($1.00).'"

Exceptions to this judgment present the matter for consideration.

From the record we learn that during the period covered, the defendant Milan was receiving plaintiff's coal at his home, three buildings on Pickering Square, the St. James, the Bangor Exchange, the Spa, and the Cuddy Building, in the City of Bangor, and during all this time it was the business and duty of defendant Toole to direct teamsters and truckmen in plaintiff's employ, at its coal yards, to load and deliver coal in the regular retail trade. It was the duty of Toole to furnish plaintiff a charge slip against each buyer showing date of delivery, kind and quantity of coal delivered and the testimony is that in the main such sales slips were not delivered by Toole on coal furnished Milan.

Witnesses were presented as follows. Perley B. Howard (in charge of one coal yard for ten years) was asked by the Court:

"Q. Did you personally accompany deliveries (of coal to defendant's tenements) in 1934?

A. I have . . . .

Q. That you personally saw delivered?

A. Well, I have been in the bins where it has been delivered.

Q. No! That you personally saw—saw going into the bins?

A. Well, do you want each place definitely?

Q. Yes.

A. The High Street, somewheres around . . . I have personally been with him . . . right around twenty-five ton; and the Corner Spa . . . I was with him . . . fifteen; St. James, around fifteen; Main Street, around ten, . . . the first house on Main Street, . . . I don't know the numbers of the houses, . . . next to the filling station, and the second one on Main Street, second below the filling station, on the corner of Main, ten ton; I have personally been with him."

Here is evidence of delivery to defendant Milan of a minimum of seventy-five tons.

Earle W. Ames, for twelve years employed by plaintiff in delivering coal, was asked and answered as follows:

"Q. Do you know how much was delivered any specific time?

A. At one time yes; we would haul . . . it would be between twenty-five hundred and a ton and a half a load.

Q. That would be a load?

A. Yes.

Q. How many loads would you haul that size?

A. Usually there would be three single teams when I would haul and we would all have that amount on."

From this witness we have testimony of a minimum of three and three-fourths tons.

Frank L. Sargent, delivery man, as follows:

"Q. Did you see any other teams or trucks?

A. Yes, sir.

Q. Of the Hincks Coal Company delivering at the same places?

A. Yes, sir.

Q. How much would you deliver at a load?

A. When I drove my team I would haul two tons and one-half, and three tons.

Q. Other teams, what would they haul?

A. Single teams haul a ton, ton and a half sometimes.

Q. Where did you deliver it to?

A. I delivered it to High Street, St. James, Haymarket Square, and down on Main Street," thus establishing a minimum of ten tons.

Herbert S. Davis, another delivery man during the period charged:

"Q. Did you ever deliver any coal to the defendant, Milan?

A. Yes, sir.

Q. Where?

A. High Street, and at the St. James, and Corner Spa, and the two Main Street places . . . .

Q. Do you know how much you personally hauled?

A. About three tons to a load."

furnishing evidence of minimum delivery as alleged of fifteen tons.

We think it established beyond question that a conspiracy existed, with consequent overt act; that it was error to conclude there was no evidence justifying more than "nominal damages only."

That damages can not be assessed by guess or mere conjecture is indubitably true, but exceptions reserved to other than this of the findings must be sustained.

Granting that upon the record approximately full damages can not be computed, it should not have been held that nominal damages only are recoverable.

Exceptions sustained, on damages only.

REUBEN R. SIMPSON *vs.* HERVEY R. EMERY.

Hancock. Opinion, March 23, 1936.

LANDLORD AND TENANT. FIXTURES.

A building erected on land of another remains personalty, and a subject of chattel mortgage, only if there be an agreement.

In case of a tenancy for any fixed and definite term, no agreement to the contrary and no waiver appearing, a tenant must remove his building or other fixtures before the termination of his tenancy.

All fixtures, for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover can not be maintained for a refusal to give them up.

In the case at bar, Lobato's tenancy was forfeited, under the terms of the lease, long before the plaintiff mortgagee took any steps toward removing the building. His right, if at any time it existed to do so, was then lost.

On report. An action of trover for a store building brought by a mortgagee of the building, which had been erected by a tenant under a lease, against the owner of the land. Judgment for the defendant. The case fully appears in the opinion.

Benjamin W. Blanchard, for plaintiff.

Fellows & Fellows, for defendant.

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

BARNES, J. This case comes on report.

It is an action in trover, for the conversion of a store building, erected by Antonio Lobato on a corner lot, held by him under written lease, in the business section of Bucksport.

Defendant leased the lot to Lobato on January 1st, 1928, for a ten-year term, at the annual rental of $75, payable semiannually in advance, and payment annually by the lessee of any increase of

tax, in excess of that levied in 1927, with a provision for forfeiture for non-payment of rent.

The lot was vacant and Lobato had only the promise of a lease when he took possession of it and began building.

After he had erected a one-story building the written lease was executed and delivered.

Later Mr. Lobato added a second story. One side of the building set on an "old foundation," the rest on posts. There was no cellar.

On April 29, 1931, Lobato made a chattel mortgage of the store building to the plaintiff for an expressed consideration of $940.

Lobato went into bankruptcy in December 1932, secured his discharge on May 5, 1933, and the first day of that month the plaintiff began foreclosure of his mortgage.

We find from the record that for a year after the execution of the mortgage defendant knew nothing of the mortgaging of the building to plaintiff; that no rent was paid by Lobato, after 1930, and that on or about December 1st, 1932, defendant claimed forfeiture; Lobato assented, and relinquished possession, giving the key to the building to defendant, and that the latter has had exclusive possession from that date until the present time.

Upon the all-important question of his intention to erect and maintain this store as a chattel, the testimony of Lobato is not convincing. He was a witness for the plaintiff.

In direct examination he was asked:

"Q. Did you have any understanding at all with Mr. Emery about the building?

A. No. What kind of an understanding?

Q. Well, that the building was yours or his?

A. Mine. . . .

Q. Did you ever have any understanding with Mr. Emery about what should become of the building after your lease expired—after your ten years were up?

A. No, sir; I expected . . .

MR. FELLOWS: Just a minute! Not what he expected.

Q. You never had any understanding with him about the building?

A. No, sir."

In his cross-examination the following interrogatories and replies occur:

"Q. As a matter of fact, wasn't it your understanding with Mr. Emery that, when you got through with the property, he was to have the building?

A. After the ten years was up I expected to renew it again.

Q. What I mean is this: You were building this building on a long term or ten-year lease?

A. Yes.

Q. And when you were through with it . . .

WITNESS: Well, when I was through with it I didn't want it.

Q. When you were through with the building Mr. Emery was to have it, wasn't he?

A. Yes, when I got through with it."

In his petition in bankruptcy, under date of December 9, 1932, Schedule B-6, we find the single entry.

"Lease of property on Main St., Bucksport, Maine, dated January 1, 1928. This leasehold terminated, lessee expelled and possession taken by Lessor December 1, 1932 under terms of lease for non-payment of rent."

And where amount of petitioner's debts and values of securities are listed, Schedule A-2, plaintiff's mortgage is listed, with entire absence of estimate of "value" of the mortgaged building.

If these admissions of Lobato, made under oath, have any evidentiary weight they tend to show that in December, 1932, he "understood" his lease was terminated, and that he failed to express any right in the building mortgaged.

On May 1st, 1933, plaintiff commenced foreclosure of his chattel mortgage, and about the first day of the succeeding August his counsel gave notice to the defendant, "to remove any fixtures or other personal property that you (defendant) may now have in the building, as the said Reuben R. Simpson intends to remove the building aforesaid, from the land upon which it now stands."

There is nothing in the testimony of the defendant which may be interpreted as waiving his right to the building except in one question and answer, as follows: "If Lobato had paid the rent according to the terms of the lease for this lot of land, you had no intention of claiming the building, had you? A. If he had paid the rent and all other expenses, I shouldn't have."

This, however, is not sufficient to overthrow the conclusion, drawn from the acts of defendant and his testimony on the points in dispute. When asked, "Did you make any agreement with Mr. Lobato at any time giving him the right to remove the building after the termination of the relationship of landlord and tenant?" he replied, "No."

And, according to the testimony of the plaintiff, in the three conferences these parties had, after the foreclosure proceedings were begun, defendant refused to recognize any right of plaintiff in the building.

It is clear, on the record, that plaintiff asked defendant if he were going to pay Lobato's debt, and equally clear that defendant entertained no such idea.

So much for the record. We hold that the building was affixed to the realty. As stated by defendant, and nowhere disputed, one-half of its periphery rested on an old rock foundation, the rest on concrete posts set in the ground.

> "Ordinarily a building on land is not regarded as the proper subject of a chattel mortgage. But a building erected by one person on the land of another, although prima facie a part of the freehold, remains personalty and is the proper subject of a chattel mortgage, if erected under an agreement with the owner of the land that it may be moved."
>
> 11 C. J. 445, Section 54.

> "In the case of a tenancy for years, i. e. for any fixed and definite term, no agreement to the contrary and no waiver appearing, a tenant must remove his buildings or other fixtures before the termination of his tenancy."

Henderson v. *Robbins*, 125 Me., 284, 133 A., 68, 69.

"All fixtures, for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover cannot be maintained for a refusal to give them up."

Davis v. *Buffum*, 51 Me., 160.

It is our opinion that Lobato's tenancy was forfeited, under the terms of the lease, long before plaintiff took any steps toward removing the building.

Hence judgment must be

For defendant.

IN RE MAINE CENTRAL RAILROAD COMPANY ET ALS.,

PETITIONERS FOR ADDITIONS TO AND CHANGES IN LOCATIONS.

Cumberland. Opinion, March 25, 1936.

RAILROADS. TAXATION. MUNICIPAL CORPORATIONS. EXCEPTIONS.

Taxation is legislative. What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the Legislature to say, without any limitations except such as are imposed by express constitutional provisions.

A town has no control over the assessment of taxes. The statute requires the town to appoint assessors of all taxes to be levied within its limits, but the town does this as the political agent of the state.

A town, as a tax district, has no private right in a railroad location. A town does not become a party to a location proceeding by calling witnesses, or by being heard in argument. Such proceedings concern the whole people, and not infrequently they involve vital questions.

In such case the Attorney General represents the whole body politic, or all the citizens and every member of the State. It is for him, in instances like these, to protect and defend the interests of the public.

For a party to be aggrieved, one of his rights must have been injuriously affected.

Exceptions will not be sustained unless he who excepts shows affirmatively that he is aggrieved. And he cannot be aggrieved unless his legal right has been invaded by the act of which he complains.

In the case at bar, the towns and cities were not parties aggrieved, and had no proper standing in the court.

Exceptions dismissed, that they may be dismissed below.

Exceptions by incorporated towns and cities to rulings of the Public Utilities Commission, on petitions by railroad corporations. Exceptions dismissed, that they may be dismissed below. The case fully appears in the opinion.

Harry C. Wilbur and Eben Winthrop Freeman, for Cities of Portland and Ellsworth and Town of Brunswick.

Donald W. Webber, for City of Auburn.

William S. Cole, for City of Bangor.

Edward Bridgham, for City of Bath.

Alton A. Lessard, for City of Lewiston.

Milan J. Smith, for City of South Portland.

Grover C. Welch, for City of Westbrook.

Howard M. Cook, for Town of Mattawamkeag.

Edward W. Wheeler and Carroll N. Perkins, for Maine Central Railroad Company.

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

DUNN, C. J. These exceptions are by incorporated towns and cities, to rulings of the Public Utilities Commission, on petitions by railroad corporations. The petitions fall into two groups: the one, for additions to existing road-beds, rights of way, tracks, and such like property, commonly called locations, which are essential to discharging functions and duties as common carriers by rail; the other, for changes in locations. R. S., Chap. 63, Secs. 26, 27. The terms "town" and "city," as herein used, are to be taken synonymously.

The exceptions go to refusal to dismiss the petitions, both originally, and as, despite objection, amended.

The first question to be decided is whether the exceptants, not otherwise interested than as civil organizations, legislatively created for political purposes, having in some matters local self-government, have such legal interest in the subject-matter as to make them "parties aggrieved."

Notice of the filing of the petitions was given towns along the railroad routes. Section 26, relating to taking additional land, prescribes hearing, but neither defines procedure, nor who shall be admitted to show cause. Section 27 does not expressly require hearing. Giving notice had, as one object, obtaining all the information necessary to enable the Commission to decide what might be reasonably requisite or expedient, with reference to the pending applications. Counsel appeared for the towns. In the popular sense of the word, the towns were interested, and might, by the introduction of evidence, and by discussion, be able to aid coming to a proper conclusion.

The Attorney General entered an appearance. The chief law officer represents the whole body politic, or all the citizens and every member of the State. Only a few of the duties of the Attorney General are specified by statute; that official is, however, clothed with common-law powers. It is for him, in instances like these, to protect and defend the interests of the public.

The towns claim to be parties in interest, on the score alone that granting the petitions removes property from the sphere of the common burdens of taxation.

A railroad location, but not buildings on it, it is true, is exonerated from local taxation. R. S., Chap. 13, Sec. 4.

Taxation is legislative. What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the Legislature to say, without any limitations except such as are imposed by express constitutional provisions. *Brewer Brick Company* v. *Brewer*, 62 Me., 62.

State, county, and town taxes are assesed by officers who, although chosen by towns, are public officers. They owe to the public, and not to the town merely, the performance of imposed duties. A

town has no control over the assessment of taxes. The statute requires the town to appoint assessors of all taxes to be levied within its limits, but the town does this as the political agent of the State. *Thorndike* v. *Camden*, 82 Me., 39, 44, 19 A., 95. Towns are not voluntary associations; they have only such powers as are conferred by statute, and can act in corporate capacity only when empowered. They may do what they are permitted to do, and nothing more.

The taxing power of a town is within a narrow compass. In the absence of special statute, a town cannot even raise money to oppose its division. *Westbrook* v. *Deering*, 63 Me., 231.

A town as a tax district, has no private right in a railroad location. A town does not become a party to a location proceeding by calling witnesses, or being heard in argument. Such proceedings concern the whole people, and not infrequently they involve vital questions.

For a party to be aggrieved, one of his rights must have been injuriously affected.

In probate court, in order to give a right of appeal, it is said that: "A party is aggrieved by such decree only when it operates on his property, or bears upon his interest directly." *Deering* v. *Adams*, 34 Me., 41, 44.

"And it is not a mere remote and contingent interest, or a wish dictated by whim or policy, without any pecuniary interest to be directly affected by the decree, that will suffice." *Veazie Bank* v. *Young*, 53 Me., 555, 560.

On general principles of law, exceptions will not be sustained unless he who excepts shows affirmatively that he is aggrieved. And he cannot be aggrieved unless his legal right has been invaded by the act of which he complains. *State* v. *Intoxicating Liquors*, 112 Me., 138, 140, 91 A., 175.

So, all in all, having no case, the towns and cities have no proper standing in court.

The several bills of exceptions are dismissed from the docket of this court, that they may be dismissed below.

It is so ordered.

SAMUEL B. HASKELL AND HAROLD S. CORTHELL

vs.

BURTON W. YOUNG.

Knox. Opinion, April 14, 1936.

FORCIBLE ENTRY & DETAINER. R. S. CHAP. 108, SEC. 6.

The transfer of an action of forcible entry and detainer from a court of original jurisdiction to the Superior Court is governed by Revised Statutes, Chapter 108, Section 6.

Under this statute, when the defendant in an action of forcible entry and detainer pleads not guilty and files a brief statement of title in himself or in another person under whom he claims the premises, he is required to recognize in a reasonable sum to the claimant with sufficient sureties conditioned to pay all intervening damages and costs and a reasonable rent for the premises. The claimant is also required in like manner to recognize to the defendant conditioned to enter the suit at the next term of the Superior Court and to pay all costs adjudged against him.

The statute also provides that, if either party neglects so to recognize, judgment shall be rendered against him as on nonsuit or default.

In the case at bar, under this statute, it was the duty of the Judge of the Rockland Municipal Court on the failure of the defendant to recognize to the claimant to enter judgment against him as on default. The case was not in order for transfer.

The Superior Court for the County of Knox as yet had no jurisdiction in this proceeding. The case should be dismissed from its docket and returned to the court from which it was transferred, there to be disposed of in accordance with the law.

Regardless of the reasons stated by the trial Judge in the Superior Court, his refusal to consider a motion for an entry of default in this action was not error.

On exception by plaintiffs. An action of forcible entry and detainer. To the refusal of the trial Justice in the Superior Court to rule upon an oral motion for an entry of default in an action of forcible entry and detainer transferred from an inferior court,

plaintiffs seasonably excepted. Exception overruled. The case fully appears in the opinion.

A. R. Gillmor, for plaintiffs.

E. W. Pike, for defendant.

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

STURGIS, J. This action of forcible entry and detainer comes to this court on exceptions to the refusal of the trial Judge at nisi prius to rule upon an oral motion for an entry of default. The record shows no prejudicial error.

The Bill of Exceptions states that the action was originally begun in the Municipal Court of the City of Rockland and transferred to the Superior Court in and for Knox County on the defendant's plea of not guilty with a brief statement of title in himself. It appears, however, that, although the plaintiffs filed their recognizance as required by law, the defendant neglected to recognize to the claimant and the case was sent forward lacking this essential prerequisite to a valid transfer to the Superior Court.

The transfer of an action of forcible entry and detainer to the Superior Court is governed by R. S., Chapter 108, Section 6, which provides:

> "When the defendant pleads not guilty and files a brief statement of title in himself or in another person under whom he claims the premises, he shall, except as hereinafter provided, recognize in a reasonable sum to the claimant, with sufficient sureties, conditioned to pay all intervening damages and costs and a reasonable rent for the premises; and the claimant shall in like manner recognize to the defendant, conditioned to enter the suit at the next term of the Superior Court, and to pay all costs adjudged against him. If either party neglects so to recognize, judgment shall be rendered against him as on nonsuit or default."

Under this statute, on the defendant's failure to file his recognizance as there required it was the duty of the Municipal Court to enter judgment against the defendant as on default. The case was not in order for transfer to the Superior Court.

The present statute is but a re-enactment by codification of the original provision governing the practice and procedure in forcible entry and detainer actions which first appeared as Section 3, Chapter 268, Public Laws 1824, wherein it was expressly provided that, if the defendant pleaded title, the defendant and complainant should recognize as under the present law and, if either party neglected or refused so to do, the magistrate hearing the cause should enter judgment against him as in case of non-suit or default. This express mandate to the magistrate was retained in the re-enactment of the law in the first revision of statutes and appears in Section 4, Chapter 128, R. S. 1841. In subsequent revisions, the statute has been continued in force without change in its general scope and effect, but beginning with the Revision of 1857 express reference to the magistrate before whom the cause originated has been omitted, the provision retained by condensation being simply, "If either party neglects so to recognize, judgment shall be rendered against him as on nonsuit or default." This, as already appears, is the mandate of the current statute. *R. S., Chap.* 108, *Sec.* 6. We are of opinion that it bears the same import as the original provision in the Act of 1824. We find no specific legislation authorizing the changing of the phraseology of the original act by striking out the subsequently omitted reference to the magistrate of the lower court. The omission noted in this forcible entry and detainer statute falls within the settled rule that a change in phraseology in the re-enactment of a statute in a general revision does not change its meaning unless the legislative intent to effect the change is evident. *Martin* v. *Bryant*, 108 Me., 256, 80 A., 702; *Glovsky* v. *Realty Bureau*, 116 Me., 379, 380, 102 A., 113; *Tarbox* v. *Tarbox*, 120 Me., 407, 115 A., 164; *Ferry Co.* v. *Casco Bay Lines*, 121 Me., 108, 115 A., 815.

On the record sent forward here, the Superior Court for the County of Knox as yet has no jurisdiction in their proceeding. The case should be dismissed from its docket and returned to the court from which it was transferred, there to be disposed of in accordance with the law. Regardless of the reasons stated by the trial Judge, his refusal to consider a motion for an entry of default in the Superior Court was proper procedure.

Exception overruled.

ARTHUR F. RICHARDSON *vs.* JOSEPH T. LALUMIERE.

Cumberland. Opinion, April 17, 1936.

EVIDENCE. EXCEPTIONS. REFERENCE AND REFEREES.

Entries in diaries or memorandum books made by a purchaser of goods are not admissible as independent evidence, but may be used for the purpose of refreshing memory.

An excepting party is bound to see that his bill of exceptions includes all that is necessary to enable the court to decide whether the rulings, of which he complains, were or were not erroneous.

Findings of fact by a referee are not exceptionable if there is any evidence of probative value to support them.

In the case at bar, the defendant was in no way aggrieved by the exclusion of his account books, nor by the finding as to the amount of interest due. There was ample credible evidence to support the award of the referee.

On exceptions. An action of assumpsit heard by a referee with right of exceptions, as to matters of law reserved. To certain rulings of the referee exception was taken by the defendant, and likewise to his finding for the plaintiff. Exceptions overruled. The case fully appears in the opinion.

Grover Welch, for plaintiff.

Edward B. Perry, for defendant.

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

MANSER, J. This case came up on exceptions to the acceptance of the report of a Referee. It is an action of assumpsit for lumber sold and delivered. By agreement of the parties the case was referred to a Referee with right of exceptions as to matters of law.

The account of the plaintiff contained seven debit items, amounting to $755.10, and gave credit for payments aggregating $250,

and evidence was offered by the plaintiff in support thereof at the hearing before the Referee.

The defendant admitted the purchase of lumber, but disputed the amount of most of the items and the prices charged. He also claimed credit for an additional payment of $200.

The Referee found in favor of the plaintiff as to the debit items, and allowed the defendant the additional $200 credit which he claimed.

The plaintiff also set up in his writ a charge for interest from July 3, 1931, that time being alleged as the date of demand for payment, and the Referee allowed interest on the net amount found by him to be due from that date to the date of the writ, and reported that judgment should be rendered for $373.39.

The defendant filed specifications of objections, asserting four errors of law on the part of the Referee. The first was to the exclusion by the Referee of two memorandum books kept by the defendant and claimed to be admissible under the shop-book rule as evidence in and of themselves of the amount of lumber purchased by the defendant. One such memorandum book was admitted without objection. The entries therein appear to refer to the first four items, but are unintelligible without explanation, and amount to nothing more than a memorandum. They do not show whether they refer to goods bought or sold. The kind of lumber is not disclosed or the price. The basis of the exception is that the Referee erred in excluding the other books offered by the defendant, which it was alleged showed the amount of some of the lumber purchased and the dates on which it was purchased. The exceptions, however, are not accompanied by the books in question, nor are the entries claimed to be admissible made a part of the record. The court can not determine their admissibility without knowing what they are.

The Referee evidently excluded them on the ground that they were entries made by the purchaser of goods and not by the seller and were merely memoranda made for the convenience of the defendant.

In *Waldron* v. *Priest*, 96 Me., 36, 51 A., 235, 236, the defendant, a lawyer, offered his office docket, which contained this memorandum: "Nov. 18, 1896, paid F. A. Waldron $25 which settles to date

as per agreement. And the court said: "The entry was not a *charge* of goods delivered or services rendered which, for the purpose of preventing a failure of justice, is admitted in evidence as an exception to the general rule. It was merely a memorandum made for the defendant's convenience. Such an entry or memorandum is not admissible in evidence."

"Loose memoranda or entries in diaries or memorandum books used for recording any matter of which the owner may wish to make note, while admissible for the purpose of refreshing the memory of a witness, have generally been excluded as independent evidence." 22 C. J., 871, citing, among other cases, *Waldron* v. *Priest*, supra.

The Referee, while excluding the books themselves, allowed the defendant to refresh his memory by their use, and the defendant testified fully concerning the items in question.

The defendant invokes the aid of Public Laws of 1933, Chap. 59, relating to the admissibility of accounts in evidence, and contends that the books were admissible by virtue of its provisions. It is unnecessary to determine how far the act referred to modifies the shop-book rule as already interpreted by our court.

The defendant had the burden of showing affirmatively that the exclusion was prejudicial to him. It does not appear that he has been aggrieved. The excluded evidence should have been printed as a part of the bill of exceptions.

"Not being printed, it is out of the question to determine whether any prejudice was done by the exclusion of the evidence. . . . The excepting party is bound to see that the bill of exceptions includes all that is necessary to enable us to decide whether the rulings, of which he complains, were or were not erroneous." *Gross* v. *Martin*, 128 Me., 445, 148 A., 680, 681.

The second objection is that the Referee erred in the computation of interest. There was a claim for interest in the declaration, and evidence of demand for payment as early as July 3, 1931. It is true that a quantity of lumber was sold in the summer of 1932, and it appears that the Referee reckoned interest upon the net amount of the account from July 3, 1931. At that date, however, there was a greater sum due than that upon which interest is reckoned. Subsequently there were debit items of $230 and credits of

$250. Under the rule given in *Pierce* v. *Faunce*, 53 Me., 351, the computation was incorrectly made. The report shows that the Referee allowed interest from July 3, 1931, *to March* 26, 1935, which was the date of the writ. An accurate reckoning to that time would give a result slightly less than the amount given in the report. However, assuming a demand on July 3, 1931, the account then became interest bearing and it did not cease to be so when the plaintiff instituted his action. The Referee reported that the plaintiff was entitled to judgment for $305.10 for principal and $68.29 for interest, in all $373.39. By the terms of the award, judgment would be entered for that amount; but the report was not made until the September Term, 1935. No interest was allowed after March 26, 1935, and the plaintiff, not the defendant, was the actual loser by the error of the Referee. The defendant is not aggrieved. The exception can not be sustained.

The third objection is to the disallowance of the defendant's claim for a credit for $69. This was a question of fact. The decision of the Referee was that the payment, admittedly made, was properly credited to a prior account and had nothing to do with the transactions in question. The plaintff so testified.

The last objection is that the Referee erred as a matter of law in finding that the allegations contained in the plaintiff's writ were sustained by evidence. In other words, it is claimed that the evidence did not sustain the facts alleged. The law is so well established it requires no repetition of the rule that findings of fact by a Referee are not exceptionable if there is any evidence of probative value to support them. *Hovey* v. *Bell*, 112 Me., 192, 91 A., 844; *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853; *McCausland* v. *York*, 133 Me., 115, 174 A., 383.

Examination of the record shows that the issues of fact were sharply controverted, but there was ample credible evidence to support the award of the Referee.

The entry will be

Exceptions overruled.

MELVIN F. MCFARLAND

vs.

MANZIE I. ROGERS

and

STANDARD ACCIDENT INSURANCE COMPANY
OF DETROIT, MICHIGAN.

Penobscot. Opinion, April 17, 1936.

SURETYSHIP AND GUARANTY.

Though there can not be imported into a bond an obligation not covered by its terms, yet the rule is that the liability of a bonding company, agreeing for a consideration to act as surety, is not to be measured by the rule of strictissimi juris. *Such agreement will be construed most strongly against the surety.*

In the case at bar, the obligation to supply the insurance was not independent of the contract and a condition precedent to the award of it. The requirement of insurance was specifically called for by the contract; the insurance was issued to comply with its terms; the premiums, therefore, represented a claim incurred in the performance of such contract.

On report, on an agreed statement of facts and stipulation. An action of debt in the name of the plaintiff as treasurer of the City of Ellsworth, obligee on a contractor's bond, brought against the principal and surety. The issue involved the question whether the surety on the bond was liable for unpaid premiums. Judgment for the plaintiff for $1,000, with interest from March 1, 1934. The case fully appears in the opinion.

James M. Gillin, for L. C. Tyler & Sons Co.

Fellows & Fellows, for Standard Accident Insurance Company.

Ross St. Germain, for Manzie I. Rogers.

B. W. Blanchard, for John T. Kelleher.

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

THAXTER, J. This action of debt was instituted by L. C. Tyler & Sons Co., Inc., in the name of the plaintiff as treasurer of the City of Ellsworth as obligee on a contractor's bond. It is brought against the principal and surety, and is before us on report on an agreed statement of facts with a stipulation that, if the plaintiff is entitled to recover, judgment shall be entered for the plaintiff for the account of L. C. Tyler & Sons Co., Inc., in the sum of $1,000 with interest from March 1, 1934.

The principal on the bond, Manzie I. Rogers, entered into a contract with the City of Ellworth for the construction of a sewer. The bond in question was given to assure the fulfillment of the contract. The defeasance clause reads as follows:

> "THE CONDITION OF THIS OBLIGATION IS SUCH, That, if the Principal designated as Contractor in the contract dated June 21, 1933 entered into between the City of Ellsworth, Maine, and Manzie I. Rogers, shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same and shall pay all bills for labor, equipment, and all material except pipe, and for all other things contracted for or used by him in connection with the work contemplated by said 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."

The contract provides that the specifications shall be a part of it. These specifications, among other things, provide:

> "The Contractor shall maintain such insurance as will protect him from claims under Workmen's Compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor, or anyone directly or indirectly employed by either of them."

L. C. Tyler & Sons Co., Inc., supplied to the contractor two policies of insurance, a public liability policy of the London Guarantee & Accident Company, Ltd., and a workman's compensation policy in the same company. These were the policies required by the contract of Rogers with the City of Ellsworth. The premiums on these have not been paid.

The sole question is whether the surety on the bond is liable for these premiums. The defendant claims that there is no liability, first, because the insurance coverage was a condition precedent to the awarding of the contract and hence the premiums therefor can not be regarded as a claim accruing under the contract; and secondly, because the bond was only intended to be security for the payment of bills for labor performed and materials furnished.

It is difficult to understand how the obligation to supply insurance can be regarded as independent of the contract and a condition precedent to the award of it, when such requirement is provided for by the contract itself as the specifications clearly show.

To substantiate the second ground of defense, counsel have cited a number of authorities. *Bay State Dredging & Contracting Co.* v. *Ellis*, 235 Mass., 263, 126 N. E., 468; *New Amsterdam Casualty Company* v. *Detroit Fidelity & Surety Company*, 187 Ark., 97, 58 S. W., 418; *Employers Liability Assur. Corp., Ltd.* v. *Cannon*, 173 Okla., 493, 49 P., 103; *Warner Co.* v. *Schoonmaker*, 174 A., 449 (Del. Ch. 1934). In each of these cases the obligation under the bond extended only to claims for material and labor; and each opinion rightly holds that liability for insurance premiums was not included.

In *Southern Surety Company* v. *Travellers Insurance Company*, 90 Ind. App., 309, 165 N. E., 444, the court construes language, which is more nearly like that now before us. The case is, however, clearly distinguishable; for the contracts there involved apparently did not require the carrying of the insurance, and the policies of insurance were blanket ones covering a large variety of jobs. Under such circumstances, in the words of the court, page 315, the claim "did not sustain an intimate, immediate and exclusive relation to the work, so as to make it a debt incurred in the prosecution of the work."

In the instant case the language of the bond is very broad. Under it the contractor is obligated to "faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same."

Though of course we can not import into a bond an obligation not covered by its terms, yet the rule is laid down in *Foster* v. *Kerr & Huston, Inc., et al,* 133 Me., 389, 179 A., 297, that the liability of a bonding company, agreeing for a consideration to act as surety, is not to be measured by the rule of *strictissimi juris.* Such an agreement will be construed most strongly against the surety.

The requirement of insurance was specifically called for by the contract with which we are here concerned; the insurance was issued to comply with its terms; the premiums, therefore, represent a claim incurred in the performance of such contract.

In accordance with the stipulation the entry will be:

Judgment for the plaintiff for $1,000, *with interest from March* 1, 1934.

FIRST AUBURN TRUST COMPANY, PETITIONER,

vs.

ESTATE OF ABRAHAM B. BAKER.

Androscoggin. Opinion, May 1, 1936.

PROBATE COURTS. CONSTRUCTION OF STATUTES. WORDS & PHRASES.

As prerequisite to the maintenance of a petition for review under R. S., Chap. 75, Sec. 33, the petitioner is required to prove that, from accident, mistake, defect of notice or otherwise without fault on his part, he omitted to claim or prosecute his appeal. This is a distinct element, essential of proof.

If shown, then the presiding Justice must proceed to the second necessary element, that "justice requires a revision."

The first element rests upon a finding of fact. The second calls for the exercise of judicial discretion, based upon facts.

Findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive, and not to be reviewed by the Law Court if the record shows any evidence to support them.

As in the case of review, the petition is denied when it appears that the petitioner's predicament is due to his own fault, and want of reasonable diligence.

In the case at bar, no legal duty rested upon the executors, the widow, their attorneys or any officer of the Probate Court to give direct notice or information to the petitioner or its attorneys of the pendency of the widow's petition for allowance. The law prescribes the method of notice. It was followed. That method was well known to the petitioner who is charged with legal notice of the proceedings. It had the means of actual notice. It was financially interested in the administration of the particular estate. It had taken part in previous proceedings, and had engaged attorneys to protect its interests. The facts can hardly be said to present anything more than a case of mere neglect or inattention.

On exceptions by respondent. Petitioner in the Supreme Court of Probate, was granted leave to enter its appeal from a decree of the Judge of Probate for the County of Androscoggin. Exceptions were thereupon filed by respondent. Exceptions sustained. The case fully appears in the opinion.

George C. & Donald W. Webber, for petitioner.

Benjamin L. Berman, David V. Berman, for respondent.

Harris M. Isaacson, for executors.

SITTING: DUNN, C. J., STURGIS, BARNES, HUDSON, MANSER, JJ.

MANSER, J. This case comes up on exceptions to a ruling granting the petitioner leave to enter its appeal from a decree of the Judge of Probate for Androscoggin County.

The provisions of the statute, so far as material in this case, are as follows: Any person aggrieved by a decree of a Judge of Probate may appeal therefrom to the Superior Court, which is the Supreme Court of Probate, if he claims his appeal within twenty days from the date of the proceeding appealed from. R. S., Chap. 75, Sec. 31.

By section 33 of the same chapter it is provided: "If any such person from accident, mistake, defect of notice, or otherwise with-

out fault on his part, omits to claim or prosecute his appeal as aforesaid, the Supreme Court of Probate, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted with the same effect, as if it had been seasonably done; but not without due notice to the party adversely interested, nor unless the petition therefor is filed with the clerk of said court within one year after the decision complained of was made; and said petition shall be heard at the next term after the filing thereof."

By decree of the Probate Court, dated January 8, 1935, an allowance was made to the widow of Abraham B. Baker. No appeal was seasonably taken; but the petitioner, a creditor of the estate, sought leave to claim and prosecute its appeal under the provisions of section 33. The presiding Justice granted the petition. It is this decree which is under consideration, on exceptions taken by the executors of the estate and the widow.

The exceptions attack the decree as unwarranted in its finding of jurisdictional facts. As prerequisite to the maintenance of the petition the petitioner is required to prove that, from accident, mistake, defect of notice or otherwise without fault on its part, it omitted to claim or prosecute its appeal. This is a distinct element, essential of proof.

If shown, then the presiding Justice must proceed to the second necessary element, that "justice requires a revision."

The first element rests upon a finding of fact. The second calls for the exercise of judicial discretion, based upon facts.

It is unnecessary to construe the rules applicable to a review of the exercise of discretion if the exceptions must be sustained upon the fundamental question of jurisdiction.

Findings of fact by a Justice presiding in the Supreme Court of Probate are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them. This rule is firmly established in this state and has been reiterated and reaffirmed in many of our decisions. *Eacott, Appellant*, 95 Me., 522, 50 A., 708; *Palmer's Appeal*, 110 Me., 441, 86 A., 919; *Grover, Appellant*, 113 Me., 156, 93 A., 64; *Thompson, Appellant*, 116 Me., 473, 102 A., 303; *Cotting* v. *Tilton*, 118 Me., 91, 106 A., 113, 114; *Packard, Appellant*, 120 Me., 556, 115 A., 173; *Rogers, Appellant*, 123 Me.,

459, 123 A., 634; *Chaplin, Appellant*, 133 Me., 287, 177 A., 191.

It appears, from almost every reported decision upon this question, that the Law Court has studied the record and analyzed the evidence to determine whether there was any support for the findings of fact. Generally speaking, such evidence has been found in the record.

There are, however, notable exceptions, as in *Rogers, Appellant*, and *Chaplin, Appellant*, supra. In *Cotting* v. *Tilton*, supra, one finding was sustained and another overruled. The Court's comment was as follows: "Holding fast to the rule of conclusiveness of the findings of the presiding Justice upon questions of fact, if there be any evidence to support those findings . . . we are of opinion that a careful examination of the record discloses some supporting evidence . . . and thus far the decree of the presiding Justice stands." And in the next paragraph of the same case the Court said: "An equally careful study of the record fails to satisfy us that the claim of Mr. Johnson for allowance for board and lodging of the deceased is sustained. In this respect the decree of the presiding Justice must be modified."

Guided by these principles, what is disclosed in the record in the present case?

Abraham B. Baker died testate, leaving a widow and three minor children. His executors qualified December 22, 1932. The present petitioner filed claims against the estate amounting to $31,000. As to a portion of this sum the estate of a brother, Joseph Baker, was also liable, and through liquidation of the indebtedness of that estate there was left outstanding two claims aggregating $15,279. Suit was brought upon these claims and prosecuted to judgment. As to the larger of the two claims, it was based upon a mortgage note given by the deceased upon property which he subsequently sold in his lifetime, subject to the mortgage. The petitioner, through competent counsel, brought suit on the note. The real estate upon which the mortgage was originally given had depreciated in value; taxes, together with interest on the note, remained unpaid for nearly two years. The president of the Trust Company, petitioner, and the attorneys had been in frequent negotiations with the executors concerning the outstanding indebtedness.

The only witness for the petitioner as to the facts necessary to sustain jurisdiction was the president-treasurer of the Trust Company, who testified that the Company had acted as administrator or executor in many instances; that he had served as trust officer of the Company for ten or fifteen years, had been a banker for thirty-five years, had acted himself as administrator in some instances, was familiar in a general way with the handling of probate estates, had prepared probate blanks himself, knew the provisions as to notices of hearings by publication, resided in the shire town where the Probate Court was held, and that the Trust Company was also located there. He testified further that the claims against this estate were regarded as delinquent; that rents had been collected from the mortgaged property intermittently by the Trust Company, and that the executors were endeavoring to compromise the claims. It further appeared from his testimony that the general counsel for the Trust Company rendered services with reference to the claims of the petitioner against the estate, and that their offices were also in the shire town.

On September 22, 1934, the witness wrote to one of the executors regarding the indebtedness and stated that he had gone over the matter thoroughly with his Board of Directors.

On November 1, 1934, the executors filed in the Probate Court a representation of insolvency in the estate of Abraham B. Baker. On December 22, 1934, the widow filed a waiver of the provisions of the will. On the same day the widow filed a petition for allowance. Upon this petition notice was ordered and published in the Lewiston Daily Sun on December 22 and 29, 1934, and January 5, 1935. The petition was made returnable upon a regular Probate Court day, on the second Tuesday of January; evidence was presented and decree made awarding an allowance. All these proceedings were in accordance with the statutory requirements. The petitioner's witness testified that the newspaper was regularly delivered at the office of the Trust Company.

The sole and only ground upon which the petitioner can rely to satisfy the requirements of the statute here invoked is that it had no actual knowledge of this particular probate proceeding for allowance to the widow. While it might be assumed that the at-

torneys for the Trust Company were also without actual notice, there is no proof of the fact, the record being silent.

No legal duty rested upon the executors, the widow, their attorneys, or any officer of the Probate Court to give direct notice or information to the petitioner or its attorneys of the pendency of the widow's petition for allowance. The law prescribes the method of notice. It was followed. That method was well known to the petitioner. No precautions are shown to have been taken by any one acting in behalf of the petitioner to avoid its oversight. The petitioner is charged with legal notice of the proceedings. It had the means of actual notice. It was financially interested in the administration of the particular estate. It had taken part in previous proceedings. It had engaged attorneys to protect its interests.

After the orderly process prescribed by statute had been taken and after the probate hearing, the petitioner still had twenty days during which time it could save its rights by appeal. This period elapsed and the decree became effective. If the mere fact of lack of actual notice under such circumstances is to be regarded as sufficient to justify the present proceedings, then the time limit for appeal is greatly extended in virtually every case.

The record is void of any evidence showing "accident, mistake, defect of notice," or that the omission to claim the appeal was "without fault." If the petition should be granted in this case, it is difficult to conceive of a case where one would be denied.

At the hearing in the Supreme Court of Probate two issues were presented at the same time to the presiding Justice. In addition to the one now considered, the remaining one was as to whether justice required a revision. They were separate. Upon the latter the evidence did present facts which, unless successfully controverted, would justify consideration. It is ofttimes difficult to keep mentally separate evidence in support of one issue and which must not be allowed to influence the mind as to another and entirely distinct issue.

In *Chase* v. *Bates*, 81 Me., 184, 16 A., 542, the allegation was that the petitioner "had no knowledge of the petition and decree and that he was ignorant of the nature of said decree until a long period had elapsed, so that he was unable to claim an appeal within

twenty days after its date." The facts showed that he resided in Portland, where the Probate Court held its sessions and its records were kept and to which he had recourse at all times. Adopting the language of the opinion in *Sykes* v. *Meachem*, 103 Mass., 285, the Court said: "The facts can hardly be said to present anything more than a case of mere neglect and inattention. He failed to make an effective inquiry and in that way remained in ignorance of a fact which was perfectly well known and which there was no attempt to conceal . . . . The only mistake is the failure to know a fact about which he made no inquiry."

The petitioner must show due diligence in the prosecution of its rights. *Graffam* v. *Cobb*, 98 Me., 200, at 206, 56 A., 645.

In analogous remedial statutes, such as petitions for review, it is held that the burden rests upon the petitioner of showing due diligence, not only on his own part but also on the part of his attorney, for the negligence of the attorney unexplained is the negligence of client. *Taylor* v. *Morgan*, 107 Me., 334, 78 A., 377.

"A review is 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., 238, 91 A., 945.

The Court has spoken to like effect in *Beale* v. *Swasey*, 106 Me., 35, 75 A., 134; *Harmon* v. *Fagan*, 130 Me., 171, 154 A., 267; *Leviston* v. *Historical Society*, 133 Me., 77, 173 A., 810.

Exceptions sustained.

THAXTER, J., took no part in the decision of this case.

PEJEPSCOT PAPER COMPANY, APPLT.

vs.

STATE OF MAINE.

Washington. Opinion, May 5, 1936.

TAXATION. CONSTRUCTION OF STATUTES. WORDS & PHRASES.

The burden of proof is on the petitioner for abatement of taxes to show that the findings of the state authorities work upon him an injustice.

It is the policy of the State that all property therein, except what is exempt from taxation by statute, shall bear its fair share of the tax burden, and it is beyond question that the "land," whatever its burden, on the surface or below, is properly taxed.

From its beginning as a state, Maine has taxed its unorganized area.

The word "land" or "lands" and words "real estate" include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein.

Under the statutes it is incumbent on the assessors not to tax on an assessment above a just and fair valuation. It is, however, not incumbent upon them to tax when not practicable, when for illustration the determination of the existence of property, such as a crop of wild fruit, and inspection thereof for purposes of valuation would entail expense incommensurate with the profit of the tax to the State.

The word "growth" as used in Chap. 12, *Sec.* 9, *R. S., is in reason, and in any business view, limited to the enlargement and increase of trees valuable for timber and wood.*

"Forest growth, oak growth, growth of timber, growth of wood, black growth," these terms and their limitations are well understood by all who deal in or read of Maine forests and woodlots, and assuredly so by a majority of all Maine legislators.

As provided in R. S., Chap. 1, *Sec.* 6, *Par. I, "Words or phrases shall be construed according to the common meaning of the language. Technical words and phrases and such as have a peculiar meaning convey such technical or peculiar meaning."*

In the case at bar, the Court holds that the legislature of 1895, in enacting chapter 132 of the Public Laws of that year, used the word "growth" in its common meaning as growth of timber or wood. It had no application to blueberries produced in the open blueberry land in question. There was therefore no right to an abatement of the tax.

On report. Appeal by owner of the fee from valuation of wild lands, known as blueberry lands, the blueberry rights being owned by others. Appeal dismissed. The case fully appears in the opinion.

Robinson and Richardson, for appellant.

Locke, Campbell & Reid, for defendant.

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

BARNES, J. A tax was levied by the state on 18,603 acres of petitioner's wild land in T. No. 18, and 20,800 acres of such land in T. No. 25, both townships in Middle Division of Washington County, in accordance with the certification of the state board of equalization under date of December 1, 1934, the "assessed valuation" of the lands taxed in each township being found by the state authorities, on separate bases, as "timbered" land at $72,418.00, open blueberry land at $23,317.00, the tax levied on the timbered land being on an average valuation of $2.00 an acre, on the blueberry land at $1.00 an acre.

The petitioner deeming itself aggrieved by the value set upon its lands for purposes of taxation, appealed therefrom to the Superior Court, and its case is brought up, on report, that its appeal may be tried, heard and determined here.

The burden of proof is on the petitioner to show that the findings of the state authorities work upon it an injustice.

No evidence of the facts found by the taxing board is presented in the "stipulation" made a part of the report, and in the exhibits, except such as may appear in the title deeds.

The land assessed to the petitioner was acquired by purchase from the Sagadahoc Towing Company, as evidenced by deed dated June 4, 1928.

As to land purchased of the Towing Company, located in Township 18, petitioner's grantor acquired title to a portion by deed of Joseph G. Ray, dated February 26, 1917.

This deed contains the following reservation:

> "The Grantor, however, reserves to himself, his heirs and assigns, these things, as if expressly granted to him by original conveyance from the Grantee herein: The right, privilege and easement to cultivate, pick and remove all blueberries on such parts of said township eighteen as shall not be timbered lands, and shall constitute reasonably and fairly blueberry lands, together with the right, privilege and easement of proper and reasonable ingress thereto and egress therefrom, and the proper and reasonable use and occupancy thereof for picking said blueberries and burning said blueberry lands for the purpose of aiding the blueberry growth, but the burning of said blueberry lands for the purpose of aiding the blueberry growth shall be done in full compliance with and conformity to all legal, reasonable and proper regulations, and the Grantee, its successors and assigns, shall have the opportunity and right to supervise said burning."

And, while not of greatest importance, in the same deed this covenant also appears:

> "The Grantee covenants and agrees to and with the Grantor, his heirs and assigns, to pay and discharge, as they may become due and payable, all taxes levied upon the lands hereby conveyed, and that this covenant shall run with the land."

To the rest of the 18,603 acres of land of petitioner, in Township 18, we learn from the stipulation that the title of plaintiff's grantor was by deed from Charles W. Mullen, which deed recited a previous conveyance from Joseph G. Ray to said Mullen, and that the latter deed contained the following:

> "It is understood and agreed that said Ray reserves the right to pick and carry away blueberries on the lands hereby conveyed, but not to interfere in any way with the operations of the Grantee at any time."

As to plaintiff's land in Township 25, the Sagadahoc Towing Company, eleven years before date of its deed to plaintiff, made the following grant to the Fry Pulpwood Company, a corporation existing under the laws of Maine, and located at Ellsworth:

> "Full license and permission, without further payment, to pick and remove all blueberries on such lands in Township Number Twenty-five, Middle Division, Washington County, Maine, owned by the Sagadahoc Towing Company and conveyed to it by deed from John A Peters, dated January 13th, 1917, recorded in Book , Page , of Washington County Registry of Deeds, as shall be reasonably and fairly designated from time to time by the Sagadahoc Towing Company, or its successors or assigns, owners of said lands, with the right on the part of said licensee, its successors and assigns under the supervision of the Sagadahoc Towing Company, its successors or assigns as owners of said lands, to burn said designated lands for the purpose of aiding blueberry growth, and with the right on the part of said licensee, its successors and assigns, to ingress and egress and the proper use and occupancy thereof for picking and burning."

On no portion of the lands with which this case deals have the rights to, the interest or privilege in the blueberry bushes or their fruit been conveyed to or acquired by the petitioner, or any of its predecessors in title subsequent to the grants above quoted.

What is "open blueberry land" may be well understood by virtue of a custom among owners of land where the blueberry bush is a natural product.

What is "open blueberry land" in tracts adjacent to timbered or wooded areas may differ in different localities. No evidence is furnished us of the distinctive meaning of the term, as used and understood by the parties to the grants recited above.

It is not known whether timber or wood may not be growing in clumps or patches interspersed with the blueberry bushes, on the so-called open blueberry lands, nor whether in the evolution of forest growth a time may come when pulpwood, timber, or wood, may not be taken from the reserved tracts.

The right to cultivate the blueberry bush is claimed and accorded. It is the bush that is cultivated. "God giveth the increase."

It is the policy of the State that all property therein, except what is exempt from taxation by statute, shall bear its fair share of the tax burden, and it is beyond question that the "land," whatever its burden, on the surface or below, is properly taxed.

"Real estate, for the purpose of taxation, except as provided in section six, includes all lands in the state, together with the water power, shore privileges and rights, forest and mineral deposits appertaining thereto, and all buildings erected on or affixed to the same, and all townships and tracts of land, the fee of which has passed from the state since the year eighteen hundred fifty, and all interests in timber upon public lands derived by permits granted by the commonwealth of Massachusetts; interest and improvements in land, the fee of which is in the state; and interest by contract or otherwise in land exempt from taxation. . . ." R. S., Chap. 13, Sec. 3.

So, from its beginning as a state, Maine has taxed its unorganized area.

"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." R. S., Chap. 1, Sec. 6, Par. X.

Under our present statute the board of state assessors, with the assistance of the forest commissioner, and "all other state officers, when requested," as well as of the county commissioners of any county in which are any wild lands, shall fix the valuation of the wild lands of the state for the levy of the state tax thereon.

This board shall value for purposes of taxation the entire lands of all unorganized townships, with exception of certain tracts not involved in this case.

Two sentences in Chap. 12, Sec. 9, of R. S., expressive of the duty of the board, applicable here, read as follows:

> "In fixing the valuation of unorganized townships whenever practicable, the lands and other property therein of any owners may be valued and assessed separately.

> "When the soil of townships or tracts taxed by the State as wild land is not owned by the person or persons who own the growth or part of the growth thereon, the board of state assessors shall value the soil and such growth separately for the purpose of taxation."

It is the view of the petitioner that the term "growth" as used in this statute includes the blueberries produced in the open blueberry land in question, and that the board of state assessors must annually tax such blueberries to the owner or owners of the blueberry rights.

Petitioner overlooks the pertinency of the first words of the statute above quoted, "In fixing the valuation of unorganized townships whenever practicable,"—the assessors may fix distinct values on lands and other property.

It is incumbent on the assessors not to tax on an assessment above a just and fair value.

And it is not incumbent upon them to tax when not practicable, —when for illustration the determination of the existence of property, such as a crop of wild fruit, and inspection thereof for purposes of valuation would entail expense incommensurate with the profit of the tax to the State.

It is our view that the second sentence of the statute quoted, on which petitioner bases its claims for abatement, requires separate valuation on soil and growth, only when practicable.

And in the record there is nothing to show the probable return from taxation of blueberry growth on petitioner's land. It is probably true that the annual yield per acre of blueberry tracts upon our wild lands can not be foretold with any degree of accuracy.

Certain it is that on a year of burning, the accepted method of cultivation of the low-bush blueberry, there is no crop to be harvested.

The quantity of the crop, like any other harvest is variable within the widest range, because of the multitude of factors that go to make a crop, and its quality fluctuates violently from the ravages of diseases and insect pests. Truly the board of assessors may have

adopted the policy of not valuing blueberry rights in unorganized townships.

But further and finally it is our opinion that the word "growth" as used in the statute quoted is in reason, and in any business view, limited to the enlargement and increase of trees valuable for timber and wood. In this we are guided by the custom of men who are owners of or operators on our wild lands, and by the many decisions of this Court in solving the real problems of persons interested in handling forest products almost from the organization of the state.

"Forest growth, oak growth, growth of timber, growth of wood, black growth," these terms and their limitations are well understood by all who deal in or read of Maine forests and woodlots, and assuredly so by majority of all Maine legislators.

As a guide in the construction of a statute, this rule is furnished: "Words or phrases shall be construed according to the common meaning of the language. Technical words and phrases and such as have a peculiar meaning convey such technical or peculiar meaning." R. S., Chap. 1, Sec. 6, Par. I.

It is our opinion that the legislature of 1895, in enacting chapter 132 of the Public Laws of that year, used the word "growth" in its common meaning as growth of timber or wood.

This is the statute upon which petitioner predicates its rights to abatement.

As we construe the statute there is no right to an abatement of the tax.

Appeal dismissed.

JOSEPH E. HARVEY.

vs.

LOUIS ANACONE.

Cumberland. Opinion, May 6, 1936.

CONDITIONAL SALES. PLEADING AND PRACTICE. TROVER.

In both a conditional sale and chattel mortgage, the legal title is held only as security, subject to redemption, and the conditional sale vendor's right is practically the same as that of the chattel mortgagee.

The right of possession in absence of agreement otherwise is in the conditional sale vendor.

When by agreement the conditional sale vendee has possession, upon default by him the vendor may repossess the property.

Title does not pass until performance of the condition by the conditional sale vendee.

By statute (R. S. 1930, *Chapter* 123, *Section* 8), *the conditional sale vendor may foreclose and the vendee redeem as in mortgages of personal property.*

Trover is "an action on the case" within the meaning of R. S. 1930, *Chapter* 105, *Section* 3.

A conditional sale vendee, without tender of his overdue indebtedness, and without demand, may not maintain trover against his vendor, who, having lawfully repossessed the property after default, has without foreclosure sold it to a third party.

Such a sale does not of itself effect a conversion of the right to redeem, for, without impairment of the right of redemption, at least in some degree, no wrong is done to the conditional sale vendee.

Such a sale by the conditional sale vendor does not necessarily give the vendee the immediate right of possession nor work a conversion without either of which trover may not be maintained.

Following such a sale, the conditional sale vendee must tender his overdue indebtedness and demand restoration of the property in order to obtain the right of immediate possession necessary for maintenance of trover.

In the case at bar, the conditional sale vendor held title rather than a lien. For breach of condition he had a right to take possession of the chattel. The plaintiff failed to prove conversion and the consequent reinvestment in himself of the right of immediate possession. Trover, therefore, was not maintainable.

On exceptions by plaintiff. An action of trover in which plaintiff sought to recover damages from the defendant for conversion of an automobile. The case was, by agreement of parties, referred to a Referee with right of exceptions as to matters of law reserved. To the finding of the Referee for the defendant, plaintiff filed specification of objection and upon allowance of the report seasonably filed exceptions.

Exceptions overruled. The case fully appears in the opinion.

Jacob H. Berman, Edward J. Berman, for plaintiff.

Ralph M. Ingalls, for defendant.

SITTING: DUNN, C. J., BARNES, THAXTER, HUDSON, MANSER, JJ.

HUDSON, J. Trover. On exceptions to the acceptance of a Referee's report.

The facts are not in dispute.

On May 14, 1932, the defendant sold and delivered a Buick sedan to the plaintiff, for which he received a Holmes note (duly recorded) for $600.00, payable in four months. It contained the usual provision of retention of title in the seller until payment.

The plaintiff continued in possession until lawful recaption by the defendant, following non-payment of the note at maturity. The defendant did not foreclose as by statute he might have done but on December 14, 1932, sold the sedan to a third party, whereupon the plaintiff, without tender or demand, brought this action of trover.

The Referee decided that it could not be maintained because the plaintiff did not have "a title, and right to possession." This constituted a ruling of law, which, accepted by the Superior Court as valid, now requires review and decision by this Court.

The transaction constituted a conditional sale.

In both a conditional sale and chattel mortgage, the legal title is

held only as security, subject to redemption, and the conditional sale vendor's right is practically the same as that of the chattel mortgagee. *Westinghouse Electric & Mfg. Co.* v. *Auburn & Turner R. R. Co.*, 106 Me., 349, 351, 352, 76 A., 897; *Doylestown Agricultural Co.* v. *Brackett, Shaw & Lunt Co.*, 109 Me., 301, 309, 84 A., 146; *Drake & Sons* v. *Nickerson*, 123 Me., 11, 121 A., 86. The right of possession in the absence of agreement otherwise is in the conditional sale vendor. *Bunker* v. *McKenney*, 63 Me., 529, 531. Upon default he may repossess the property, *Peabody, et als.* v. *Maguire, et als.*, 79 Me., 572, 585, 12 A., 630; *Franklin Motor Car Co.* v. *Hamilton*, 113 Me., 63, 64, 92 A., 100 T; and title does not pass until performance of the condition. *Franklin Motor Car Co.* v. *Hamilton*, supra.

By statute, the conditional sale vendor is given the right to foreclose and the vendee to redeem as in mortgages of personal property. R. S. 1930, Chap. 123, Sec. 8.

In *Monaghan* v. *Longfellow*, 82 Me., 419, on page 421, 19 A., 857, Chief Justice Peters said:

> "A Holmes note has been placed by the statutes in all respects on the footing of a mortgage. Without form of a mortgage, it is in effect a mortgage. The condition precedent contained in the note is by statute substantially converted into a condition subsequent." Also see *Westinghouse Electric & Mfg. Co.* v. *Auburn & Turner R. R. Co.*, supra.

The question now presented is whether such a conditional sale vendee, without tender of his overdue indebtedness, and without demand, may maintain trover against his vendor, who, having lawfully repossessed the property after default, has without foreclosure sold it to a third party.

Our Uniform Sales Act has no applicability because of express exemption. R. S. 1930, Chap. 165, Sec. 75.

At common law, there was no right either of foreclosure or redemption. *Flanders* v. *Barstow*, 18 Me., 357. If the mortgagor did not pay at the promised time, title became absolute *then* in the mortgagee. Right of redemption first appeared in R. S. 1840 (see Chap. 125, sections 30 and 31), and thereby the mortgagor could

redeem within sixty days next after the breach of the condition and if within that time he did not pay or tender payment, the title passed absolutely to the mortgagee. Not until 1861 was any provision made for foreclosure (see P. L. 1861, Chap. 23). Thereafter the mortgagee could foreclose upon breach of the condition and if he did, the time of redemption did not expire until sixty days after the recording of the foreclosure notice. To redeem, either before or after foreclosure, it was necessary for the redeemer to pay or tender to the mortgagee the amount of the mortgage indebtedness. Upon payment or tender by the mortgagor, "The property became absolutely his, to be recovered and defended by his own hand or by the usual actions at law." *Loggie* v. *Chandler*, 95 Me., 220, 227, 49 A., 1059, 1062. Tender or performance ipso facto put an end to the interest of the mortgagee. *Ramsdell* v. *Tewksbury*, 73 Me., 197, 199; *Drake & Sons* v. *Nickerson*, 123 Me., 11, 13, 121 A., 86. Without either, within the time of redemption following foreclosure, the property vested "absolutely in the mortgagee, leaving no scintilla of right in the mortgagor cognizable either at law or in equity."

> "In Maine . . . chattel mortgages and the rights, duties and remedies of the parties to them after breach of condition have been, and are, wholly regulated by statute." *Loggie* v. *Chandler*, supra, pages 226, 227; *Titcomb* v. *McAllister*, 77 Me., 353, 355.

The applicable statute in material parts reads:

> "When the condition of a mortgage of personal property is broken, the mortgagor, . . . may redeem it at any time before . . . the right of redemption is foreclosed . . . by paying or tendering to the mortgagee, or the person holding the mortgage by assignment thereof, (duly recorded), the sum due thereon, or by performing, or offering to perform the conditions thereof, when not for the payment of money, with all reasonable charges incurred; and the property if not immediately restored, may be replevied, or damages for withholding it recovered in an action on the case." R. S. 1930, Chap. 105, Sec. 3.

This being a remedial statute, may be construed liberally; consequently its condition precedent for payment or tender before redemption or action at law for damages is not necessary of performance, when the mortgagee by his own act has made impossible the restoration of the mortgaged property. Excused is the useless ceremony of tender and demand, which otherwise would have been essential. *Richards* v. *Allen*, 17 Me., 296. It is said to be a settled rule of law that a demand, otherwise necessary, becomes useless and unnecessary when the party, on whom it is to be made, by his own act has disabled himself from complying with it. *Woods* v. *Cooke*, 61 Me., 215. Hence, failure of tender and demand here did not deprive the plaintiff of his statutory right of action at law.

The remedy provided by the statute is "an action on the case." Such is trover. *McConnell* v. *Leighton*, 74 Me., 415. So also are case and assumpsit. *Hathorn* v. *Calef, et al.*, 53 Me., 471, 477. Which should be brought—case, trover or assumpsit—depends upon the facts of the particular case, applying thereto the common law principles governing the form of action. As said in *Hathorn* v. *Calef*, supra, on page 477:

> "But . . . whether in the form of assumpsit, or tort, must be decided from the nature of these facts."

The common law principles pertaining to the action brought must be observed.

> "But this remedy at law must be sought agreeably to the ordinary rules affecting other actions at law." Jones' Chattel Mortgages and Conditional Sales, *supra*, Vol. 2, page 442.

This plaintiff declared in trover. As in other actions of tort, he must establish the commission of a wrong by the defendant, as well as a right in himself to recover damages for it. The wrong to be established in trover is termed conversion.

What is conversion?

> "It is established as elementary law by well-settled principles, and a long line of decisions, that any distinct act of dominion wrongfully exerted over property in denial of the

owner's right, or inconsistent with it, amounts to a conversion. . . . If he has exercised a dominion over it in exclusion, or in defiance of, or inconsistent with, the owner's right that in law is a conversion, whether it be for his own or another person's use." *McPheters et als.* v. *Page*, 83 Me., 234, 235, 236, 22 A., 101, 102.

Then has this plaintiff, assuming the burden to prove conversion, would he recover in trover, done so? No; unless he has shown that this defendant by some distinct act has wrongfully exerted dominion over the property of the plaintiff in exclusion or in defiance of or inconsistent with his right in it. The plaintiff's right was simply to redeem. Following breach, the defendant had the right to immediate possession, actual possession as well as the legal title, subject only to the plaintiff's right of redemption. The distinct act claimed to constitute the conversion was the sale of the security by the conditional sale vendor. But such a sale did not *of itself* effect a conversion of the right to redeem. Without impairment of the right of redemption, at least in some degree, no wrong is done to a mortgagor by such a sale and no conversion committed.

"A sale of the entire property by the mortgagee, entitled to possession, before foreclosure, does not amount to a conversion of it for which the mortgagor may maintain an action in the nature of trover." Jones' Chattel Mortgages and Conditional Sales, 6th Ed., Vol. 2, Sec. 435, page 195.

In *Landon, et al.* v. *Emmons*, 97 Mass., 37, Justice Gray stated:

"A mortgagee, having the right of property, defeasible only on performance of the condition of the mortgage, may assign his mortgage, and sell the *mortgaged property to a third person, subject only to the mortgagor's right of redemption.* . . . When the mortgagee is entitled to the possession of the property, the mortgagor, having no right to the possession as against the mortgagee or his assigns, can not maintain an action of tort in the nature of trover. *Holmes* v. *Bell*, 3 Cush. 324; *Goodrich* v. *Willard*, 2 Gray, 203; *Leach* v. *Campbell*, 34 N. H., 568."

In the Landon case, *Spaulding* v. *Barnes*, 4 Gray 330 is distinguished, for in the latter the mortgagee did not sell all but only a part of the property "which might perhaps be held to be inconsistent with the rights of redemption of the mortgagor, and of attachment by his creditors given by our statutes." The Court stated:

> "Whether a sale by the mortgagee of part only of the mortgaged property would amount to a conversion, give the mortgagor an immediate right of possession, and enable him to maintain an action in the nature of trover, is a question which does not arise in the present case."

Neither does it arise in the case at the bar.

Landon, et al. v. *Emmons* has been followed in *Keeler* v. *Goodwin, et al.*, 111 Mass., 490, 491; *Ring* v. *Neale*, 114 Mass., 111, 113; *Clapp* v. *Campbell*, 124 Mass., 50, 52; *Copp* v. *Williams*, 135 Mass., 401, 404; *Wells* v. *Connable*, 138 Mass., 513, 515; *Raymond Syndicate* v. *Guttentag*, 177 Mass., 562, 564.

In *Wells* v. *Connable*, supra, the plaintiff mortgaged a pair of stags to the defendant, who subsequently to default repossessed the property and sold it without foreclosure. Without payment, tender or demand the plaintiff sued the defendant and the Court held the declaration to be in the nature of trover. Then Chief Justice Morton said that the defendant had the right "to come to the trial relying upon the settled law that a mortgagor can not maintain trover against his mortgagee."

In *Dahill* v. *Booker*, 140 Mass., 308, 5 N. E., 496, one Wheeler, a mortgagee of personal property, for breach of condition repossessed the property and sold it to the defendant without foreclosure. The plaintiff mortgagor sued in the nature of trover. Justice Holmes stated, on page 309:

> "The case is not affected by the transfer from Wheeler to the defendant. The plaintiff's possession and right of possession were put an end to by the breach of condition and Wheeler's seizure. Under such circumstances, it is settled that a mortgagor can not maintain trover for a subsequent sale of all the mortgaged goods together by the mortgagee. Such a sale

does not *of itself* import a repudiation of the mortgage, or determine the title under it. *Landon* v. *Emmons*, 97 Mass., 37. *Wells* v. *Connable*, 138 Mass., 513. See further *Halliday* v. *Holgate*, L. R., 3 Ex. 299; *Donald* v. *Suckling*, L. R., 1 Q. B. 585, 617; *Mulliner* v. *Florence*, 3 Q. B. D., 484."

Lest it be thought that Massachusetts had no statute similar to ours when *Dahill* v. *Booker*, supra, was decided, it should be stated that it did, and therein it was provided; " . . . and if upon such payment or performance, or upon tender thereof, the property is not forthwith restored, the person entitled to redeem may recover it in an action of replevin, or may recover in any action adapted to the circumstances of the case such damages as he may sustain by the withholding thereof." P. S. of Mass. 1882, Ch. 192, Sec. 6. Nevertheless, the Massachusetts Court held that a sale by the mortgagee in lawful possession following breach of the condition was not of itself a conversion justifying trover, as it neither imported a repudiation of the mortgage nor determined the title under it.

The record in this case does not disclose any repudiation or impairment of the plaintiff's right to redeem. So far as we know, the effect of the sale might have been to aid rather than hinder the vendee in the exercise of his right of redemption.

The right in the plaintiff to immediate possession of the property is indispensable in trover, even where he has the general title. *Gilpatrick* v. *Chamberlain, et al.*, 121 Me., 561, 118 A., 481. Right to possession at some future time is not enough to justify trover but may case for damage to the reversionary interest. *Ayer* v. *Bartlett*, 9 Pick., 156; *Raymond Syndicate* v. *Guttentag*, 177 Mass., 562, 564; *Moulton* v. *Witherell*, 52 Me., 237, 243; *Fairbank et al.* v. *Phelps*, 22 Pick., 535; Cooley on Torts, *supra*, pages 490, 491.

"When, therefore, it is said that the plaintiff in trover must have had, at the time of the conversion, the right to the property, and also a right of possession, nothing more can be intended than this: 'That the right of which he complains he has been deprived must have been either a right actually in possession or a right immediately to take possession; it is not

enough that it be merely a right in action or a right to take possession at some future date.' " Cooley on Torts, *supra*, page 489.

This sale by the defendant, not having impaired or repudiated the plaintiff's right of redemption, neither effected a conversion nor gave to the plaintiff the right to immediate possession, without either of which he could not maintain trover.

We know of no reason, however, why following the sale the plaintiff could not have tendered payment to the defendant, demanded the property, and, upon refusal of restoration, have maintained trover for a conversion then and thereby committed by the defendant's distinct act of dominion in denial of the plaintiff's right of redemption.

But it may be asked why the need of making this tender any more than of that provided for by the statute, which we have already stated was excused by the sale. In the latter instance, the purpose of the tender was to perform the statutory condition, precedent to the commencement of an appropriate action at law, the performance of which condition could be excused by the defendant. In the former instance, the sale not constituting conversion nor giving to the plaintiff the right to immediate possession, the plaintiff would make his tender and demand, not to perform the condition precedent to action but to establish the commission of the tort by the defendant by his refusal to restore the property, for until such, the defendant would have committed no wrong for reasons already stated. As the sale was not a conversion, giving the plaintiff the right to immediate possession, it could not excuse the necessity of a later tender and demand to be employed as a means to get into the plaintiff the right to immediate possession. A plaintiff in trover "must rely upon the strength of his own title and not upon the weakness of that of the defendant." Cooley on Torts, *supra*, Vol. 2, page 486. To obtain this indispensable right to immediate possession, the plaintiff must make his tender and demand following the sale, would he recover by virtue of his own strength and not the weakness of the defendant. Such tender and demand would not be useless and idle ceremony, for the resulting conversion would create

in the plaintiff that which he had not before, viz.; the lacking necessary element of right to immediate possession.

We will now consider the Maine cases particularly relied upon by the plaintiff, viz.: *Mathews* v. *Fisk*, 64 Me., 101; *Drummond* v. *Trickey*, 118 Me., 296, 108 A., 72; *Drake & Sons* v. *Nickerson*, 123 Me., 11, 121 A., 86; and *Bedford* v. *Bernstein*, 126 Me., 369, 138 A., 567.

Mathews v. *Fisk*, supra, is clearly distinguishable because there the debt had been paid, demand for the property had been made and consequently the plaintiff had the right to immediate possession, entitling him to maintain trover.

In *Drummond* v. *Trickey*, supra, Justice Hanson said, on page 297:

> "When the mortgagee exercised absolute dominion over the mortgaged property and disposed of the same by absolute sale before foreclosure, and did not account to the plaintiff or in any manner regard his substantial rights, he committed a wrongful act, which in this State has been held to be a conversion."

As supporting cases, the Court cited *Mathews* v. *Fisk*, supra, which already has been distinguished; *Spaulding* v. *Barnes*, 4 Gray, 330, distinguished by Judge Holmes in *Dahill* v. *Booker*, supra; *Lee* v. *Gorham*, 165 Mass., 130, 42 N. E., 556, governed by the Massachusetts statute of 1884, Chap. 313, relating to conditional sales of furniture and other household effects; *Bacon* v. *Hooker*, 173 Mass., 554, 54 N. E., 253, in which the unaccepted tender had re-vested the right to immediate possession in the plaintiff before the sale; *Montenegro-Riehm Music Company* v. *Beuris*, L. R. A. 1916, C 557 (Ky.), 169 S. W., 986, in which the Court held that the provision in the contract that title should not pass until payment was invalid under Kentucky law and so the seller had only a lien, which distinguishes it from our Maine decisions; and, finally, *Steidl, Respt.* v. *Aitken*, L. R. A. 1915, E., 192, 152 N. W., 276, in which the sale was held to be a conversion because the mortgagee had obtained his possession as a trespasser "maliciously and by force or fraud."

Furthermore, the language of Justice Hanson above quoted,

particularly, "or in any manner regard his substantial rights," tends to show that the Court would not hold that a sale by a mortgagee of mortgaged property would constitute conversion unless it did impair the right of redemption.

Of importance is it that *Drummond* v. *Trickey* as reported does not disclose whether the form of action was trover or case, but an examination of the writ reveals that it was *case*, which clearly justifies the decision. At most the statement of the Justice was *obiter dicta*, for the Court held that there was a sufficient tender.

In *Drake & Sons* v. *Nickerson*, supra, it is stated only that compliance by the mortgagor with his condition to pay, either by payment or tender, terminate the vital existence of the mortgage and causes title instantly to revert and, also, failure to pay or to tender payment within the statutory limit of time for redemption precludes redemption. Nowhere in the case is there any discussion of excuse of tender because of any sale of property by the mortgagee and there was in fact in that case no sale by the conditional sale vendee.

Finally, in *Bedford* v. *Bernstein*, supra, the plaintiff places his greatest reliance. In that case, without foreclosure, the conditional sale vendor subsequently to breach did not sell but destroyed the property, and it was held that the plaintiff could maintain trover without tender. The Court relied on *Drummond* v. *Trickey*, supra, which, as above stated, was an action on the case. Still, the judgment for the plaintiff was justified by the distinguishing fact of destruction of the property, its complete annihilation, rather than its sale. Nothing could more completely defeat redemption than destruction of the security and so constitute conversion.

Mr. Jones in his work on chattel mortgages and conditional sales, by way of summary of the law, draws the distinction between states holding to the lien and those to the title theory. In Vol. 2, pages 546 and 547, he says:

> "A mortgagee has, in some states as noted in the beginning of this section, the legal title to the property, and also the right of possession, unless this is expressly or by necessary implication given to the mortgagor. Having title and possession, he necessarily has the right of disposal, subject only to

> the mortgagor's right of redemption; and the mortgagor, having neither the title nor the right of possession, can not maintain any action at law for the recovery of the property or of its value. . . . The rule is otherwise where a chattel mortgage is regarded as giving the mortgagee a mere lien upon the property and not as conferring a title upon him. A sale of the mortgaged property by him, after taking possession for condition broken, otherwise than by foreclosure sale, or without complying with all the requirements of the statute, is a conversion of the property."

As already stated, Maine adopts the title, not the lien theory.

So also does the conditional sale vendor hold title rather than a lien, for he has simply contracted to sell conditionally, and the contractors agree that title shall not pass until performance.

Our conclusion is that the plaintiff, having failed to prove conversion, and the consequent reinvestment in himself of the right to immediate possession, trover is not maintainable.

Exceptions overruled.

GUTHRIE *vs.* MOWRY ET AL.

Penobscot. Opinion, May 8, 1936.

WORKMEN'S COMPENSATION ACT.

Under the Workmen's Compensation Act a claimant is entitled to make a claim for compensation not for mere injury, but for accidental injury resulting in loss of earning power. It is then that the six months given for making claim begins to run.

In cases under the Workmen's Compensation Act it is not the province of the Law Court to ascertain and determine facts; neither does the Court have the right or duty to pass upon the application of a legal principle when it appears that the ruling was predicated upon an erroneous assumption as to facts, or

that the Commissioner failed to decide facts which if found in favor of the claimant, would obviate the necessity of considering the legal issue raised.

The Law Court has authority to recommit the case to the Industrial Accident Commission for the purpose indicated, and the Commission may receive and consider additional evidence thereon.

Under Section 36 of the Act, the Commissioner must decide the merits of the controversy. Then under Section 40 proceedings to procure a review require a decree pro forma *by a Justice of the Superior Court as though rendered in a suit in equity duly heard and determined by the Court. Both requirements clearly provide that cases under this Act must not be sent up piecemeal.*

In the case at bar, the appeal was prematurely brought before the Law Court. The case was not closed before the Commission. The last paragraph of its decision reads: "It was agreed at the hearing that if liability was fixed, further evidence should be introduced at a continued hearing as to incapacity. The case stands continued. So ordered."

The appeal must therefore be dismissed.

A Workmen's Compensation Case. Appeal from a decree of the Superior Court affirming a decree of the Industrial Accident Commission, awarding compensation to claimant. Appeal dismissed. Case recommitted to Industrial Accident Commission for further proceedings. The case fully appears in the opinion.

Michael Pilot, for petitioner.

James M. Gillin, for respondents.

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

MANSER, J. Appeal by defendants from decree in favor of petitioner under Workmen's Compensation Act.

The claimant received an injury to his eye on March 4, 1934. The employer had notice of the accident. By R. S., Chap. 55, Sec. 32, an employee's claim for compensation is barred unless made to an employer within six months *after the date of incapacity*, with certain exceptions not necessary to consider here.

The defendants contended that no such claim was made or presented within the required period. The Commissioner ruled that the right to set up this defense had been waived by the employer.

Insistence of the defendants was that no evidence warranted the ruling as to waiver. The defendants presented no other issue on appeal.

Counsel for claimant conceded in argument that the ruling was erroneous, but contended that the claim was presented seasonably within the terms of the statute.

The legal principles as to waiver would have no application if, as a fact, the claim was made within the prescribed period from date of incapacity.

Examination of the record discloses that the Commissioner did not make any finding of fact as to the date of incapacity nor as to the date when the claim was actually made or presented. There was conflicting evidence upon both these questions. It might be said that the Commissioner, in determining that the employer had waived the requirement of notice of claim, assumed that the date of incapacity was coincident with the date of the injury, but this is *non sequitur.*

As pointed out in *Hustus' Case,* 123 Me., 428, 123 A., 514, 515, "A workman is incapacitated within the act when he had lost his earning power in whole or in part. This is the only test. The law provides no compensation for pain and none for physical impairment, except when it is of such character as to raise a presumption of incapacity to earn. . . . The workman is entitled to make a claim for compensation not for mere injury, but for accidental injury resulting in loss of earning power." It is then that the six months given for making claim begins to run.

It is evident from the record that the injury was caused by the accidental introduction of a foreign substance in the eye of the claimant. That it immediately incapacitated him was not decided. The defendant employer in his report to the Commission stated that at the time of the accident the claimant said he got something in his eye "and brushed it out and went to work. Nothing further was said for about three weeks, when he said his eye bothered him. . . . There seemed to be no injury at the time." No medical attention was secured until March 17th, when the claimant called at the office of a physician, and continued to do so for several days. He procured a prescription which he had filled at a drugstore. He went to a hospital on April 9th.

It is within the realm of common knowledge that a person may

suffer from an inflamed eye, which may be troublesome, without being incapacitated from attending to his work.

The Commissioner might find that date of incapacity as late as April 9th or as early as March 5th. Again, the Commissioner might find the date of claim for compensation as soon as September 6th or as late as October 3rd.

Sufficient reference has been made to show that these material questions were in doubt and left undecided. It is not the province of this Court to ascertain and determine facts; neither does the Court have the right nor duty to pass upon the application of a legal principle when it appears that the ruling was predicated upon an erroneous assumption as to facts, or that the Commissioner failed to decide facts which, if found in favor of the claimant, would obviate the necessity of considering the legal issue raised.

The Court has authority to recommit the case to the Industrial Accident Commission for the purpose indicated, and the Commission may receive and consider additional evidence thereon. *McKenna's Case*, 117 Me., 179, 103 A., 69; *Maxwell's Case*, 119 Me., 504, 111 A., 849; *Gauthier's Case*, 120 Me., 79, 113 A., 28; *Hutchinson's Case*, 123 Me., 250, 122 A., 626; *Murphy's Case*, 226 Mass., 60, 115 N. E., 40.

It has been deemed advisable to give the foregoing statement of the view of the Court, that the parties may adequately present factual issues for the determination of the proper tribunal, and avoid the contingency of future litigated questions with relation thereto.

There is, also, another and jurisdictional objection to the maintenance of the present appeal. It is premature. The case has never been closed before the Commission. The last paragraph of the decision reads: "It was agreed at the hearing that if liability were fixed, further evidence should be introduced at a continued hearing as to incapacity. The case stands continued. So ordered."

Under the Act, Sec. 36, the "Commissioner shall in a summary manner decide the merits of the controversy. His decision, findings of fact, and rulings of law, and any other matters pertinent to the questions so raised, shall be filed in the office of the Commission."

The Commissioner did not decide all the issues. Others, both of law and fact, remained undetermined. There is no stipulation filed

in the case which would prevent further litigation, including the right of appeal with respect thereto. Neither claimant nor defendant should be required to be subject to the delay or expense thereof.

Under Sec. 40, any party in interest may present certified copies of any order or decision to the Superior Court, whereupon any Justice thereof shall render a *pro forma* decree in accordance therewith. "Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit in equity duly heard and determined by said Court."

First, the Commissioner must decide the merits of the controversy. Then proceedings to procure a review require a decree *pro forma* by a Justice of the Superior Court, as though duly heard and determined by said Court. Both requirements clearly provide that cases under this Act must not be sent up piecemeal. In equity procedure it is irregular to bring exceptions to the Law Court before final hearing, and interlocutory decrees await determination on appeal until after final decree, when all previous decrees and orders are open to revision, renewal or approval. *Bath* v. *Palmer*, 90 Me., 467, 38 A., 365; *Maine Benefit Association* v. *Hamilton*, 80 Me., 99, 13 A., 134.

True, certain modifications of this rule are sometimes recognized in equity, as fully discussed in *Bean* v. *Power Co.*, 133 Me., 9, 173 A., 498; but they have no application here.

Appeal dismissed.
Case recommitted to Industrial Accident Commission for further proceedings.

INHABITANTS OF GUILFORD *vs.* INHABITANTS OF MONSON.

Piscataquis. Opinion, May 29, 1936.

PAUPERS AND PAUPER SUPPLIES. CONSTRUCTION OF STATUTES.

P. L. 1933, CHAPTER 203.

In construing pauper statutes it is the underlying principle that settlement of children should follow that of the parent who was responsible for their support.

The term "stepchildren" is ordinarily defined as the children by a former marriage of either the husband or wife. In a literal sense it might be considered to have application to children of a living father where the remarriage of the mother had taken place after the divorce. It is the duty of the Court, however, to interpret the provisions of P. L. 1933, *Chapter* 203, *in accordance with established principles relating to pauper settlements and consonant therewith, and which at the same time obviate anomalous and absurd situations.*

A statute of doubtful import is to be expounded, not according to the letter, but according to the intention of the makers.

The fundamental rule in construction of statutes is that they are to be construed according to the intention of the Legislature. All statutes on one subject are to be viewed as one. Such a construction must prevail as will form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration.

To relieve ambiguity and dispel doubt a rational and reasonable interpretation of P. L. 1933, *Chapter* 203, *conformable to well-established principles of pauper law, requires that the meaning and interpretation of the word "stepchildren" be restricted to the class who have lost their father by death, and whose place is filled by a "stepfather."*

On report on an agreed statement of facts. An action of assumpsit brought by the plaintiff town against the defendant town to recover the sum of $624.81 for pauper supplies furnished by plaintiff town to three minor children. The issue involved the construction of P. L. 1933, Chapter 203, Section 2, as to the meaning of "stepfather" as used therein. Judgment for the plaintiff for

$624.18 with interest from date of writ. The case fully appears in the opinion.

John P. White, for plaintiff.

Pattangall, Williamson, Birkenwald, for defendant.

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

MANSER, J. On report upon agreed statement of facts. Assumpsit for reimbursement for pauper supplies furnished to three minor children.

The facts necessary for a determination of the case, as shown by the agreed statement of the parties, are as follows: Francis Jerome Dudley is the father of three legitimate minor children. His wife, Lelia, was divorced from him upon her libel, on September 24, 1923. The pauper settlement of the father has been continuously in the defendant town of Monson. Sometime after the divorce, Lelia Dudley married one Clyde Leighton, whose pauper residence during the time covered by the writ was in the town of Willimantic in this State. After the divorce, pauper supplies were furnished by the plaintiff town of Guilford for the minor children. The defendant town, where the father of the children admittedly had his pauper settlement, reimbursed the plaintiff town for all of such supplies up to August 1, 1933. From that time until July 6, 1935, the plaintiff town continued to furnish pauper supplies for the children, but the defendant town has denied liability, upon the ground that the pauper settlement of these minors was changed by virtue of the provisions of P. L. of 1933, Chap. 203, and remained so changed until the repeal of this law, which took effect July 6, 1935.

For more than a century, by language of the same import and since the revision of 1857 in the same verbiage, our statutes provided that "Legitimate children have the settlement of their father, if he has any in the state; if he has not, they have the settlement of their mother within it; but they do not have the settlement of either, acquired after they are of age and have capacity to acquire one." R. S., Chap. 33, Sec. 1. The law thus stood in 1923, when the divorce was granted. Such divorce effected no change in the pauper settlement of the minor children. The defendant town, where the

father had his settlement, was responsible for pauper supplies furnished to his children.

In 1929, by P. L., Chap. 191, this section was amended by adding thereto the words: "Minor children of divorced parents, if given into the custody of either parent by the decree of divorce, shall follow the settlement of the parent to whom custody is given; if custody is not given, such children shall follow the settlement of their father, unless emancipated."

This amendment had no application to the circumstances then existing in the present case, because it applied only in cases where parents were divorced after July 12, 1929.

Then followed the amendment of 1933, effective for two years, and repealed in 1935, with respect to stepchildren, and which is as follows: "Stepchildren have the settlement of their stepfather, if he has any in the state; if he has not, they shall be deemed to have no settlement in the state." P. L. 1933, Chap. 203, amending R. S., Chap. 33, Sec. 1, II.

The question of emancipation is not involved, as the report of agreed facts states the children in this case were not emancipated.

If this statute effects a change in the pauper settlement of the legitimate minor children of Dudley, then the defendant town is not liable for the period covered by the suit. If no change was effected, then it is liable. The amendment must be construed to determine whether unemancipated minor children of a living father who is divorced from his wife lose their pauper settlement derived from their father, and acquire settlement of the man whom the wife later marries. Did the new husband become their stepfather and did they become his stepchildren within the purview and intendment of the amended statute?

In construing the original statute, the Court has said in effect that the fundamental principle upon which it rested was that the settlement of legitimate children should be that of the father, whose duty it was to maintain and support them and who was entitled to their services. *Springfield* v. *Wilbraham*, 4 Mass., 493; *Portland* v. *New Gloucester*, 16 Me., 427; *Hampden* v. *Brewer*, 24 Me., 281; *Hampden* v. *Troy*, 70 Me., 484.

"It is also settled that at least during the life of the father, the mother, in the absence of any statutory provision, or decree relat-

ing thereto, not being entitled to the services of their minor children, is not bound by law to support them." *Gilley* v. *Gilley*, 79 Me., 292, 9 A., 623, 624.

With these principles well established, the Legislature in 1929, by P. L., Chap. 191, amended the section relating to legitimate children by adding the provision with reference to minor children of divorced parents.

While this amendment does not apply to the present case, it recognizes the underlying principle that settlement of children should follow that of the parent who was responsible for their support. This principle was pointed out in *Hall* v. *Green*, 87 Me., 122, 32 A., 796, that when a divorce is granted to a wife and the care and custody of a minor child is committed to her by decree, "It follows that the father becomes entirely absolved from the common law obligation which previously rested upon him to support such child."

Again, the common law rule is that "a stepfather, as such, is not under obligation to support the children of his wife by a former husband, but that, if he takes the children into his family or under his care in such a way that he places himself in *loco parentis*, he assumes an obligation to support them, and acquires a correlative right to their services." 20 R. C. L., 594.

Our Court expressed the same principle as follows: "The father-in-law (stepfather) is not bound to support the children of his wife by a former husband, in consequence merely of his union with the mother." *Dennysville* v. *Trescott*, 30 Me., 470; *Parsonsfield* v. *Kennebunkport*, 4 Me., 47.

There are cases in this State in which the decisions had the effect of making the settlement of the stepfather the same as that of the stepchild. Analysis of these decisions shows that in each case the father of the child had no pauper settlement in the State, and under the statute then existing the child took the settlement of the mother. When the mother remarried, after death or divorce of the husband, the settlement of the child changed with that of the mother. *St. George* v. *Rockland*, 89 Me., 43, 35 A., 1033; *Albany* v. *Norway*, 107 Me., 174, 77 A., 713.

"It is only when the father has no settlement in this state, that the children follow the settlement of the mother, and if she marries a second time, her newly acquired settlement then becomes

theirs also." *Thomaston* v. *Greenbush*, 106 Me., 242, 76 A., 690, 691.

Generally speaking, however, the pauper settlement of minor children remained that of their father, even after his death. So, too, it was decided in *Farmington* v. *Jay*, 18 Me., 378, that a child born posthumously takes the settlement of his deceased father.

The term "stepchildren" is ordinarily defined as the children by a former marriage of either the husband or wife, and in a literal sense might be considered to have application to children of a living father where remarriage of the mother had taken place after divorce. Yet it is the duty of the Court to interpret the statute in accordance with the established principles relating to pauper settlements and consonant therewith, and which at the same time obviates anomalous and absurd situations.

For illustration: If the construction claimed by the defendant town were adopted, and if the mother of the children married, as her second husband, a man who had no settlement in the State, then the children lost any settlement whatsoever, although they had a living father, responsible for their support, whose settlement remained in the defendant town.

Again, under a literal construction, it might even be contended that the children in the actual custody and control of their own father lost their settlement derived from him, because their mother remarried.

"It is a rule of law, that a statute of doubtful import, is to be expounded, not according to the letter, but according to the intention of its makers." *Woodward* v. *Ware*, 37 Me., 563.

As well said in *Smith* v. *Chase*, 71 Me., 164, "The fundamental rule in the construction of statutes is that they are to be construed according to the intention of the legislature. Another is, that all the statutes on one subject are to be viewed as one. Such a construction must prevail as will form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration. The context, and the course of legislation, as matter of history often throw light upon the meaning and application of terms used in the statutes."

To the same effect are *Porter* v. *Whitney*, 1 Me., 306; *Pierce* v. *Bangor*, 105 Me., 413, 74 A., 1039.

Restricting the meaning and interpretation of the word "step-children" to the class who have lost their father by death and whose place is filled by a stepfather, gives to the statute a rational and reasonable interpretation, conformable to well-established principles of pauper law and at the same time relieves ambiguity and dispels doubt. The Court is of opinion that the intent of the Legislature is thus correctly interpreted.

Under the terms of the report, the mandate will be

Judgment for the plaintiff for $624.81, *with interest from date of writ.*

GEORGE E. GOODWIN *vs.* THE TEXAS COMPANY.

ROBERT STEWART *vs.* THE TEXAS COMPANY.

Cumberland. Opinion, June 25, 1936.

NUISANCE. DAMAGES. WATERS AND WATER COURSES.

It is settled law in this State that one who creates a nuisance upon another's land is under legal obligation to remove it. Successive actions may be maintained until he is compelled to do so.

In the case at bar, the Court holds that the distinction between stopping the flow of a stream, with consequent flooding of property of another, and waste committed on real estate is obvious.

The cases are to be returned to the Superior Court that evidence may be taken out as to the amount of damages to which each plaintiff is entitled, and assessment of damages therefor, from August 19, 1933, to July 26, 1935, with interest and costs.

On report. Two actions for damage to real estate caused by an obstruction of a water course, and for other damages. Judgment

for plaintiffs. Cases remanded for hearing on the amount of damages. The cases fully appear in the opinion.

Milan J. Smith, for plaintiffs.

Strout & Strout, for defendant.

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

BARNES, J. On report. These two actions for damages for nuisances brought about and maintained by the defendant on lands of the plaintiffs, were argued together, and this opinion applies in each case.

The writs were issued on July 26, 1935.

They charge that from August 19, 1933, to date of their issuance plaintiffs have suffered separate damages as a result of the construction by defendant, in 1930, of a ten-acre block of made land.

For their damages from date of the construction to August 19, 1933, plaintiffs were awarded damages by jury, as reported in 133 Me., 260, 176 A., 873, 874.

The verdicts, sustained in the report of the former cases, were based on damage, by salt water, and by flooding caused by obstruction of a natural water course, and in that report we say, "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 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 damages found in the reported case were paid but the nuisance was not abated, and plaintiffs brought the present actions to recover damages for the period from August 19, 1933, to July 26, 1935.

In the report we note that the allegations in the declarations in the present cases are substantially the same as set forth in the former actions, with other allegations, complaining of the continuance of the obstruction of the natural water course to the dates of these writs, with the further frank statement, "The defendant claims that the damages so recovered represented the permanent damage to the plaintiff and this action cannot be maintained for that reason."

We are furnished with the testimony and the charge of the Justice who presided in the reported case. In that case, without objection of opposing counsel testimony was given as to depreciation of value of plaintiffs' houselots, and in discussing the evidence, in his charge the learned Justice alluded to testimony as to depreciation. But, apparently bearing in mind that in the case of nuisances every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts (8 R. C. L., 541, Sec. 92), he clearly and, we think, correctly instructed the jury, at the close of his charge, as to inadmissibility of such testimony in an action for damage by maintaining a nuisance on property of another.

The final instruction to the jury on this branch of the charge was as follows, "You cannot estimate or allow to either plaintiff any sum for damages that you may believe have happened after the date of the writs, which is August 19th, 1933. Their cases, if you reach that point, can be figured up to August 19, 1933, but not a day afterwards.

"This case is different from many, perhaps most, cases of a somewhat similar nature.

"No figuring can be done as to permanent depreciation of their properties or permanent loss of comfort and loss of quiet enjoyment, because in law successive suits can be brought for the nuisance, in the future another suit from the date of the bringing of the last suit up to the date when the next one is brought, and so on indefinitely."

Sixty years ago Mr. Justice Walton, speaking for the Court, said, "It is now perfectly settled that one who creates a nuisance upon another's land is under legal obligation to remove it. And

successive actions may be maintained until he is compelled to do so." *C. & O. Canal* v. *Hitchings*, 65 Me., 140.

Repeatedly, and without variance, this fundamental principle of the law has been restated in our decisions, down to *Caron* v. *Margolin*, 128 Me., 339, 147 A., 419, where the cases are collected.

The distinction between stopping the flow of a stream, with consequent flooding of property of another, and waste committed on real estate is so obvious as to call for no comment.

Evidence must be heard on the amount of damages to which each plaintiff is entitled, and the cases are returned to the Superior Court for assessment of damages, from August 19, 1933, to July 26, 1935, with interest and costs.

So ordered.

STATE OF MAINE *vs.* ALEXANDER CLOUTIER.

York. Opinion, July 31, 1936.

CRIMINAL LAW. EVIDENCE. EXCEPTIONS.

When the validity of a conviction depends upon circumstantial evidence, it is not for that reason any less conclusive. Crimes of violence are not usually committed in sight of man, and most murderers will go unpunished if resort can not be had to collateral facts from which the inference of guilt arises.

When many circumstances having their origin in unrelated sources and established by the testimony of impartial witnesses, all point in one direction, their force is often compelling, the inference to be drawn from them irresistible.

In considering exceptions the rule is now well established in this State that mere technical error will not justify a new trial. There must be substantial prejudice. A just verdict will not be lightly set aside.

In considering testimony as to good character the ordinary rule is that the inquiry must be as to the reputation in the community where the respondent was living.

In the case at bar, neither all, nor any substantial part of the circumstances established by proof could concur and leave any reasonable doubt in the minds of an impartial jury of the respondent's guilt.

No prejudice resulted to the respondent from the admission in evidence of two pieces of wood found under the body.

The admission in evidence of the front seats of the automobile and of the car itself was proper.

The admission in evidence of articles of clothing worn by the victim was proper, on the ground that the clothing not being torn tended to disprove the claim of the respondent that the girl met her death by falling from a moving automobile.

The question asked of Mederic Cloutier as to whether or not he had a license to drive an automobile was proper. It was not asked for the purpose of impeaching the witness. It was asked in an effort to show that he had actually driven his father's car.

The charge of the Court stated the law clearly, correctly and adequately.

There was no substantial error in the conduct of the trial. The rights of the respondent were safeguarded throughout. The verdict was warranted by the evidence. Justice would not have been satisfied by any other result.

Respondent indicted for murder by the Grand Jury for the County of York, was tried and found guilty. To the admission and to the exclusion of certain evidence, and to the refusal of the presiding Justice to give certain requested instructions, respondent seasonably excepted. After the verdict, a motion for new trial was addressed to the presiding Justice and denied. Appeal from such ruling was thereupon had. Exceptions overruled. Appeal dismissed. Judgment for the State. Case remanded to the Superior Court for sentence of the respondent. The case fully appears in the opinion.

Clyde R. Chapman, Attorney General,
Robert B. Seidel, County Attorney, for the State.
Richard H. Armstrong,
Simon Spill,
Hiram Willard, for the respondent.

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

THAXTER, J. The respondent, indicted by the Grand Jury for the County of York for the murder of Florence Grenier, pleaded not guilty, was tried and convicted. During the course of the trial

numerous exceptions were taken to the admission and to the exclusion of evidence, to the refusal of the presiding Justice to give certain requested instructions; and, after the verdict, a motion for a new trial was addressed to the presiding Justice, which was denied. The case is now before this Court on the exceptions and on an appeal from the ruling denying the motion for a new trial.

THE APPEAL

Florence Grenier, a girl seventeen years old, left her home in Williams Court, Biddeford, sometime between quarter and half past nine on Tuesday morning, August 20th, 1935. She passed from Center Street to Elm Street, walked easterly on Elm to Cutts Street, was observed proceeding southwesterly on Cutts Street, and was last seen about half past nine in front of the Buick & Olds Service Station at the corner of Elm and Cutts Streets, passing in the rear of a parked automobile which was identified as one belonging to John Cloutier, the father of the respondent. She did not return to her home and an intensive search was begun. She had been a friend of the Cloutier family, and the evidence clearly establishes that the respondent had shown her considerable attention. They had been automobiling together, to the moving pictures, and he had frequently come to the house for her. Cloutier had spoken to Irene Grenier of his affection for her sister, Florence, and had asked her to put in a good word for him.

Believing that Florence had entered the Cloutier car on the morning of her disappearance and had been driven off by the respondent, the Biddeford police placed him under arrest and questioned him as to her whereabouts. He denied even knowing this girl to whom he had been paying such close attention; he claimed that he had never ridden with her in an automobile; he refused to recognize her picture; at first he could not remember where he was the morning of her disappearance, and then claimed that he was at the mill at Alfred all day where his father worked. Finally, becoming very much distraught, he said: "I am going to tell you." At this time an interruption came when the telephone bell in the office rang; and when the interrogation was resumed, the respondent had recovered his composure and refused to divulge anything. There is no evidence whatsoever that there was any abuse of the prisoner at this

time. In fact he was carefully informed of his rights. On Friday morning there was further questioning under similar conditions. His reply was: "I will die before I talk."

Though it is true that sometimes those accused of crime, even though innocent, may through fear attempt to divert suspicion from themselves by false statements, yet such is not the usual conduct of innocent men. The statements of Cloutier in this instance are particularly significant, because, at the time when they were made, there was no charge of murder. The authorities were attempting to find a missing girl, one who had apparently been the sweetheart of the man, who, at the time of the search, denied ever having known her. His sudden lack of interest in her whereabouts, his failure to co-operate with those who were straining every energy to locate her, his disregard of her family with whom he had been on terms of intimate friendship, all cast the shadow of suspicion toward him. Alone, of all people in that community, he seemed to have no concern about her. To the agonized inquiries of relatives and friends, his reply was: "I do not know the girl."

On Friday morning, three days after her disappearance, the body of Florence Grenier was found in a dump in the town of Lyman about three hundred feet from the main highway leading from Biddeford to Alfred. It was partially covered with boxes, branches and rubbish. Under the head, soaked with blood, was a small pillow similar to those used as a back rest in chairs or automobiles. The condition of the body indicated beyond question that the girl had come to her death by violence. Her clothing was drenched with blood; there was a deep cut on her forehead apparently made by some blunt instrument; there was a compound fracture of the skull extending from the base of the nose to the top of the head and from there to the back of the left ear; the lower jaw was fractured and the chin pushed back into the mouth. With the exception of slight bruises, there were no marks of any kind on the body. The nature of the injuries indicated that her face and head had been beaten with some blunt instrument. It was without question an incredibly brutal murder.

Cloutier's whereabouts in the early morning of August 20th, the day of her disappearance, seem to be fairly well established. He left his home in Biddeford in the family automobile and drove his father

and his brother, Noe, to the Shepard Morse sawmill at Alfred where they worked, a distance of approximately twelve miles. They arrived there about quarter past six. William R. Berry, who lived about a mile from Alfred on the Biddeford road, testifies that sometime between seven and eight in the morning, the respondent stopped at his house and wanted to borrow fifty cents with which to buy some gasoline. Instead of giving him the money, Berry gave him some gas. The respondent at this time was neatly dressed in blue pants and a light shirt. Arthur Boulay, who was employed at the Staples Service Station on Franklin Street in Biddeford, testifies that Cloutier stopped at his station about eight o'clock and bought gasoline. The time is fixed very definitely, for a charge slip was offered in evidence and Boulay states that the sale to the respondent was made about half or three-quarters of an hour after a sale to a man named Greenier, who called at the station at half past seven every morning. According to the testimony of Mederic Lebel, who was employed in the service station at the corner of Elm and Cutts Streets, the respondent next appears there about half past nine. He parked his car in the street, walked to the station, and talked to Lebel. He was cleanly dressed and his hair was neatly combed. He said that he was waiting for some one. Looking outside, and apparently seeing the person whom he was expecting, he left and got into his car, leaving the right-hand door open. Lebel saw a girl, whom he recognized as Florence Grenier, cross the street and walk in back of the car. He heard the door close and saw the car drive off. These details fit in with the testimony of Romeo Gagne and Blanche Bastille who testify that they saw the girl coming down Cutts Street about a quarter or half past nine. The testimony of Everett McLeod, who worked at the mill, is significant in this connection. He saw the respondent at the mill between seven and eight in the morning, and thereafter until after dinner he did not see him, nor was the Cloutier car in its usual parking place.

From this testimony the jury was warranted in finding that Cloutier drove his father and brother to the mill at Alfred early in the morning; that he left there sometime between seven and eight and drove first to Mr. Berry's, then to the Staples Service Station in Biddeford, and finally arrived at the corner of Cutts and Elm

Streets where he was expecting to meet Florence Grenier; that he did meet her there about half past nine; that she entered his car; that they drove off; and that she was never seen again alive.

His own story of his movements is confused, at some points at variance with established facts, uncorroborated except by members of his family, evasive, and altogether improbable. He admits driving back to Biddeford to buy tires, but claims that after leaving the Staples Service Station, where he talked with Boulay, he drove back to Alfred. There, he says, he went to see a man by the name of Jones, who worked at the mill packing shavings. Jones, however, did not appear at the trial. Then he drove to Springvale to look at a steam engine. Just what his purpose was in so doing is not explained, except that his father had an interest in the engine. He then spent the rest of the morning at the mill in Alfred. His father says that he saw him about the mill during the morning. Neither the respondent's testimony nor that of his family carries conviction. It is inconsistent with their previous testimony and with their earlier statements. It is highly significant that the respondent himself does not recall his visit to the service station where Lebel says he talked with him for it was here that the murdered girl was last seen alive.

Under the head of Florence Grenier, as she lay in her shallow grave, was found a cushion. It was certainly not by chance that her head happened to fall on that. Just what may have been passing through the mind of her murderer, as he laid her battered features on that pillow, we can only guess. Boulay testifies that he saw such a cushion in the Cloutier car when the respondent stopped at his filling station for gas, and that he moved it to one side in the front seat when he got in at Cloutier's suggestion to try the car. Jeanette Bill, who had ridden in the car and had been a visitor at the Cloutier house, testifies that she had seen this cushion in the car and at the house. Archille Angers, who operated a truck and had moved the Cloutier family, testifies that such a cushion was among the furnishings of the Cloutier family and that he had used it in moving to place between articles of furniture to protect them. As against all this, Cloutier claims that there never was any cushion in the car. His brother, Noe, says the same thing. Others state that they never

saw the cushion in the house or in the car. Some possible bias against the family was indicated by Jeanette Bill, but the statements of Boulay and Angers seem impartial and convincing.

It is conceded that sometime shortly after noon the respondent was at the mill. Everett McLeod saw him sitting in his car after dinner. During the early part of the afternoon, the automobile mysteriously caught fire. Cloutier in his testimony offers no explanation of the cause of the fire. He claims to have first seen from the mill smoke coming from the car. McLeod, however, who helped put the fire out, says that Cloutier told him it was caused by a cigarette. Of real significance, however, is the statement of McLeod that, when he was helping to extinguish the blaze, which seems to have been confined wholly to the upholstery, neither the cushion for the back seat, nor the back cushion was in the car. These were both there at the time Boulay examined it in the morning; and it is, therefore, clear that between then and the time of the fire they had been removed. Certainly, after the fire broke out, there was no opportunity for Cloutier to have disposed of them. The cushions disappeared, and the only explanation offered is that of Mederic Cloutier, a brother, who says that he threw them on a fire in the dump Tuesday night. The remains of them were, however, never found there. After the fire had been extinguished, the respondent spent about two hours cleaning the automobile, and that night after it was brought home, John Cloutier, the father, washed it again. Had Florence Grenier been beaten to death in that automobile that morning, the telltale marks of blood, which must have drenched the back cushions, disappeared when the cushions were removed; and spattered blood stains were obliterated by the fire and cleaning. From one of the front seats about a third of the upholstery had been removed. An examination shows a clean, straight cut apparently made with a knife or pair of scissors.

In spite of fire and water, spots of human blood were found on the underneath part of one front seat, on the rear part of the other, and on the metal on the bottom of the right front door.

Prior to his arrest Cloutier had ample time to change and to clean the clothes which he wore Tuesday morning. His own statement of what he wore that morning does not agree with the testi-

mony of the witnesses for the State. In any event, neither the clothing which they said he wore, nor that which he said he had on, was produced at the trial.

All those who saw him early Tuesday morning agree that there was nothing unusual at that time about his appearance, unless it was that he was unusually neatly attired. There was no mark on his face, nothing in fact to attract attention. But, at the time of the fire, he had a fresh scar on his nose. That was received sometime between half past nine Tuesday morning and noon. It was seen by McLeod at the time of the fire; it was there when he was arrested on Wednesday. The officers who arrested him testify that they also found scratches on his neck, on his right ear, on his left shoulder, and on his arms. Significant, indeed, were these latter which he did not even attempt to explain. Some comment he evidently thought was necessary with respect to the mark on his nose. Wednesday, when he was arrested, he was not accused of murder. There was no apparent connection between the scar and a missing girl. What purpose was there in prevaricating? Yet, when asked by the officers how he received the injury, he said first that a piece of wood flew off the saw at the mill and hit him Tuesday. When one of the officers commented on the freshness of the scar, he said that the same thing happened again Wednesday. He later told them that while walking in the yard he stepped on the end of a stick which flew up and hit him in the nose. At another time he said that he got it while putting out the fire, and this was the story which he decided to stick to on the witness stand.

Those marks and that scar were by themselves some evidence that he had had a struggle with some one that morning. How he received them was open to explanation by him. When he failed to account for the scratches on his face, his neck and his arms, and gave an obviously untrue account of how he received the scar on his nose, their importance is magnified many times.

Such, in substance, is the case built up about this man. The defense failed to establish a satisfactory alibi. After his father, brothers and friends had finished their testimony, the jury were undoubtedly satisfied that he met Florence Grenier at half past nine in the morning, and that thereafter until sometime after noon, he was not

seen again. If Jones saw him, where was he at the trial? If Cloutier was about the mill all the morning, why is it that only his father and his brother testify to his being there? His alleged trip to inspect the steam engine seems to have been without purpose, and no one was found who could corroborate his testimony on this point. His movements to half past nine are fully accounted for; thereafter, for at least three hours, he drops from sight.

The validity of this conviction depends on circumstantial evidence. It is not for that reason any less conclusive. Crimes of violence are not usually committed in the sight of men, and most murderers will go unpunished if resort can not be had to collateral facts, from which the inference of guilt arises. The advances of science have furnished to the culprit additional means to escape detection; they are not denied to the state in the effort to suppress crime. The criticism of circumstantial evidence usually comes from those who view each separate circumstance by itself rather than in its relation to the others, from those who fail to see the whole pattern into which each separate incident so neatly fits. When many circumstances, having their origins in unrelated sources and established by the testimony of impartial witnesses, all point in one direction, their force is often compelling, the inference to be drawn from them irresistible. In *Commonwealth* v. *Webster*, 5 Cush., 295, 311, Chief Justice Shaw in his discussion of circumstantial evidence cites with approval the following language from East's Pleas of the Crown: "Perhaps strong circumstantial evidence, in cases of crimes like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous."

And so in this instance the State has proved that this girl was last seen alive as she was about to enter an automobile with this respondent; that she was murdered, and her body left at a lonely

place about six miles away; that the respondent's whereabouts that morning after half past nine were unaccounted for; that under her head was a sofa cushion similar in all respects to one that had been seen in the respondent's car that morning and at other times in his home; that a mysterious fire occurred in his car; that the cushions from the back seat were missing, and part of the upholstery on the front seat cut off; that, in spite of the fire within the car and the cleaning of it, spots of human blood afterwards were found in it; that the respondent, sometime during the morning of the girl's disappearance, received scratches on his face, neck and arms, and a scar on his nose; that his conduct strongly pointed to guilty knowledge of the girl's disappearance, in that when taken into custody he denied knowing her, when in fact she was a close friend; in that he said, "I will die before I talk," and at another time, "I will tell all"; that he failed to account for his whereabouts on the morning that she disappeared; that he gave a false explanation of how he received the scar on his nose.

Neither all, nor indeed any substantial part of these circumstances, could concur and leave any reasonable doubt in the minds of an impartial jury of the respondent's guilt. The verdict was fully justified. The motion for a new trial was properly denied.

THE EXCEPTIONS

In considering the exceptions it must at all times be borne in mind that the rule is now well established in this jurisdiction that mere technical error will not justify a new trial. There must be substantial prejudice. A just verdict will not be lightly set aside. *State* v. *Priest*, 117 Me., 223, 103 A., 359.

The respondent objected to the admission in evidence of Exhibits 3 and 4, two pieces of wood found under the body. The objection to these is based on the fact that they were in no way connected with the commission of crime. If such is the case, and they were merely a part of the debris that littered the dump where the body was placed, and like the ground stained with the blood of the victim, it is hard to see how the respondent was in any way prejudiced by their admission.

The respondent objected to the admission of Exhibits 6, 7, the front seats of the automobile used by the respondent, Exhibit 8,

the door, and Exhibit 13, the car itself. All of these were relevant and properly admitted.

Exhibits 9, 10 and 11 were different articles of clothing worn by the victim. Counsel contend that their admission in evidence was solely for the purpose of arousing prejudice against the accused. Such is not the fact. On cross-examination, counsel for the defense sought to prove by Dr. Love that the girl might have met her death by jumping or falling from a moving automobile. The witness suggested that, if such had been the case, the clothing would have been torn. The clothing was properly exhibited to the jury on this issue. That it was not torn was cogent evidence to refute such claim.

During the cross-examination of Mederic Cloutier, he was asked whether he had a license to drive a car. The respondent objected to the evidence on the ground that the witness could not be impeached in this manner. Conceding the soundness of this contention, the question was not asked for such purpose. The prosecutor was endeavoring to show that the witness disposed of the cushions by taking them somewhere in the car. The witness claimed that he walked and had never driven his father's car. In an endeavor to break down this testimony, he was asked if he didn't have a license to drive. His negative answer was certainly not prejudicial. He neither drove, nor had a license to drive. In any event, this particular inquiry was of trifling moment and the admission of the evidence would by no means justify the granting of a new trial.

The next exception relates to the exclusion of evidence that the respondent was taken to the morgue, shown the girl's body, and questioned there. Such evidence was properly excluded. Had statements of the respondent made under such conditions been offered against him, the objection might have had some force. The only admissions, however, which tended to incriminate him were made to the police prior to the time when the body was discovered, and to such statements there was no objection offered. By no possibility could the fact that he was subsequently questioned at the morgue after the body was discovered have any relevancy.

One Sam Jutras, a resident of Claremont, New Hampshire, was called as a witness by the defense to testify as to the good character of the respondent while living at Claremont. The Cloutier family had moved from Claremont to Biddeford two years before. The

witness testified that he knew nothing about Cloutier's reputation in Biddeford. The Court ruled that the evidence was inadmissible because the inquiry could be only as to his reputation in Biddeford where he was then living. The defense noted an exception. If he had lived in Biddeford a sufficiently long time to have acquired a reputation there, such ruling was correct. The Court had a discretion in determining this preliminary question, and in the absence of strong evidence showing the ruling is wrong, we can not hold that such discretion was abused.

The next exception relates to the admission of the testimony given by certain defense witnesses at the coroner's inquest. It was offered to show inconsistencies with their testimony at the trial. The exception is not seriously pressed. The testimony was clearly admissible for this purpose.

The last exception was to the refusal of the presiding Justice to give certain requested instructions relating to circumstantial evidence. These were seven in number. The Court gave the first exactly as requested. It was as follows:

> "I. Before you are justified in finding the respondent guilty on circumstantial evidence, the State must prove every circumstance upon which a conviction must rest 'beyond a reasonable doubt' and the evidence must also be sufficient to exclude 'beyond a reasonable doubt' every other reasonable hypothesis except that of the respondent's guilt, and if the evidence of the State fails to do this, the respondent is entitled to a verdict of not guilty."

This stated the law clearly, correctly, and adequately. The other six were hardly more than variations in phrasing of the one given, and, the subject having been adequately covered, they were properly refused.

Counsel complain of the remarks of the presiding Justice in explaining this instruction. These are as follows:

> "That means, Mr. Foreman and Members of the Panel, what I tried to explain to you and thought I had. I read that because I thought I might have omitted something. The circumstances upon which the State relies must, of course, prove

—must point to—all of them, all of those that are necessary to show the crime, must point to—the defendant's guilt. If they do not point to the defendant's guilt or if they point to the guilt of some other party, then the respondent is not guilty. I tried to say that in my main charge, but I read and give you the requested charge in addition to what I have said about it."

It is said that from this the jury would have been warranted in convicting the respondent if the circumstances merely pointed to the defendant's guilt. Taking the charge as a whole, and the instruction as given, this would be a very strained interpretation. Reading the whole charge, what the Judge really says is that all of the necessary circumstances must point to the defendant's guilt and to that of no one else. In addition, they must be proved beyond a reasonable doubt, and every other reasonable hypothesis than that of guilt must be excluded beyond a reasonable doubt. We do not see how there could have been any possible misunderstanding in the minds of the jury.

In any event, if counsel had thought otherwise, the remedy was to have called the matter to the attention of the Court and to have excepted to the explanatory remarks as made.

We find no substantial error in the conduct of the trial. The rights of the respondent seem to have been safeguarded throughout, both by his counsel and by the Court. The verdict was warranted by the evidence. Justice would not have been satisfied by any other result.

Exceptions overruled.
Appeal dismissed.
Judgment for the State.
Case remanded to the Superior Court for sentence of the respondent.

FRED E. GOODWIN *vs.* BOSTON & MAINE RAILROAD.

York. Opinion, July 31, 1936.

NEW TRIALS. EVIDENCE.

It is well settled that in considering motions for new trials the Court must view the evidence in the light most favorable to the plaintiff. On the defendant is the burden of proving that the jury's verdict is manifestly wrong.

If from facts and circumstances, satisfactorily proven, the normal, reasoning mind may infer that a fire was communicated from a railroad engine of the defendant, the jury may properly draw that inference.

In the case at bar, there was sufficient pertinent evidence to justify the finding that the defendant was liable for the damage.

On general motion for new trial by defendant. An action on the case to recover damages for loss of farm buildings and contents, alleged to have been caused by fire communicated by defendant's locomotive. Trial was had at the October Term, 1935, of the Superior Court for the County of York. The jury found for the plaintiff in the sum of $4,130.81. A general motion for new trial was thereupon filed by the defendant. Motion overruled. The case fully appears in the opinion.

Hollis B. Cole,
George D. Varney, for plaintiff.
Arthur E. Sewall, for defendant.

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

BARNES, J. This is an action on the case, to recover damages for buildings and contents destroyed by fire in Eliot, on the night of October 27, 1934, property of the plaintiff, who alleges that the fire was communicated to his ice house or shed by a locomotive of the defendant.

Verdict was for plaintiff, and in support of its motion for a new trial defendant argues only on liability.

The railroad right of way ran almost directly south over plaintiff's land, a hundred-acre farm.

His house stood about seventy-two feet west of the nearest rail, ice house and tool shed about one hundred nineteen feet therefrom. The barn, milk house and carriage house were west of the house, sixty and thirty feet distant.

Catching on ice house or contiguous shed, the fire consumed all the buildings except two small hen houses. The roof of the ice house was covered with old cedar shingles; that of the shed with paper roofing, old and torn.

The trial jury viewed the locus.

As this Court has most recently said in *Searles* v. *Ross*, 134 Me., 77, 181 A., 820, "In considering these motions, we must view the evidence in the light most favorable to the plaintiffs. On the defendants is the burden of proving that the jury's verdicts are manifestly wrong."

Some of the buildings were electrically lighted, but the ice house and tool shed were not wired for electricity, and the fire was first seen on roof or side of one or both of these buildings. It was urged by defendant that the fire was communicated from the house chimney.

A daughter of plaintiff, in the early evening put her baby to bed, and, about six o'clock, followed the child, in a room in the southeast corner of the house, on the first floor, a room having an east window looking on the railroad track.

The wife and grown sons retired, and plaintiff, after visiting the barn in the evening, went to bed, at about ten o'clock.

His testimony as to the wind, during the afternoon when he was working his team about the place, was: "It was very windy and changeable. I think it was squally that night. We had a snow squall, I remember, about eight o'clock." It was windy when he was at the stable in the evening.

The nearest neighbor, living northerly, drove into her dooryard at about eleven that night and testified to a wind from the northeast blowing in her face as she walked from her garage to her house.

She sat up till about 11:45, and as she started to her bedroom "noticed that awful flame down to Mr. Goodwin's."

At the Goodwin home the daughter was wakeful during the first hours of the night, and testified she was awake when the passenger train went by toward Boston, at about eleven o'clock. She said "I looked out of my window and saw a large blaze. Apparently they were coaling the engine, because there was such an enormous blaze it frightened me." She said she dozed back to sleep and awakened again about a quarter of twelve, saw a red reflection in the sky, arose, went to the dining room door, looked out of the (northerly) window "and saw the fire on the shed."

She roused the household; father and boys rushed out and up to save the farm machinery, which was in the tool shed.

The men folks testified the wind was then blowing from the track onto the farm buildings. Their water system, from a pressure tank, was put in use, but the fire persisted and soon ignited the house and shed.

Furniture, etc., was piled southwesterly from the house, where it, a bit later, was blazing, in part, and was a second time removed and guarded.

Against this testimony there was much presented, as to the perfect condition of the locomotive, the alleged fact it was running without pressure along a one per cent grade by the buildings.

Out of all the believable testimony the jury had to determine whence came the hot ember that ignited roof or wall of ice house or shed.

The only fire testified to as used in the Goodwin house that day was in the kitchen stove, a fire of dry wood.

Plaintiff testified that when he went to bed there was a little fire in that stove.

No other source is suggested whence the destructive spark may have come.

If from facts and circumstances, satisfactorily proven, the normal, reasoning mind may infer that the fire was communicated from defendant's engine, the jury may properly draw that inference.

Jones v. *Railroad Co.*, 106 Me., 442, 76 A., 710; *Interstate Mfg. Co.* v. *M. C. R. Co.*, 123 Me., 549, 121 A., 90; *Libby* v. *Railroad*

Co., 116 Me., 234, 100 A., 1025; *Warner* v. *M. C. R. Co.*, 113 Me., 129, 93 A., 53; *Duplissy* v. *Railroad Co.*, 112 Me., 263, 91 A., 983.

There is in the record enough to satisfy us that finding defendant liable in this case was justified by the pertinent evidence.

The jury had more to guide them than have we, for they inspected the locus, and much of the testimony was thus interpreted for them.

Motion overruled.

CITY OF OLD TOWN *vs.* CHESTER W. ROBBINS.

Penobscot. Opinion, August 3, 1936.

TAXATION. R. S., CHAPTER 14, SECTION 79.

The sale of land for taxes is the execution of a naked power.

All provisions of the statute, whether they relate to proceedings before, or subsequent to the sale, must be strictly complied with, or the sale will be invalid.

The statute exacts that, within thirty days, the collector "shall . . . make a return, with a particular statement of his doings in making such sale, to the clerk of his town, who shall record it in the town records; and said return, . . . shall be evidence of the facts therein set forth. . . ."

These commands are positive and direct; there is no limitation, no modification, attached to them.

One of the principal objects of returns of tax sales is that persons who are interested in the realty may be apprised of their situation. The return is: "the legal source from which the owner must ascertain what portion of his land, if any, has been sold for taxes, and . . . to learn what he is required to redeem."

The purchaser at a tax sale has no title till the expiration of the time for redemption. The deed is to be executed, but not delivered, immediately; it is to be put in the treasurer's office, and there remain two years, subject, meanwhile, on redemption from the sale, to cancellation. Redemption cuts off the purchaser's rights, and makes the original title absolute. This right of redemption need not be exercised unless it can be shown that the steps leading up to the sale have

been taken in strict accordance with law. The doctrine of caveat emptor applies to such sales in its fullest force.

The right of redemption is a substantial one.

In the case at bar, the purposed return, as made and filed, fell short, for want of signature and date, of compliance with the statute. No return, affording a basis for possible amendment, had been made.

On exceptions by plaintiff. Three writs of entry brought to recover possession of three separate parcels of real estate located in the City of Old Town. The issue involved the validity of tax deeds, and the construction of Section 79, Chapter 14, R. S. Exceptions overruled. The cases fully appear in the opinion.

Stanley F. Needham,

William H. Powell, for plaintiff.

Albert C. Blanchard, for defendant.

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

DUNN, C. J. These three real actions, to recover as many parcels of land, were brought by the city of Old Town, against the original resident owner, in reliance on tax titles.

The tenant pleaded the general issue.

The cases were heard as one, jury waived, on identical facts. Demandant did not prevail.

Title, if any, to the property, had been acquired by the demandant, on purchases at summary and direct sales to enforce liens, for 1930 tax delinquency, forfeitures of the real estate assessed being sought. R. S., Chap. 14, Sec. 75.

The statute will, for the sake of simplicity, hereinafter be cited by section only.

It may be assumed, for purposes of decision, that the lands were liable to taxation; that the taxes were duly laid; that they were liens; that all of the proceedings preliminary to the sales were regular; and that there was no error, afterward, excepting the return of the sales, required by Section 79.

At the trial, demandant offered, and there was introduced without objection, as the formal return of the tax sales, what the bill

of exceptions styles a "document." As tendered, acquiesced, and received, it was apparently supposed sufficient.

Section 79, prescribing the making of returns, is of moment. It exacts that, within thirty days, the collector

> "shall . . . make a return, with a particular statement of his doings in making such sale, to the clerk of his town, who shall record it in the town records; and said return, . . . shall be evidence of the facts therein set forth. . . ."

The commands of the section are positive and direct; there is no limitation, no modification, attached to them.

The section recites the form which the collector, in making his return, must, in substance, follow; the form is indicative that, to be complete, the return must be dated, and be signed by the tax collector.

The document lacked both date and signature. When this came to attention, counsel for demandant moved leave to amend. The judge found, from testimony, that what was intended as an official return, had been seasonably prepared and filed; and that want thereon of signature and date, arose from oversight, merely.

It was ruled that the return the collector had attempted to make was amendable to conform to facts. Permission being granted, the omissions were supplied by the collector who had sold the lands.

The tenant noted exception.

Later in the trial, the judge ruled that the purposed return fell short, as made and filed, of compliance with the statute; that it could not legally be amended; and that a proper return was necessary.

At this point demandant rested.

The tenant produced no evidence. The cases were decided, as has already been stated, in his favor.

Exceptions by demandant question rulings: That the statute relating to returns is mandatory; that the return was not amendable; that though it had been allowed amended, and admitted, once, it was not proof; and that, on all the evidence, the burden of proof had not been sustained.

The exceptions must be overruled.

One of the principal objects of returns of tax sales is that persons who are interested in the realty may be apprised of their situation. The return is "the legal source from which the owner must ascertain what portion of his land, if any, has been sold for taxes, and . . . to learn what he is required to redeem." *Burgess* v. *Robinson*, 95 Me., 120, 126, 49 A., 606.

All provisions of the statute, whether they relate to proceedings before, or subsequent to the sale, must be strictly complied with, or the sale will be invalid. *Landis* v. *Vineland*, 61 N. J. L., 424, 39 A., 685.

The sale of land for taxes is the execution of a naked power. *Baxter* v. *Jersey City*, 7 Vroom, 188, 191.

To prevent forfeitures, strict constructions are not unreasonable. *Cressey* v. *Parks*, 76 Me., 532; *Charleston* v. *Lawry*, 89 Me., 582, 36 A., 1103; *Baker* v. *Webber*, 102 Me., 414, 67 A., 144; *Milo* v. *Water Company*, 131 Me., 372, 163 A., 163.

The purchaser at a tax sale has no title till the expiration of the time for redemption. The deed is to be executed, but not delivered, immediately; it is to be put in the treasurer's office, and there remain two years, subject, meanwhile, on redemption from the sale, to cancellation. Secs. 76, 80. Redemption cuts off the purchaser's rights, and makes the original title absolute. This right of redemption need not be exercised unless it can be shown that the steps leading up to the sale have been taken in strict accordance with law. *Landis* v. *Vineland*, supra. The doctrine of caveat emptor applies to such sales in its fullest force. *Packard* v. *New Limerick*, 34 Me., 266.

A purpose of returns of tax sales is to facilitate redemption.

Mr. Cooley says: "The making of the return is important to the land owner if his right to redeem is to depend upon or be ascertained by it, and then the failure to make it would be fatal. If made, it should be filed or recorded in proper time, and should conform in its recitals and certifications to the statutory requirements." Cooley on Taxation (3rd ed.), page 989. See, too, *Ladd* v. *Dickey*, 84 Me., 190, 24 A., 813.

The right of redemption is a substantial one. *Martin* v. *Barbour*, 140 U. S., 634, 35 Law ed., 546.

The signature of the collector gives the return authenticity.

Undated returns on writs, primary to final inclusive, may be amended, *Haven* v. *Snow*, 14 Pick., 28, and when what was designed as the return is unsigned, the signature may be added; not, however, to affect the rights of innocent third persons. *Fairfield* v. *Paine*, 23 Me., 498; *Wilton, etc., Co.* v. *Butler*, 34 Me., 431; *Glidden* v. *Philbrick*, 56 Me., 222; *Briggs* v. *Hodgdon*, 78 Me., 514, 7 A., 387.

But the inherent and comprehensive power which courts have over their process, is without efficacy here, because of a governing statute. Sec. 79, before cited.

If, in forfeiture proceedings, a return of the sale of real estate, for an ordinary assessment of taxes, be amendable, the return must first have existence. Without the signature of the collector, there is no return. This principle finds support in our own cases. *Norridgewock* v. *Walker*, 71 Me., 181, 183; *Belfast Savings Bank* v. *Kennebec, etc., Company*, 73 Me., 404; *Topsham* v. *Purinton*, 94 Me., 354, 47 A., 919. See, too, *Bass* v. *Dumas*, 114 Me., 50, 95 A., 286.

Amendment could not alter the fact that no return of the sales, under signature of the collector, and dated, was ever made and filed. That which was made and filed, was simply a sheet of paper on which were certain words and figures; but no signature; no date. It was not entitled to record. *DeWitt* v. *Moulton*, 17 Me., 418.

Demandant further contends that the return had, with the approval of the court, been amended; that it was evidence, and ought to have been given consideration.

The case was being tried without the intervention of a jury, right to exceptions on the law reserved.

The judge was sitting as trier of the facts as well as the law. He permitted amendment; on deeper reflection, he ruled that there was no evidence of a return. He declared that what was meant for a return of the lands sold did not comply with the statute, and could not be amended. There was no error in that.

Another contention is that to establish a prima facie case, it only became necessary to introduce the tax deeds, Section 87; and that, the tenant offering no testimony, the deeds sustained the claim of title to the respective lots.

The "document," though held inadequate as a return, remained in evidence; which side introduced it was of no concern. *Foss* v.

McRae, 105 Me., 140, 73 A., 827. The fact was proved that no return of the sales, affording a basis for possible amendment, had been made. The prima facie showing of the tax deeds, standing alone, was overcome.

Exceptions overruled.

MANOOG MUGERDICHIAN *vs.* GEORGE GOUDALION.

York. Opinion, August 3, 1936.

PLEADING AND PRACTICE. R. S., CHAP. 96, SEC. 129.

The primary idea of the word "account" is some matter of debt and credit, or demand in the nature of debt and credit, between parties. The term implies that one is responsible to another for moneys or other things.

"Itemized account" is a detailed statement of items of debt and credit arising on the score of contract. "Itemized" requires specific statement.

Practice and authority has long sanctioned the account annexed as a simpler and more direct mode of declaring than the money counts for which it is substitute.

In the case at bar, the affidavit was prima facie evidence; it was sufficient to raise a presumption of fact, or to establish the fact in question unless rebutted. The conclusion below was justified.

On exception by defendant. An action of assumpsit brought on account annexed, for money loaned. The case was heard by the Court, without jury, with right of exceptions as to matters of law reserved. The issue involved the validity of plaintiff's affidavit of claim under Section 129, Chapter 96, R. S. To the finding for plaintiff, defendant seasonably excepted. Exception overruled. The case fully appears in the opinion.

Armstrong & Spill, for plaintiff.

Arthur J. Lesieur, for defendant.

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

DUNN, C. J. Did plaintiff, on the trial of his action of assumpsit on account annexed, to recover money loaned, by the introduction, in conformity with Revised Statutes, Chapter 96, Section 129, as amended by 1935 Laws, Chapter 138, of his own verifying affidavit, absent objection, with no proof independent, make out a case, which could properly be found to entitle him to a recovery? The answer is Yes.

The account annexed to the writ reads as follows:

"Biddeford, Maine
May 28, 1934

George Goudalion
To: Manoog Mugerdichian, Dr.

To money loaned June 1—1930	$100.00
Received on account	5.00
Balance	$ 95.00"

The declaration also comprised a count commonly called an omnibus count, combining all the money counts with one for goods sold and delivered and work and labor, but this count was not relied on.

The statute provides in part:

> "In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit with all proper credits given, and that the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statement made in such affidavit, and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence." R. S., *supra.*

Its further words are not of present relation.

The statute prescribes a rule of evidence; it puts itemized accounts into an evidential class of their own, without creating a

change in the substantive law. *Mansfield* v. *Gushee*, 120 Me., 333, 114 A., 296; *Hamilton Brown Shoe Company* v. *McCurdy*, 124 Me., 111, 126 A., 377.

In the Biddeford Municipal Court, where this action was begun, judgment went for plaintiff; thereupon defendant made an appeal to the Superior Court. That court referred the case. The referee left to the court of his appointment, decision as to admissibility, with respect to the form of action, of the affidavit offered in evidence.

Counsel mutually assenting, the court struck off the reference; and, plea of the general issue having been filed, and joined, the case was set for hearing anew.

A jury was waived, and trial was by the judge.

The affidavit was ruled competent, and, without remonstrance, admitted. Upon that, plaintiff rested.

Defendant produced no evidence. He rested; and argued for, but did not gain judgment. Decision was favorable to plaintiff.

The primary idea of the word "account" is some matter of debt and credit, or demand in the nature of debt and credit, between parties. The term implies that one is responsible to another for moneys or other things. *Whitwell* v. *Willard*, 1 Met., 216, 218.

An "itemized account" is a detailed statement of items of debt and credit arising on the score of contract. *Turgeon* v. *Cote*, 88 Me., 108, 33 A., 787. "Itemized" requires specific statement. *Dyar Sales, etc., Co.* v. *Mininni*, 132 Me., 79, 166 A., 620.

Practice and authority have long sanctioned the account annexed as a simpler and more direct mode of declaring than the money counts for which it is substitute. *Cape Elizabeth* v. *Lombard*, 70 Me., 396. See, also, *Elm City Club* v. *Howes*, 92 Me., 211, 42 A., 392; *Levee* v. *Mardin*, 126 Me., 133, 136 A., 696.

Whether the affidavit was permissible was a question of law. *Dyar Sales, etc., Co.* v. *Mininni*, supra. Allowed, probative force was determinable by the trier of the facts. *Mansfield* v. *Gushee*, supra; *Fishing Gazette Publishing Co., Inc.* v. *Beale & Gannett Company*, 124 Me., 278, 127 A., 904; *Dyar Sales, etc., Co.* v. *Mininni*, supra.

The affidavit was prima facie evidence; it was sufficient to raise a presumption of fact, or establish the fact in question unless re-

butted. *Foss* v. *McRae*, 105 Me., 140, 73 A., 827; *Kelly* v. *Jackson*, 6 Pet., 622, 8 Law ed., 523; *Troy* v. *Evans*, 97 U. S., 1, 24 Law ed., 941.

The conclusion below was justified.

The cases of *McCamant* v. *Batsell*, 59 Tex., 363, and *Saylor* v. *Hawes*, 30 Ariz., 197, 245 P., 354, cited by defendant, while applicable, are not controlling.

Exception overruled.

BRUNSWICK COAL & LUMBER CO. *vs.* WARREN W. GROWS.

Cumberland. Opinion, August 3, 1936.

REFERENCE AND REFEREES. FINDINGS OF FACT.

In the reference of cases by rule of Court, the decision of the referee upon all fact questions, where findings are supported by any evidence, is final.

In the case at bar, the contention by the defendant that the cause of action arising from the contract for sale of cord wood was extinguished, by substituting therefor an agreement for its satisfaction, (namely, payment of the notes in accordance with their original tenor,) and the execution of such substituted agreement, could not be maintained. The referee had found that there had been no such agreement. His finding of fact was conclusive.

On exception. An action to recover damages for breach of a written contract for sale and delivery of cord wood. The case was heard by a referee with right of exception as to matter of law reserved. To the acceptance of the referee's report, finding for the plaintiff in the sum of $582.00, defendant seasonably excepted. Exception overruled. The case fully appears in the opinion.

Joseph A. Aldred, for plaintiff.

Ellis L. Aldrich,

Sherwood Aldrich, for defendant.

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

DUNN, C. J. Defendant, who had a woodlot, was owing plaintiff, a dealer in fuel, certain promissory notes. They agreed, mutually, in writing, to change from money to cordwood the medium for paying the notes. Two hundred cords, selected, cleft, dried, of first-class quality and indicated kinds, in instalments over a definite period of time, proper credits, at the rate of $4.50 a cord, to be endorsed properly on the making of deliveries, was, in essence, what the parties contracted.

The notes themselves were in nowise varied; they always read the same.

Three cords of wood had been delivered, and a fourth was being unloaded, when plaintiff caused the wood then drawn to its yard to be inspected. All was classed inferior, and rejected.

Defendant did not bring more wood, or proffer any, but said that the round wood should not have been sent, and that as for the rest, he had nothing better.

Defendant later came for the four cords which had been delivered, only to be refused.

Plaintiff sued for breach of contract to deliver the wood, alleging total failure, and averring that no act on plaintiff's part prevented performance,—with claim for compensation for the loss sustained.

The case was referred, under a rule of court, to a referee, subject to exceptions as to matters of law.

The report of the referee, favorable to plaintiff, was accepted below.

The case is up on exception. Only questions of law are reviewable.

The referee settled the fact, from competent evidence, that there had been breach of contract; he determined, too, that had the two hundred cords of wood been delivered, each cord would have had a market value of $8.00.

Plaintiff, on a day preceding the hearing, left the notes at a bank, where defendant, meeting demand for payment, did so in cash.

Contention by defendant that the cause of action arising from the contract was extinguished, by substituting therefor an agreement for its satisfaction, (namely, payment of the notes in accordance with their original tenor,) and the execution of such substi-

tuted agreement, is not now open. The referee found that there had been no such agreement; his finding of fact is conclusive.

The referee assessed damages for nonperformance of the contract.

Though the four cords of wood delivered were not of contract grade, they were, nevertheless, retained and used by plaintiff.

On finding reasonable worth of the four cords, the referee deducted the amount from the damages. It would have been unjust to allow the plaintiff to keep the wood without paying anything.

In the reference of cases by rule of court, the decision of the referee upon all fact questions, where findings are supported by any evidence, is final. *Hawkins* v. *Theaters Co.*, 132 Me., 1, 164 A., 628; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171.

Exception overruled.

INHABITANTS OF TRENTON *vs.* CITY OF BREWER.

Hancock. Opinion, August 3, 1936.

PAUPERS AND PAUPER SUPPLIES. PAUPER SETTLEMENT.

The pauper settlement of a legitimate child is, by statute, that of his father, if he has one within the State. If the pauper settlement of the father changes during the child's minority, that of the child likewise changes, by operation of law, and regardless of the consent or desire of the parties. Upon emancipation, the child takes his father's pauper settlement, and retains it until he himself acquires a new one.

Emancipation may take place in one of several ways, during the minority of the child.

Marriage of a minor son, with the consent, and not contrary to the direction of his parents, works complete emancipation.

Emancipation is never presumed, but must always be proved. It may be implied from circumstances, or inferred from the conduct of the parties.

In the case at bar, whether Earland Tourtelotte was, while a minor, emancipated, and if so, where, at emancipation, was his father's pauper settlement, were pertinent inquiries. The evidence offered should have been studied by the jury. It could have been found to affect substantial rights essentially. Failure to present such evidence warranted the setting of the verdict aside, and the granting of a new trial.

On general motion for new trial by defendant. An action to recover for pauper supplies furnished by plaintiff town. Trial was had at the September Term, 1935, of the Superior Court for the County of Hancock. The jury found for the plaintiff in the sum of $374.89. A general motion for new trial was thereupon filed by the defendant. Motion sustained. Verdict set aside. New trial granted.

Percy T. Clarke, for plaintiff.

Frank B. Foster,

James M. Gillin, for defendant.

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

DUNN, C. J. In this action under the pauper statutes, Revised Statutes, Chapter 33, Section 29, as amended by 1931 Laws, Chapter 225, Section 27, plaintiff town gained the general verdict, and was awarded damages, substantially as claimed. Defendant city, by motion for a new trial, challenges the verdict.

In 1933, beginning on April 19, and ending with October 3; and again in 1934, February 10 to December 30, both dates inclusive; one Earland A. Tourtelotte had help, as a pauper, from Trenton. His wife and children were dependent upon him for support; in consequence of his impoverished condition, they too were destitute; the supplies in the account sued on were for Tourtelotte and his family.

The necessity for pauper assistance, the amount of supplies, the reasonableness of the charges, or the statute notices and replies, are not, as the case is submitted, in dispute.

One argument at the bar was whether certain evidence, upon which the jury, in determining the pauper settlement, should have passed, escaped consideration.

Earland A. Tourtelotte had been born in wedlock, in Ellsworth, on February 23, 1904.

Key questions in the trial court were: When was Earland Tourtelotte emancipated? and was his father's settlement, under the poor laws, then in Brewer, from having had his home there five continuous years, free from pauperism? R. S., *supra*, Sec. 1, par. VI.

It is accurate enough, as a broad statement, to say that a child, on coming of age, i.e., on attaining the age of twenty-one years, is, by virtue of that fact, emancipated. *Hampden* v. *Brewer*, 24 Me., 281; *Milo* v. *Gardiner*, 41 Me., 549; *Hampden* v. *Troy*, 70 Me., 484.

The word "settlement" means that a person has, on becoming poor and unable to support himself, a right of support from the town where his settlement may be. *Jefferson* v. *Washington*, 19 Me., 293. "Town" and "city," for present purposes, express the same idea. R. S., Chap. 1, Sec. 6, par. XIX.

The pauper settlement of a legitimate child is, by statute, that of his father, if he has one within the State. R. S., Chap. 33, Sec. 1, par. II, (amendments are not here material); *Oldtown* v. *Falmouth*, 40 Me., 106; *Monroe* v. *Jackson*, 55 Me., 55. If the pauper settlement of the father changes during the child's minority, that of the child likewise changes, by operation of law, and regardless of the consent or desire of the parties. *Milo* v. *Gardiner*, supra. Upon emancipation, the child takes his father's pauper settlement, and retains it until he himself acquires a new one. *Lowell* v. *Newport*, 66 Me., 78; *Orneville* v. *Glenburn*, 70 Me., 353; *Liberty* v. *Levant*, 122 Me., 300, 119 A., 811; *Winslow* v. *Old Town*, 134 Me., 73, 181 A., 816. The child, when emancipated, ceases to be a part of the father's family; hence, subsequent acquisition by the father of a pauper settlement does not affect that of the child.

If, for the moment, it be assumed, to give decision direction, that the pauper settlement of the father of Earland A. Tourtelotte, when the latter became of age, was shown to have been in the defendant city; yet another aspect of the case appears to have been overlooked.

"Emancipation," the dissolution of paternal authority during the lifetime of the parents, may take place in one of several ways, during the minority of the child.

It seems to be settled law that the marriage of a minor son, with the consent, and not contrary to the direction of his parents, works complete emancipation. *White* v. *Henry*, 24 Me., 531. When that case was decided, custody and control of an infant, as the law styles a person under age, was solely with its father; now, by statute, with both parents jointly. R. S., Chap. 72, Sec. 43.

Emancipation in infancy severs parent-child relationship as fully as though the child were twenty-one years of age. *Lowell* v. *Newport*, supra. Legal recognition is given to the fact of independent existence. Wharton, Conflict of Laws, Sec. 41.

Emancipation is never presumed, but must always be proved. *Sumner* v. *Sebec*, 3 Me., 223; *Wells* v. *Kennebunk*, 8 Me., 200. It may be implied from circumstances, or inferred from the conduct of the parties. *Wells* v. *Kennebunk*, supra; *Dennysville* v. *Trescott*, 30 Me., 470; *Bucksport* v. *Rockland*, 56 Me., 22; *Lowell* v. *Newport*, supra; *Carthage* v. *Canton*, 97 Me., 473, 54 A., 1104; *Merithew* v. *Ellis*, 116 Me., 468, 102 A., 301.

For instance, contracting the marriage status is generally a matter of notoriety in a town. *Sherburne* v. *Hartland*, 37 Vt., 528. Marriage, in the vicinity, without the parents interposing opposition, might be found to imply emancipation. *Bucksport* v. *Rockland*, supra.

To resume narration:

In the fall of 1919, the pauper's father removed from Ellsworth; he came to Brewer, all the members of his family with him, to remain indefinitely.

He stayed there ten consecutive years, double the time requisite to acquire a pauper settlement by residence. R. S., Chap. 33, Sec. 1, par. VI, cited before. However, the evidence may show that he had been living in Brewer but four years when his son Earland, then in his twentieth year, married.

Earland himself testified that he left Brewer the summer of 1923; his testimony is contended susceptible that he was then married.

The Brewer overseer of the poor, who investigated the claim that the pauper was a charge of that city, attested, on the witness stand, as follows:

"Why, my first act was to look over the city books to see if he had ever been a taxpayer in Brewer. Not being able to find him as a taxpayer I looked over the births and records and found nothing there. Finally the marriage records showed that one Earland Tourtelotte was married, in 1923 I think it was, in Brewer; but we found no further records."

The pauper, in a statement dated June 13, 1932, mentions his eldest child as eight years old. Witnessing, (the trial was at the September Term, 1935, in Hancock,) he said this child was eleven years of age. The evidence might tend to prove that the child had been born in 1924, as early as June or not later than September.

Birth of the child was preceded by the necessary period of gestation. *In re McNamara's Estate*, 181 Cal., 82, 183 P., 552. The usual period of pregnancy in a woman is forty weeks. *Young* v. *Makepeace*, 103 Mass., 50, 51.

Earland Tourtelotte became twenty-one in 1925. His first child may have been both conceived and born while he (Earland) was still an infant; and conceived prior to the acquirement by Earland's own father of a pauper settlement in Brewer.

The parents of the pauper were called to testify, by plaintiff. True, neither was asked whether consent to their son's marriage had been given; but, the case was not being developed on the theory of settlement derivative from the father, on the son's emancipation by marriage. As plaintiff's counsel, with commendable frankness, states:

"The jury was not instructed, the court making no reference to the marriage."

Was Earland Tourtelotte, while a minor, emancipated? If so, where, at emancipation, was his father's pauper settlement?

These were pertinent inquiries. The evidence offered should have been studied by the jury. It could have been found to affect substantial rights essentially.

There may, on occasion, be review of questions of law, on a new trial motion, though this is not compatible with best practice. *Pierce* v. *Rodliff*, 95 Me., 346, 50 A., 32; *Simonds* v. *Maine Telephone, etc., Co.*, 104 Me., 440, 72 A., 175; *State* v. *Meservie*, 121 Me., 564, 118 A., 482; *State* v. *Wright*, 128 Me., 404, 148 A., 141.

Injustice was, or might have been, done on the former trial.

The verdict is set aside, as against law. A new trial is granted.

Other legal propositions are argued; they need not, as decision hinges, be decided.

Motion sustained.
Verdict set aside.
New trial granted.

ALFRED LAPITRE *vs.* EDMOND BRETON, ALIAS EDMOND BUTLER.

Androscoggin. Opinion, August 5, 1936.

REFERENCE AND REFEREES. DEEDS. REAL ACTIONS.

One giving a deed with covenants of warranty can not thereafter deny the recitals in the deed, and set up an after-acquired title in derogation of that conveyed by such instrument.

In the case at bar, the Referee's apparent ruling that the defendant had a better title must be read in the light of the fact that the defendant had previously given a warranty deed of a half interest to the plaintiff's predecessor in title of the property involved in the suit, and that he is estopped now to set up his own title to the land, which he subsequently acquired.

On exception by defendant. A writ of entry to recover possession of land in Lisbon. The case was submitted to a Referee who found for plaintiff. Objections to the acceptance of the report were filed, and on its acceptance, exception was taken by defendant. Exception overruled. The case sufficiently appears in the opinion.

Aldrich & Aldrich, for plaintiff.

Clifford & Clifford, for defendant.

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

THAXTER, J. The plaintiff has brought a writ of entry to recover possession of certain land in the Town of Lisbon, Maine, from which he claims to have been disseized by the defendant. The case was submitted to a Referee who found for the plaintiff; written ob-

jections to the acceptance of the report were filed; and on its acceptance exceptions were taken by the defendant.

Two lots of land are mentioned in the plaintiff's writ. There is, however, no controversy with respect to the second. To it the defendant makes no claim. As to a portion of the first lot, the defendant has filed a disclaimer, his contention being that the premises described in the writ overlap to some extent his land.

The evidence is not printed but the contention is that the Referee's findings on their face are erroneous as a matter of law. The rulings of the Referee which are challenged are as follows:

> "Referee does not determine that the present plaintiff acquired title to the disputed area."
>
> "The evidence preponderates in favor of the defendant as to title having been conveyed to him of the area he now claims."

Counsel for the defendant cite the well-known rule that the plaintiff must recover on the strength of his own title, and claims that the Referee has, not only made no finding that the plaintiff has title, but has in effect ruled that the defendant has a better title. This contention, however, disregards one important element in the case. The present defendant had in 1906 by a warranty deed conveyed an undivided half interest in the strip in controversy to one Cesaree Greenwood from whose heirs the plaintiff claims title by deed dated January 29, 1921. The Referee's ruling is that notwithstanding the fact that the strip in controversy may not at that time have been owned by those who purported to convey it, yet the defendant, having previously given a warranty deed of it to one from whom through intermediate conveyances the plaintiff acquired title, is estopped now to set up his own title to the land, which he subsequently acquired.

The findings of the Referee must be read as an entirety. They are in accord with the well-established principle that one giving a deed with covenants of warranty can not thereafter deny the recitals in the deed, and set up an after-acquired title in derogation of that conveyed by such instrument. *Doten* v. *Bartlett*, 107 Me., 351, 78 A., 456; *Powers* v. *Patten*, 71 Me., 585.

Exception overruled.

SOPHIA B. GATCHELL AND FRANCES JEFFREY

vs.

MARION G. CURTIS AND HARVEY J. GIVEN,

AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE

ESTATE OF JAMES D. CURTIS, DECEASED.

Cumberland. Opinion, August 8, 1936.

ADOPTION. WILLS. EQUITY. R. S., CHAP. 80, SEC. 38.

Adoption is unknown to the common law; it exists solely by virtue of statute. Various legislative acts determine the right of the parties affected by the decree of adoption.

By the act of 1917 *now embodied in R. S.* 1930, *Chapter* 80, *Section* 38, *the Legislature expressly provided in case of intestacy for the descent of such property as the adopted child might own at his death. Such property as he acquired himself or from his adopting parents or their kindred is to be distributed in accordance with the general statute governing the descent of property as if the child had been born to them in lawful wedlock.*

A decree of adoption entered in accordance with power conferred by statute fixes the status of the child; it divests the natural parents of control and establishes the rights and obligations of the foster parents. It does not settle for all time the child's right to inherit property. That remains, as in the case of all persons, subject to legislative regulation, until it becomes vested by the death of him whose estate may be subject to administration. The same principle applies to rights of those who may inherit from the child.

In the case at bar, the Court holds that had James D. Curtis died intestate, his widow would not have been entitled to all of his estate. By waiving the provisions of his will, one half of the real estate descended to her, two thirds of which interest is not liable for the payment of debts. The other one third of her one half interest is subject to payment of one fourth of the debts and expenses of administration, the other three fourths of which together with the legacy of $2000 to Mrs. Jeffrey are chargeable against the other half interest of the real estate. The balance of such real estate or the proceeds thereof pass under the residuary clause of the will to the plaintiff, Sophia B. Gatchell..

On report. A bill in equity seeking the interpretation of the will of James D. Curtis. Case remanded to the sitting Justice for decree in accordance with the opinion.

Ellis L. Aldrich,
Sherwood Aldrich, for plaintiff.
Joseph H. Rousseau, for Marion G. Curtis.
Joseph A. Aldred, for Harvey J. Given, Admr.

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

THAXTER, J. This is a bill in equity seeking an interpretation of the will of James D. Curtis, who died a resident of West Bath in the County of Sagadahoc. It is brought by the legatees under the will against the widow and the administrator, c. t. a. The answers of the two defendants admit the facts as set forth in the bill. The case is before us on report on bill and answers.

The decedent, James D. Curtis, was the adopted child of James W. Curtis and Anna Curtis, who were residents of Brunswick in the County of Cumberland. The decree of adoption is dated April 20, 1895, and complied with the statutory provisions in force at that time. It reads in part as follows:

> "You therefore assume the relations of parents to said child, and will hereafter cherish, support, educate, and otherwise provide for him as though you were his natural parents and his natural parents are divested of all legal rights in respect to him, and he is free from all legal obligations of obedience and maintenance in respect to them; and he is, for the custody of the person and all rights of inheritance, obedience and maintenance, to all intents and purposes, your child the same as if born to you in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of your body, nor property from your lineal or collateral kindred by right of representation."

The adopted son received under the will of his adopting father, who died in 1910, two parcels of real estate located in Brunswick which, according to the inventory of the decedent's estate, are

worth $34,850. These two parcels comprise his entire estate. The plaintiff, Mrs. Jeffrey, under his will is given a legacy of $2000. This legacy can be paid and debts and expenses of administration satisfied only out of the proceeds of the sale of this real estate. Under the will the widow, Marion G. Curtis, was given "that portion of my estate which the laws of the State of Maine provides, and no more." The decedent died leaving no issue and no blood relations, but he was survived by a brother of his adopting mother and by a sister of his adopting father. The widow, Marion G. Curtis, under the provisions of R. S. 1930, Chap. 89, Sec. 13, waived the provisions of the will and claimed her right and interest by descent. Her contention is that by so doing she became entitled to that portion of her late husband's estate which would have descended to her had he died without a will, and that under the provisions of R. S. 1930, Chap. 89, Sec. 1, this was the entire estate because he was survived by no kindred. It is of course conceded by all that there being no issue, the widow takes one-half of the estate, two-thirds of which interest, it being all real estate, is free from payment of debts. Mrs. Jeffrey claims that her legacy should be satisfied out of the other half interest after the payment of debts; and the plaintiff, Mrs. Gatchell, claims the residue of the half interest after debts and the legacy to Mrs. Jeffrey are paid.

These matters are properly before the court on a bill for the construction of the will. *Haseltine* v. *Shepherd*, 99 Me., 495, 445, 59 A., 1025.

The real question to be decided is to whom would this estate have gone had James D. Curtis died intestate. If any part of it would have descended to the kindred of his adopting parents, the claim of his widow to the entire estate falls.

Counsel for the widow argues that the term "kindred" as used in the statute providing for descent and distribution refers only to blood kindred, and the case of *Warren* v. *Prescott*, 84 Me., 483, 24 A., 948, 949, is cited for the proposition as stated in the opinion that "By adoption the adopters can make themselves an heir, but they can not thus make one for their kindred."

But the important point to remember is that adoption is unknown to the common law; it exists solely by virtue of statute. We must accordingly look to the various legislative acts to determine

the rights of the parties affected by the decree of adoption.

The first statute in this state authorizing adoption of children, Pub. Laws 1855, Chap. 189, provided only for the custody and control over the child. Nothing was said as to rights of inheritance. Pub. Laws 1880, Chap. 183, provided that the child should have the right to inherit from his adopting parents unless the decree should otherwise provide. This provision for inheritance was only, however, to apply to adoptions thereafter made. Pub. Laws 1891, Chap. 78, provided that the property of an adopted child dying before reaching the age of twenty-one years unmarried and without issue received by virtue of the adoption should descend the same as if such child were by birth the child of his adopters. This gave to the adopting parents or their heirs a limited right of inheritance in the estate of the child. No further change was made until 1917, when this particular section of the statute relating to adoption was amended by Pub. Laws 1917, Chap. 245, to read as follows:

> "By such decree the natural parents are divested of all legal rights in respect to such child, and he is freed from all legal obligations of obedience and maintenance in respect to them; and he is, for the custody of the person and right of obedience and maintenance, to all intents and purposes, the child of his adopters, with right of inheritance when not otherwise expressly provided in the decree of adoption, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters, nor property from their lineal or collateral kindred by right of representation; but he shall not by reason of adoption lose his right to inherit from his natural parents or kindred; and the adoption of a child, made in any other state, according to the laws of that state, shall have the same force and effect in this state, as to inheritance and all other rights and duties as it had in the state where made, in case the person adopting thereafter dies domiciled in this state. If the person adopted died intestate his property acquired by himself or by devise, bequest, gift or otherwise before or after such adoption, from his adopting parents or from the kindred of said adopting parents shall be distributed according to the

provisions of chapter eighty, the same as if born to said adopting parents in lawful wedlock; and property received by devise, bequest, gift or otherwise from his natural parents or kindred shall be distributed according to the provisions of said chapter eighty as if no act of adoption had taken place."

This provision has now been embodied in R. S. 1930, Chap. 80, Sec. 38.

Conceding the force of the argument of counsel for the widow that "kindred" when used in the statute governing the descent of property means "blood kindred," we must still hold that the Legislature, if it so desires, can include other kindred than blood kindred within its scope. This it did in 1880 when it provided that an adopted child should inherit from its adopting parents as if born in lawful wedlock. The case *Warren* v. *Prescott*, supra, in holding that adopters could make themselves an heir but not one for their kindred, was given to the statute then in force its proper limitation.

By the act passed in 1917 the Legislature expressly provided in case of intestacy for the descent of such property as the adopted child might own at his death. Such property as he acquired himself or from his adopting parents or their kindred is to be distributed in accordance with the general statute governing the descent of property as if the child had been born to them in lawful wedlock. It seems perfectly obvious that, if this statute governs this case and James D. Curtis had died intestate, the property here in question which he had acquired from his adopting father would have descended to his uncle and his aunt by adoption as his next of kin.

Counsel for the widow contends, however, that such statute having been passed since the adoption does not control, that it is the act which was in effect at the time of the adoption which determines the rights of the parties.

Such is not the law. The case of *Latham, Appellant*, 124 Me., 120, 126 A., 626, is a direct authority to the contrary. A decree of adoption entered in accordance with power conferred by statute fixes the status of the child; it divests the natural parents of control and establishes the rights and obligations of the foster parents. It does not settle for all time the child's right to inherit property. That remains as in the case of all persons subject to legislative

regulation, until it becomes vested by the death of him whose estate may be subject to administration. The same principle of course applies to the rights of those who may inherit from the child. The rule is well set forth in *Latham, Appellant,* supra, at page 122, in the following language:

> "The rights of descent flow from the legal status of the parties, and where the status is fixed, the law supplies the rules of descent, with reference to the situation as it existed at the death of the decedent."

The following authorities support this same general doctrine. *In re Clarence E. Crowell's Estate,* 124 Me., 71, 126 A., 178; *Gilliam* v. *Guaranty Trust Company of New York,* 186 N. Y., 127, 78 N. E., 697; *Sorenson* v. *Rasmussen,* 114 Minn., 324, 131 N. W., 325; *The Brooks Bank & Trust Company* v. *Rorabacher,* 118 Conn., 202, 171 A., 655; 1 Am. Jur., 659; 1 C. J., 1400.

The case of *Simmons, Appellant,* 121 Me., 97, 115 A., 765, is cited by counsel for the widow as authority for the proposition that the right of an adopted child to inherit is determined by the law in force at the time of the adoption. The adoption with which the Court was there concerned was by special legislative act passed in 1864, which provided that the adopted child should inherit from her adopting parents. The case holds that her heirs by blood were not deprived of their right to inherit from her. Counsel assumes, because the decision in this case was handed down in 1922, that the Court ignored the provisions of the act passed in 1917 which provided a different rule for the descent of property of an adopted child dying intestate. The reason that the act of 1917 is not mentioned in the opinion of the Court is because the adopted child, as will appear from the opinion in *Skolfield* v. *Littlefield,* 116 Me., 440, 102 A., 240, died in 1914. The general law then in force as established by Pub. Laws 1891, Chap. 78, and incorporated in R. S. 1903, Chap. 69, Sec. 35, made no provision for inheritance from an adult adopted child in favor of the adopting parents or their heirs. In this respect the provisions of the general law and the special act under which the decedent had been adopted were identical at the time of her death in 1914; and the case properly holds that her heirs should be sought in the family into which she was born rather

than in the family of which she became a part by adoption. The Court had no occasion to consider the effect of a statute on the devolution of the property of a child who had been adopted prior to its enactment.

Had James D. Curtis died intestate, his widow would not have been entitled to all of his estate. By waiving the provisions of his will, one half of the real estate descended to her, two thirds of which interest is not liable for the payment of debts. The other third of her one half interest is subject to the payment of one fourth of the debts and expenses of administration, the other three fourths of which together with the legacy of $2000 to Mrs. Jeffrey are chargeable against the other half interest of the real estate. The balance of such real estate or the proceeds thereof pass under the residuary clause of the will to the plaintiff, Sophia B. Gatchell.

The case is remanded to the sitting Justice for a decree in accordance with this opinion.

So ordered.

DOMINICK M. SUSI *vs.* ERMINE B. DAVIS.

DOMINICK M. SUSI *vs.* E. EVERETT DAVIS.

Waldo. Opinion, August 11, 1936.

REAL ACTIONS. PLEADING AND PRACTICE. TRESPASS DE BONIS ASPORTATIS.

In real actions, disclaimers must be filed at the first term and within two days after entry of the action.

In general, a judgment is conclusive only as to facts without proof of which the action could not have been maintained. In a real action on a plea of estoppel by a former judgment, it must appear that the issue of title was not merely submitted, but was determined.

The gist of the actions of trespass de bonis *is an injury to the plaintiff's possession. To maintain the action, it is essential only that the plaintiff at the time of the alleged trespass should have had either actual or constructive possession or a right to immediate possession of the personalty.*

Title to the land from which goods were taken is not necessarily in issue. A simple verdict of "not guilty" in such an action does not establish a finding upon the issue of soil and freehold nor determine the title to the locus.

In the case at bar, it appearing that the demandant proved title at least to all of Lots 10 and 11 lying west of the "Foster" or "Gore" line, he was entitled to judgment therefor. The ruling below directing a general verdict for the defendants was for this reason erroneous.

The record showed that the presiding Justice instructed the jury to return the opinion and mandate it handed down were not competent evidence of any fact in controversy between the parties in the pending actions; nor was the brief of counsel filed in that case.

The record showed that the presiding Justice instructed the jury to return verdicts for the defendant upon the ground that the plaintiff was estopped to litigate the question of title to the disputed area in the demanded premises by reason of the judgment in the prior trespass *de bonis asportatis* action between the same parties. The instruction was wrong, and exceptions thereto must be sustained.

On exceptions by plaintiff. Real actions to recover possession of lots in Gardiner and in the Town of Burnham. Trial was had at the October Term, 1935, of the Superior Court for the County of Waldo. To the admission of certain documentary evidence, and to the directing of a verdict for the defendants, plaintiff seasonably excepted. Exceptions sustained. New trials ordered. The cases fully appear in the opinion.

H. R. Coolidge, for plaintiff.

Locke, Campbell & Reid, for defendants.

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

STURGIS, J. Real actions to recover possession of Lots 10 and 11 in Gardiner and Williams Gore in the Town of Burnham. The actions were entered at the October Term of the Superior Court for Waldo County, but pleadings were not filed until the second day of the following January Term. The pleas were the general issue with a brief statement denying entry on part of the demanded premises and alleging estoppel by a former verdict and judgment thereon. The cases come forward on exceptions to the admis-

sion of evidence and to the granting of the defendants' motions for directed verdicts.

As appears by the Reports of this State, this is but an added chapter to a prolonged litigation over these lands and the incidental rights of the owners. Controversy here wages as to the dividing line between the easterly and westerly tier of lots in the Gore. The plaintiff claims that the divisional line between his lots in the westerly tier and the defendants' adjoining lands which lie in the easterly tier is the "Transit Line," so called, delineated on the plan of one Hayden and on another made in 1930 by Harry Green. The defendants claim that the dividing line is farther west and in accordance with the plan made by the same Harry Green as a court surveyor and called the "Foster" or "Gore" Line. The strip of land in controversy is from twenty-five rods to thirty-eight rods in width, extends the entire length and includes about one fifth of the demanded premises. The defendants claim no right, title or interest in the remaining westerly part of the demandant's lots. The record shows that the demandant proved title at least to all of Lots 10 and 11 lying west of the "Foster" or "Gore" Line, so called, and was entitled to judgment therefor. R. S., Chap. 118, Sec. 10; *May* v. *Labbe*, 114 Me., 374, 96 A., 502; *Spencer* v. *Bouchard*, 123 Me., 15, 26, 121 A., 164. In this respect, the ruling below directing a general verdict for the defendants was error.

The defendants take nothing by their attempted disclaimers of lands west of the "Foster" or "Gore" Line, so called. If sufficient in form and substance as a disclaimer, which we do not pass upon, it was not filed until the second term of the court, to which the action was returned. The docket entries show no enlargement of the time for filing by leave of Court, without which, to be effective, disclaimers should have been filed at the first term and within two days after entry of the action. R. S., Chap. 118, Sec. 6; Rule V, Supreme Judicial and Superior Courts; *Brown* v. *Webber*, 103 Me., 60, 61, 68 A., 456; *Hazen* v. *Wright*, 85 Me., 314, 27 A., 181; *Billings* v. *Gibbs*, 55 Me., 238; *Colburn* v. *Grover*, 44 Me., 47.

The former action, upon which the defendants relied for estoppel by judgment as pleaded in their brief statements, was recently before this Court and is reported as *Susi* v. *Davis, et al.*, 133 Me.,

354, 177 A., 610. The action was trespass *de bonis asportatis*, brought in Somerset County, and the declaration reads:

> "In a plea of trespass, for that the said defendants at said Burnham on the first day of February, 1932, with force and arms took and carried away one hundred and ten cords of pulp wood of the property, goods and chattels of the plaintiff of great value, to wit, of the value of eleven hundred twenty-two ($1122.00) dollars, and disposed of the same to their own use against the peace of the State."

The defendants there pleaded the general issue and filed Specifications of Defense of the following tenor:

> "That the defendants did not as in plaintiff's declaration alleged with force and arms take and carry away 110 cords of pulp wood of the property, goods and chattels of the plaintiff and of the value of $1122; that defendants did not at said time and place take and carry away any property of the plaintiff of any value."

The verdict returned at the trial in the Superior Court for Somerset County at the September Term, A. D. 1934, was general and in the following form:

> "The Jury find for the defendants."

So far as appears, no special verdict involving the title to land was found or returned.

The instant writs of entry, although between the parties to the former action of trespass are for entirely different and independent causes of action. Here, title to that part of the demanded premises in controversy is directly in issue. There, the land upon which the trespass was alleged to have been committed was not bounded or described, the only reference to its area and location being that the trespass occurred at Burnham. Nothing in the pleadings or the verdict in that case gives the slightest indication that title to the disputed strip here in controversy was there put in issue and passed upon by the jury.

In general, a judgment is conclusive only as to facts without proof of which the action could not have been maintained. In a real action on a plea of estoppel by a former judgment, it must appear that the issue of title was not merely submitted, but was determined. It is for this reason that it is uniformly held that a judgment in trespass *quare clausum* is not a bar to a real action. The only fact necessarily determined by such a judgment is that the plaintiff at the time had rightful possession of the particular locus where the alleged acts of trespass were committed. Although the defendant in the trespass action may have pleaded and proved title, the plaintiff may have had rightful possession. Title was not necessarily determined. *Kimball* v. *Hilton*, 92 Me., 214, 221, 42 A., 394.

In *Young* v. *Pritchard*, 75 Me., 513, this Court held:

> "To raise an estoppel, it is not sufficient to show that the matter in controversy may have been determined in the former litigation between the parties or their privies. The party claiming an estoppel against his adversary must make it appear affirmatively by legal evidence that it was determined.
>
> ". . . 'It is not the recovery but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.' 'In every action, . . . the verdict is conclusive as to the subject matter of the suit, and any matter particularly put in issue and found by the jury.' But it is just as essential that it should appear that it was 'found by the Jury' (or other tribunal to which it was presented), and that it was 'the ground upon which the recovery proceeded,' as that it was 'matter alleged by the party,' or 'particularly put in issue.' A simple 'not guilty' of the trespass alleged settles nothing as to the location of the line between the parties when it does not appear that there was any finding upon the issue of soil and freehold, or any precise definition and description of the locus."

See *Standish* v. *Parker*, 2 Pick. (Mass.), 20, 22.

The principles stated in these cases must be applied to judgments in actions of trespass *de bonis* when pleaded in bar of a real action. The gist of the action of trespass *de bonis* is an injury to the plain-

tiff's possession. To maintain the action, it is essential only that the plaintiff at the time of the alleged trespass should have had either actual or constructive possession or a right to immediate possession of the personalty. *Lunt* v. *Brown*, 13 Me., 236; *Freeman* v. *Rankin*, 21 Me., 446; *Jones* v. *Smith*, 79 Me., 446, 10 A., 254. Title to the land from which the goods were taken is not necessarily in issue. A simple verdict of "not guilty" in such an action does not establish a finding upon the issue of soil and freehold nor determine the title to the locus.

The case reported to the Law Court in the former action of trespass d. b. a. and the opinion and mandate it handed down are not competent evidence of any fact in controversy between the parties in the pending action. No more is the brief of counsel filed in that case. As was said in *Young* v. *Pritchard*, supra, we do not "see upon what principle it can be regarded as competent evidence of any fact in controversy between the parties." In so far as the exception reserved to the admission of evidence relates to the allowance of the introduction of these exhibits, it must be sustained.

At the trial below, as the record shows, the presiding Justice stated that his instruction to the jury to return verdicts for the defendant was based solely upon the plaintiff's estoppel to litigate the question of title to the disputed area in the demanded premises by reason of the judgment in the prior trespass *de bonis asportatis* action between the same parties. His ruling on this point was clearly wrong and the exception reserved must be sustained.

Exceptions sustained.
New trials ordered.

AUGUSTA TRUST COMPANY

vs.

AUGUSTA, HALLOWELL & GARDINER RAILROAD CO., ET ALS.

AND

HENRY LEWIS, ET ALS.

vs.

AUGUSTA, WINTHROP & GARDINER RAILWAY

ANDROSCOGGIN & KENNEBEC RAILWAY

AUGUSTA TRUST CO., AND AUGUSTA TRUST CO., TRUSTEE.

Kennebec. Opinion, August 11, 1936.

EQUITY. CORPORATIONS. STOCKS AND BONDS. MORTGAGES. ESTOPPEL.

It is universally recognized that, in the absence of express or implied prohibition or restrictions in its charter or other statute, a corporation has the implied power to issue bonds for any purpose for which it may lawfully borrow money or contract a debt, and special authority to that effect is unnecessary.

An agreement for conversion, although appearing on the face of the bonds, is in fact a separate independent agreement and no part of the bonds proper. Its presence does not affect their negotiability and its invalidity would not impair the liability of the obligors to discharge the debts.

The well-settled rule is that, in the absence of clear and express statutory authority therefor, preferred stockholders as such are not creditors of the corporation and can not be made so to the prejudice of actual creditors. Agreements made to accomplish this result without legislative sanction are against public policy and therefore illegal and void.

It is within the power of the legislature, by charter or statute, to prescribe that corporations may issue certificates in the form of certificates of preferred stock, so-called, making the holders creditors of the corporation as well as

stockholders, and giving them a lien upon the property of the corporation with priority over other creditors.

A statute conferring that extraordinary power upon corporations must be clear and definite in its terms. And of such preferred stock it is said that it is not ordinary preferred stock, nor technically is it preferred stock at all. It is sui generis, *not governed by the ordinary rules, but by the provisions of the statutes by which it is authorized.*

Preferred stock, so-called, may be issued in such a way and under such terms as to make the certificates thereof merely evidence of indebtedness and the holders creditors of the corporation and not stockholders.

A contract of a corporation, if illegal and void when made, because contrary to public policy, is not validated by a subsequent statute authorizing it.

The mere acceptance of a conveyance of land subject to a mortgage does not bind the grantee to assume and pay the mortgage debt.

When a party is to be deprived of his right to allege the truth by an estoppel, the equity must be strong and the proof clear. The estoppel must be certain to every intent and not taken by argument or inference.

In the case at bar, the preferences given the holders of the preferred stock in the conversion agreements were not authorized by statute when made. The certificates delivered to the holders of the bonds exchanged therefor designated the stock as preferred stock and certified that the holders were entitled to the number of shares therein enumerated in the "full paid preferred capital stock" of the companies. The holders of this stock had a right to vote in the election of directors and were entitled to receive fixed yearly dividends payable semiannually at the times therein specified. The certificates contained every essential feature of a certificate of preferred stock and none of a contract creating the relation of a creditor of the corporation.

The Androscoggin & Kennebec Railway Company was not liable for the debts secured by the mortgages of the Augusta, Hallowell & Gardiner Railroad Co., and the Augusta, Winthrop & Gardiner Railroad which incumbered the properties which they purchased at receiver's sale in the course of the foreclosure proceedings against the Lewiston, Augusta & Waterville Street Railway.

The Androscoggin & Kennebec Railway Company purchased the equities of redemption without assuming payment of the mortgage debts, and did not intentionally assume this obligation and it was therefore not liable to a deficiency judgment, nor was it estopped to deny that it assumed the mortgage debts.

On appeal. Appeals from decrees of a single Justice sitting in equity. The issue involved the right of the owners of preferred stock

to share equally and ratably in the security of the mortgages as provided in the trust indentures and the stock and bonds issued thereunder. Appeal sustained, and the cases remanded for entry of decrees modifying the original decrees in accordance with the opinion. In all other respects, decrees below affirmed. The cases fully appear in the opinion.

Walter M. Sanborn,
Robert B. Williamson, for August Trust Company.
Skelton & Mahon, for Androscoggin & Kennebec Railroad Co.
Sewall C. Strout,
Charles E. Gurney, for Henry Lewis, et als.

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

STURGIS, J. These causes, consolidated and tried together, come forward on appeals from the decrees of a single Justice of the Supreme Judicial Court sitting in equity. Interlocutory decrees already entered, and stipulations on file or noted on the briefs, dispose of numerous issues raised by the pleadings and pressed at the hearing below. As the cases are presented, the decrees below may be affirmed except as to rulings directly attacked on this review and argued on the briefs.

The Augusta Trust Company, a banking corporation located in Augusta, Maine, is the Trustee named in the General Convertible Mortgage which the Augusta, Hallowell & Gardiner Railroad Co., a street railway corporation formerly furnishing transportation service in and between the cities represented in its name, gave on June 18, 1901, to secure its issue of serial coupon bonds maturing July 1, 1951, and amounting in the aggregate to two hundred and fifty thousand ($250,000) dollars, of which bonds of the par value of fifty-five thousand ($55,000) dollars are outstanding, together with preferred stock in the amount of one hundred and ninety-five thousand ($195,000) dollars which was issued in exchange for the bonds in accordance with the terms of the mortgage, which gave to the holders of the bonds the right and privilege of converting the same into preferred stock of the Company secured under the mortgage both as to principal and dividends equally and ratably with

the bonds. Both the bonds and preferred stock were callable on or after July 1, 1911, and redeemable at par on July 1, 1951, with accrued interest and dividends thereon. All the franchises, lands, incomes, revenues and other property of every kind then owned or thereafter acquired by the Company were included in the conveyance to the Trustee and subjected to the lien of the mortgage.

The bonds issued under this mortgage each contained the following provision:

> "The holder of this bond has the right at any time to convert the same into the preferred stock of the Augusta, Hallowell and Gardiner Railroad Company by surrender hereof to the Treasurer of said Company for cancellation and exchange. Said preferred stock is two hundred and fifty thousand dollars in amount, in shares of one hundred dollars each, with agreed dividends of four per cent per annum, payable semi-annually, on the first days of January and July, callable in like manner as this bond, to be redeemed on July 1, A. D. 1951, and the payment of said dividends and the redemption of said stock at maturity, or on default, are equally and ratably secured by said trust mortgage and equally and ratably with the bonds and coupons secured thereunder."

The certificates of preferred stock by the same authority each bore on its face the inscription,

> "This stock is part of an issue limited to two hundred and fifty thousand dollars par value. The holder is entitled to receive and the Company is bound to pay hereon a fixed yearly dividend of four per centum, payable half-yearly on January 1 and July 1. This share is redeemable on or after July 1, 1911, at 104 and accrued interest, and will be redeemed at par on July 1, 1951. The payment of principal and dividends is equally and ratably secured by a trust mortgage to the Augusta Trust Company, Trustee, duly recorded in the County of Kennebec."

and on the back a certificate that the stock was issued in exchange for an equal amount of principal of the bonds and was equally and ratably secured with the bonds by the mortgage.

By authority of a vote of its stockholders at a meeting held on April 5, 1902, the Augusta, Hallowell & Gardiner Railroad Co. conveyed all its properties, rights, privileges and franchises to the Augusta, Winthrop & Gardiner Railway, a street railway corporation operating in the same or adjoining territories, which assumed the payment and satisfaction of all debts, contracts and liabilities of the old Company.

The Augusta, Winthrop & Gardiner Railway, on May 10, 1902, named the Augusta Trust Company as Trustee in its convertible first mortgage for one hundred and fifty thousand ($150,000) dollars given to secure an issue of bonds of like aggregate amount which were payable July 1, 1952, and convertible into preferred stock of the Corporation at the option of the holder on substantially the same terms and conditions as those appearing in the Augusta, Hallowell & Gardiner Railroad Co. mortgage already described in detail, which remained a senior incumbrance on the common properties included in the two mortgages. The record shows that bonds to the amount of ninety-five thousand ($95,000) dollars originally issued under this mortgage were finally converted into preferred stock, leaving bonds of the par value of fifty-five thousand ($50,000) dollars now outstanding. For the purposes of this opinion, all outstanding bonds and preferred stock issued under this mortgage may be treated as subject to the conversion privileges and provisions appearing in the general convertible mortgage of the Augusta, Hallowell & Gardiner Railroad Co. already herein described with quotations from the original text.

On February 1, 1905, the Augusta, Winthrop & Gardiner Railway, to secure another bond issue of one hundred and twenty-five thousand ($125,000) dollars, placed a second mortgage on all its properties subject, however, to the existing liens of the underlying mortgages already described. These bonds, of which one hundred thousand ($100,000) dollars remain outstanding, were payable January 1, 1935, and are in default. The Augusta Trust Company is also the Trustee named in this mortgage.

On or about April 27, 1907, the Lewiston, Augusta & Waterville Street Railway, under legislative authority acquired the consolidated properties, franchises and rights of the Augusta, Winthrop & Gardiner Railway and thereafter owned and operated the same

until, by decree of the Supreme Judicial Court in foreclosure proceedings begun on or about December 16, 1918, all its properties, rights and operating franchises were sold to a new corporation organized by the bondholders under Chapter 57 of the Revised Statutes (1916) and known as the Androscoggin & Kennebec Railway Company. By the terms of this sale, the properties covered by the mortgages of the Augusta, Hallowell & Gardiner Railroad Co. and the Augusta, Winthrop & Gardiner Railway were made subject to any valid and subsisting prior liens or legal or equitable interests therein, but without adjudication of the number, nature, validity or extent of the same or the rights of any person making claim thereto. It does not appear that there was any express provision in this decree or in the conveyance made pursuant thereto that the purchaser, the Androscoggin & Kennebec Railway Company, should assume the payment of any of the debts of the Lewiston, Augusta & Waterville Street Railway or any of its predecessors in title.

The Androscoggin & Kennebec Railway Company, for a time, operated the railway system it acquired under this foreclosure sale and until July 1, 1931, paid all coupons and dividends as they matured on the bonds and preferred stock issued under the several mortgages still incumbering their properties. On July 31, 1932, by authority of the Public Utilities Commission of Maine, the street railway systems originally operated by the Augusta, Hallowell & Gardiner Railroad Co., and later by the Augusta, Winthrop & Gardiner Railway, were abandoned. Part of the physical properties was sold and part of the proceeds deposited with the Augusta Trust Company as Trustee. Arrangements have been made for the deposit of the balance of the proceeds received from such sales but not paid over. At an earlier stage of these proceedings, foreclosure of the general convertible mortgage given by the Augusta, Hallowell & Gardiner Railroad Co. was ordered, and the Receiver, then appointed, has taken possession of the remaining assets and sold all or part under order of the Court.

The action of *Augusta Trust Company* v. *Augusta, Hallowell & Gardiner Railroad Co., et als.*, is brought primarily to foreclose the several mortgages given by the Augusta, Hallowell & Gardiner Railroad Co. and by the Augusta, Winthrop & Gardiner Railway.

The bill contains prayers for special relief in the form of instructions as to the proper disposition of the proceeds of the mortgaged properties and, upon allegations that the same will be substantially less than the amount remaining due upon the bonds and preferred stock issued under the mortgages and equitably the Androscoggin & Kennebec Railway Company is liable therefor, that judgment be entered against that Company for such deficiencies. The Androscoggin & Kennebec Railway Company, in its answer, denies liability for any part of the debts secured by these mortgages, and is concerned only in this issue on this review. Intervening bondholders, appearing in person and through a committee, deny the right of the owners of preferred stock to share equally and ratably in the security of the mortgages.

In *Henry Lewis, et al.* v. *Augusta, Winthrop & Gardiner Railway, et als.*, the complainants, as individual owners and as a Committee of the Bondholders, bring their bill specifically for the foreclosure of the convertible first mortgage of May 10, 1902, given by the Augusta, Winthrop & Gardiner Railway, and pray judgment against the Androscoggin & Kennebec Railway Company for any deficiency in the payment of the amount due upon their bonds resulting from such foreclosure. These complainants also deny the right of the holders of the preferred stock to share equally and ratably with the bondholders in the proceeds of the property covered by this mortgage. The issues raised in this proceeding having been already presented in *Augusta Trust Company* v. *Augusta, Hallowell & Gardiner Railroad Co., et als.*, the actions were consolidated and heard together, and a decree entered accordingly. The sitting Justice, after hearing, found and ruled that,

> (1) The holders of the preferred stock issued and outstanding in exchange for bonds under the general convertible mortgage of July 18, 1901, executed by the Augusta, Hallowell & Gardiner Railroad Co. and under the convertible first mortgage of May 10, 1902, executed by the Augusta, Winthrop & Gardiner Railway are entitled to
>
> > "share ratably with the holders of bonds issued and outstanding under said indentures in the benefits of their respective mortgages."

(2) The Androscoggin & Kennebec Railway Company has not assumed and is not liable for the debts secured by either of these mortgage indentures.

(3) As against the Androscoggin & Kennebec Railway Company, the Bill of Complaint of *Henry Lewis, et al.* v. *Augusta, Winthrop & Gardiner Railway, et als.*, is dismissed.

On these appeals, arguments are directed solely to these rulings. Other objections to the decree are now waived.

No question is raised, nor can be, as to the power of the street railway companies here involved to issue bonds secured by mortgages of their corporate properties and franchises within the limitations and for the purposes specified in their charters or elsewhere in the general statutes. Were express authority lacking, it is universally recognized that, in the absence of express or implied prohibition or restriction upon this power in its charter or other statute, a corporation has the implied power to issue bonds for any purpose for which it may lawfully borrow money or contract a debt, and special authority to that effect is unnecessary. Fletcher Cyc. Corp., Perm. Ed., Sec. 2650; 14-A C. J., 612 and cases cited.

Nor is the validity of these bonds impaired by the conversion agreements written into them permitting the holders to exchange them for preferred stock of the companies. Such an agreement for conversion, although appearing on the face of the bonds, is in fact a separate independent agreement and no part of the bonds proper. Its presence does not affect their negotiability and its invalidity would not impair the liability of the obligors to discharge the debts. The agreement "gains nothing in force by reason of its association with the stipulation of the bond. It must be construed as though embodied in a separate writing." *Lisman* v. *Milwaukee L. S. & W. Ry. Co.*, 161 Fed., 472; *Wood* v. *Whelen*, 93 Ill., 153; Fletcher Cyc. Corp., *supra*, Sec. 2693. We see no reason for giving a different construction to the conversion agreements because incorporated into the mortgage indentures.

Nor is there doubt as to the right of the street railway companies to increase their capital stock by issuing preferred stock in the strict sense of that term as known generally in corporation finance and law. The issues were duly authorized by votes of the stockhold-

ers under the general law then in force. Chapter 229, Public Laws 1901. This statutory authority, however, was general in its terms and did not, expressly nor impliedly, confer power upon corporations to issue preferred stock guaranteed both as to principal and dividends and secured by a lien upon the property of the corporation. The well-settled rule is that, in the absence of clear and express statutory authority therefor, preferred stockholders as such are not creditors of the corporation and can not be made so to the prejudice of actual creditors. Agreements made to accomplish this result without legislative sanction are against public policy and therefore illegal and void.

In *Spear* v. *Rockland-Rockport Lime Co.*, 113 Me., 285, 93 A., 754, 756, Savage, C. J., stating the opinion of the Court said:

> "A preferred stockholder is not a creditor. He is a stockholder, although his peculiar rights arise from contract. He is a stockholder as to creditors in general, and his rights are subordinate to theirs. He cannot claim dividends out of funds that are needed for, or that properly should be applied to, the payment of debts. . . .
>
> "Stockholders, even preferred stockholders, can have no priority over creditors." See *Belfast & M. Lake R. R. Co* v. *Belfast*, 77 Me., 445, 1 A., 362.

In *Warren* v. *Queen & Co.*, 240 Pa., 154, 87 A., 595, 597, after holding that the Act of April 28, 1873, P. L. 79, of that state did not authorize the preferred stockholder of a corporation to enforce payment of his stock in preference to the claims of creditors, that Court said:

> "Aside from the Act of 1873, it would be against public policy to permit a preferred stockholder to assert his claim as such against the funds of a corporation in preference to the claims of creditors. The stock of a corporation is its capital, and is responsive to the claims of its creditors. It is held in trust for the payment of the indebtedness of the corporation. The relation of a stockholder and a creditor to a corporation is not at all alike, but entirely different. A certificate of stock does not make the holder a creditor as well as a stockholder.

A stockholder cannot be both a creditor and a debtor by virtue of his ownership of stock: *Warren* v. *King*, 108 U. S., 389, 399. The stock is part of the capital of the corporation which the holder cannot withdraw until its indebtedness is paid. The preferred stockholder is but a stockholder with a right to have his dividend paid before dividends on the common stock are paid, and he is not entitled to any dividend until the corporation has funds which are properly applicable to the payment of dividends: 1 Cook on Corp., Sec. 271. He has the right to the dividends on his shares to the extent authorized by his certificate in preference to the holder of common stock, but beyond this he has no right superior to the holder of common stock, and both hold their stock subject to the payment of the indebtedness of the corporation. This is the settled rule recognized in all jurisdictions. A corporation has no right to make any rules by which the holder of stock, common or preferred, may be preferred in the liquidation of its assets over the creditors of the company."

In *Hamlin* v. *Toledo, St. L. & K. C. R. Co.*, 78 Fed., 664, 670, Lurton, J., says:

"There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. . . . The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. 'He cannot be both a creditor and debtor by virtue of his ownership of stock.' *Warren* v. *King*, supra. If the purpose in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of the stock might be withdrawn before the full discharge of all

corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy and void as to creditors affected thereby."

In Cook on Corporations (8th Ed.), Sec. 271, the author states the rule in this language:

"Formerly it was a matter of doubt and discussion whether or not a preferred stockholder had any rights as a creditor of the company or was confined to his rights as a stockholder. The law is now clearly settled that a preferred stockholder is not a corporate creditor. . . . A contract that dividends shall be paid on the preferred stock whether any profits are made or not would be contrary to public policy and void. An agreement to pay dividends absolutely and at all events—from the profits when there are any and from the capital when there are not—is an undertaking that is contrary to law and is void. Public policy condemns with emphasis any such undertaking on the part of a corporation as to its preferred or guaranteed stock. . . . An agreement of a corporation to pay the preferred stockholders before corporate creditors are paid is void. . . .

"Occasionally a mortgage is given by the corporation to secure the payment of dividends on preferred stock and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal unless it has been issued under express statutory authority. The courts have no power to give the stockholders a preference over creditors, even though the preferred stock is by its terms to be a lien on the property. . . . A mortgage to secure preferred stockholders may be good as to common stockholders but not as to subsequent corporate creditors. A mortgage given to secure preferred stock, while not valid as against corporate creditors, may be valid in the distribution of the assets after creditors are paid."

Among the many other authorities supporting the rule as stated, are *King* v. *Ohio & M. Ry.*, 2 Fed., 36, aff'd. in *Warren* v. *King*, 108 U. S., 389; *Continental Trust Co.* v. *Toledo, etc. R. Co.*, 72 Fed., 92; *Spencer* v. *Smith*, 201 Fed., 647; *Reagan* v. *First Na-*

tional Bank, 157 Ind., 623, 61 N. E., 575, 62 N. E., 701; *Cass* v. *Realty, etc., Co.*, 132 N. Y. S., 1074; *Hewitt* v. *Linnhaven, etc., Co.*, 90 Ore., 1, 174 Pac., 616. See Fletcher Cyc. Corp., *supra*, Sec. 6290; Note, 29 A. L. R., 258; 14 Corpus Juris, 416, 423; 7 Ruling Case Law, Section 171.

As recognized in the authorities cited, it is within the power of the legislature, by charter or statute, to prescribe that corporations may issue certificates in the form of certificates of preferred stock, so-called, making the holders creditors of the corporation as well as stockholders, and giving them a lien upon the property of the corporation with a priority over other creditors. Cook on Corp. (8th Ed.), Sec. 271; Fletcher Cyc. Corp., *supra*, Sec. 5291. It is held, however, that a statute conferring this extraordinary power upon corporations must be clear and definite in its terms. *Kinston Cotton Mills* v. *Wachovia Bank & Trust Co.*, 185 N. C., 7, 115 S. E., 883. And of such preferred stock it is said that it is not ordinary preferred stock, nor technically is it preferred stock at all. It is *sui generis*, not governed by the ordinary rules, but by the provisions of the statutes by which it is authorized. *Heller* v. *National Marine Bank*, 89 Md., 602, 43 A., 800. Suffice it to say that the preferences given the holders of the preferred stock in the conversion agreements here in controversy were not authorized by statute when made. The stock was not statutory preferred stock of the kind just described.

The argument is advanced that the certificates of preferred stock issued in exchange for bonds were in fact certificates of indebtedness and not stock. We can not concur in this view. It is true that preferred stock, so-called, may be issued in such a way and under such terms as to make the certificates thereof merely evidence of indebtedness and the holders creditors of the corporation and not stockholders. *Hazel Atlas Glass Co.* v. *Van Dyk & Reeves, Inc.*, 8 Fed. (2d), 716; *Armstrong* v. *Union Trust & Savings Bank*, 248 Fed., 268; *Savannah Real Estate, Loan & Building Co.* v. *Silverberg*, 108 Ga., 281, 33 S. E., 906; *Heller* v. *National Marine Bank*, supra; *Burt* v. *Rattle*, 31 Ohio St., 116; *Best* v. *Oklahoma Mill Co.*, 124 Okla., 135, 253 P., 1005; Fletcher Cyc. Corp., *supra*, Sec. 5294; 14 Corpus Juris, 416 and cases cited. Here, all facts and circumstances convincingly characterize the

preferred stock issued by the street railway companies as preferred stock. In each instance, the stockholders voted increases in the capital stock by the creation of preferred stock. The certificates delivered to the holders of the bonds exchanged therefor designated the stock as preferred stock and certified that the holders were entitled to the number of shares therein enumerated in the "full paid preferred capital stock" of the companies. The holders of this stock had a right to vote in the election of directors and were entitled to receive fixed yearly dividends payable semi-annually at the times therein specified. The certificates contain every essential feature of a certificate of preferred stock and none of a contract creating the relation of a creditor of the corporation. In *Warren* v. *Queen & Co.*, 240 Pa., 154, 87 A., 595, supra, reasons not more abundant or persuasive were deemed sufficient to fix the character of stock as preferred stock and not certificates of indebtedness.

The holders of the preferred stock contend, however, that, if their conversion agreements and the preferences therein created were unauthorized when made, their illegality has been removed by subsequent curative legislation. They call attention to Section 16, Chapter 203, Private and Special Laws 1907, which reads:

> "So far as the consent of the state is essential thereto, all the acts and doings of the Augusta, Winthrop and Gardiner Railway in the acquisition of the property and franchises of the Augusta, Hallowell and Gardiner Railroad Company and in the issue of its stocks and bonds and the mortgages securing the same, and also all the acts and doings of the Augusta, Hallowell and Gardiner Railroad Company in the issue of its stocks and bonds and the mortgages securing the same, are ratified, confirmed and approved."

We are not of opinion that the illegality of the conversion agreements was cured by this statute. The act does not clearly and definitely confer validity upon the agreements. The statute is not within the rule of *Kinston Cotton Mills* v. *Wachovia Bank & Trust Co.*, supra. Furthermore the validity of the conversion agreement depends upon the law existing when they were made. A contract of a corporation, if illegal and void when made because contrary to public policy, is not validated by a subsequent statute au-

thorizing it. *Schaun* v. *Brandt*, 116 Md., 560, 82 A., 551. This rule is not peculiar to corporate transactions. It applies to all contracts. "If an agreement was illegal by statute or on the grounds of public policy when made, it is not, according to the great weight of authority, rendered legal by repeal of the statute or by a subsequent change in public or legislative policy." 13 C. J., 261 and cases cited.

Nor can the conversion agreements be sustained on the ground of mistake or rendered valid by invoking the doctrine of estoppel. If it may be assumed that those who exchanged their bonds thereunder and the common stockholders and officers of the street railway companies believed the agreements to be valid when made, this was a mistake of law unaccompanied by other equities which entitle any of the parties to equitable relief. *Fenderson* v. *Fenderson*, 116 Me., 362, 102 A., 69. The agreements being void as against public policy, it is open to either party to urge the defense of illegality upon the principle that no one can be regarded as deceived into the supposition that a corporation can make a contract in which it is sought to enter if it is contrary to public policy. *Water Works Co.* v. *Brown*, 191 Ala., 457, 469; *Colby* v. *Title Ins. & Trust Co.*, 160 Cal., 632, 644, 117 P., 913; *Brown* v. *First National Bank*, 137 Ind., 655, 672, 37 N. E., 158; *Langan, et al.* v. *Sankey*, 55 Iowa, 52, 7 N. W., 393; *Seitz* v. *Michel*, 148 Minn., 80, 181 N. W., 102; *Wheeler* v. *Wheeler*, 5 Lans. (N. Y.), 355; 2 Beach on Pr. Corp., Sec. 438 et seq; 6 R. C. L., 819; 10 R. C. L., 729. See *Gardiner Trust Co.* v. *Augusta Trust Co.*, 134 Me., —, 182 Atl. Rep., 685.

It must be held, therefore, that by surrendering their bonds and taking in lieu thereof preferred stock, the bondholders of these street railway companies ceased to be creditors and became mere stockholders. Those who have not made the exchange and hold their bonds are entitled to the security of the mortgages shorn of the illegal conversion agreements. The preferred stockholders are not entitled to share in the assets of the companies until all creditors have been paid in full.

The ruling of the sitting Justice that the Androscoggin & Kennebec Railway Company did not assume payment and is not liable for the debts secured by the mortgages of the Augusta, Hallowell & Gardiner Railroad Co. and the Augusta, Winthrop & Gardiner

Railway must be affirmed. So far as appears in the record, the railway company purchased the equities of redemption in the properties covered by the mortgages subject to incumbrances but without assuming payment of the mortgage debts. Although the deed of the Receiver of the Lewiston, Augusta & Waterville Street Railway by which these equities were acquired is not before the Court, it is conceded that it contained no recital imposing personal liability on the grantee. Nor does any accompanying contract, fact or circumstance indicate that the purchaser intentionally assumed this obligation to pay the mortgage debts. The mere acceptance of a conveyance of land subject to a mortgage does not bind the grantee to assume and pay the mortgage debt. *Elliott* v. *Sackett*, 108 U. S., 132; *Fiske* v. *Tolman*, 124 Mass., 254; Jones on Mortgages (8th Ed.), Sec. 933. For particular application of the rule to the purchase of an equity of redemption at a judicial sale, see *Equitable Trust Co.* v. *United Box Board & Paper Co.*, 220 Fed., 714. No more is there convincing proof of a subsequent binding agreement by the railway company to assume these mortgages. If the acts and declarations of its officers could be construed as implying a promise to pay these debts, which is very doubtful, the promise is clearly without consideration and void. *Andrews* v. *Robertson*, 177 Cal., 434, 170 P., 1129; *Frase* v. *Lee*, 152 Mo. App., 562, 134 S. W., 10; *Green* v. *Hall*, 45 Neb., 89, 63 N. W., 119; *Brown* v. *Leeak*, 52 N. D., 398, 203 N. W., 185; 41 C. J., 727.

The Androscoggin & Kennebec Railway Company is not estopped to deny that it assumed these mortgage debts. In its annual reports to its stockholders and to the Public Utilities Commission of Maine, these mortgages, for a number of years, were included in its funded debt. It is not clearly established, however, that these reports were made for the purpose of inducing the purchase of bonds secured by the mortgages, or had that result. Apparently, the complainant, Henry Lewis, alone had access to the reports to the stockholders and, noting the amount of the funded debt, assumed that the mortgages were included in that liability item. These reports are not brought before this Court and their contents are largely a matter of conjecture. The appellant, Lewis, is not certain what reports he saw or when he read them. In cross-examination, he admits he knew that the railway company pur-

chased the properties at Receiver's sale subject to outstanding mortgages and "that they purchased it without assuming the debts." As to the reports to the Public Utilities Commission, so far as the record discloses, neither this appellant nor any other bondholders saw the reports or knew their contents. No other fact or circumstance is shown to the Court which would warrant the conclusion that any of the appellants, by relying thereon, were misled to their prejudice. Estoppel can not rest upon mere conjecture. When a party is to be deprived of his right to allege the truth by an estoppel, the equity must be strong and the proof clear. The estoppel must be certain to every intent and not taken by argument or inference. *Hooper* v. *Bail*, 133 Me., 416, 179 A., 404; *Stubbs* v. *Pratt*, 85 Me., 429, 27 A., 341; Coke, Litt., 352b.

The appeals are sustained and the cases remanded for entry of decrees modifying the original decrees in accordance with this opinion. In all other respects, the decrees below are affirmed.

So ordered.

PORTLAND TRACTOR CO., INC.

vs.

INHABITANTS OF THE TOWN OF ANSON.

Cumberland. Opinion, August 11, 1936.

MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW.

All municipal indebtedness or liability incurred beyond the constitutional limit is void and unenforcible, and the fact that the municipality has had the benefit of the contract by which the indebtedness was incurred does not render it liable upon an implied contract to pay the value thereof.

One who contracts with a city or town, by which an indebtedness or liability is created, must, at his peril, take notice of its financial standing and condition and satisfy himself as to whether its debt limit is or will thereby be exceeded.

In the case at bar, the contract in suit was illegal and void when made. Neither

prior authorization or subsequent ratification by the town, which does not appear, could give it validity.

The Selectmen of Anson were not and could not be authorized to make the contract which they signed. The Portland Tractor Co., Inc., in leasing the snow plow to them, was bound to take notice, at its peril, of the extent of their authority. No liability attached to the Town on implied assumpsit or otherwise on their unauthorized agreement.

On exceptions by plaintiff. An action on the case in which plaintiff sought to recover from defendant the sum of $2,500.00, the same being the lease price for a tractor and plow for the snow season of 1935. Trial was had at the November Term, 1935, of the Superior Court for the County of Cumberland. At the conclusion of the testimony, defendant moved for a directed verdict. To the granting of the motion, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Walter M. Tapley, Jr.

James M. Thorne, for plaintiff.

Bernard Gibbs, for defendant.

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

STURGIS, J. The Selectmen of the Town of Anson on February 5, 1935, attempted to enter into a contract with the Portland Tractor Co., Inc., of Portland, Maine, for the use of a Cletrac 80 tractor and Sargent plow for breaking roads during the remainder of that snow season. The contract was in the form of a written order signed by the Selectmen and thereafter accepted and approved by the president of the Tractor Co., and provided that the charge or rental price for the use of the plow was to be $2,500 payable within fifteen days from date of delivery, but "subject to ability of town to secure sufficient funds for truck expense and income account." The truck was delivered and used a few times, but the town failed to affirm the contract, denied liability, and refused to pay for the use of the tractor.

This action was begun by writ dated October 2, 1935, and entered at the following November Term in the Superior Court for Cumberland County. The declaration is in assumpsit on an account

annexed with omnibus counts attached. The specifications are limited to the amount of rental charge agreed upon in the contract made by the Selectmen and for accrued interest. The plea is the general issue. At the trial, the presiding Justice, on motion, directed the jury to return a verdict for the defendant. An exception was reserved.

The bill of exceptions shows in the exhibits and evidence made a part thereof that, at the annual town meeting held in Anson in March, 1932, pursuant to Article 23 of the warrant, it was voted

> "to ratify and confirm the action of the selectmen and the State Auditor's department in setting up an account entitled 'Truck expense and income,' said account to be continued as such hereafter and to be credited with the earnings of the trucks, tractors, and other road equipment, (at the same rates as allowed by the state for similar equipment) and the proceeds of sale of said trucks, tractors and other road equipment, and appropriate the proceeds of such credits for the cost of motor fuel, oil, grease, repairs, parts, freight and express on same, housing of such equipment, and the purchase, lease or rental of trucks, tractors and other equipment and other expense necessary and incidental to the owning and operating of such equipment."

This account was set up and thereafter from year to year carried on the books, but treated only as a bookkeeping entry. No moneys were transferred or specifically set apart as belonging to it. Credits were set up for the use of the road equipment of the town together with other small miscellaneous items, and moneys paid out of the town treasury for road expenses were debited. The account did not record any actual money transactions nor in its apparent credit balance represent the existence of funds available for the purposes enumerated in the vote by which it was authorized.

At the annual town meeting of March 5, 1934, under Article 22, the Town of Anson had voted to raise and appropriate $2,500

> "for the removal of snow, sanding streets and walks, and erecting snow fence, said appropriation, if any, to be available for expenditure until May 1, 1935."

But the moneys of this appropriation had been entirely expended when this contract for the lease of the snow plow was signed. The record further shows that the town did not have sufficient funds to pay the rental charge agreed upon and could not negotiate a loan. The last regular valuation of all the taxable property of its inhabitants was $937,013, and its net debt approximately $70,728.21. It was over its debt limit. Article XXXIV of the amendments to the constitution provides:

> "No city or town having less than forty thousand inhabitants, according to the last census taken by the United States, shall hereafter create and debt or liability, which single or in the aggregate, with previous debts or liabilities shall exceed five per centum of the last regular valuation of said city or town."

Mathematical computation shows that this constitutional prohibition had been disregarded and a further violation of it was attempted in this transaction.

The contract in suit was illegal and void when made. Neither prior authorization or subsequent ratification by the town, which does not appear, could give it validity. All indebtedness or liability incurred beyond the constitutional limit is void and unenforcible, and the fact that the municipality has had the benefit of the contract by which the indebtedness was incurred does not render it liable upon an implied contract to pay the value thereof. 3 McQuillin Mun. Corp. (2d Ed.), Sec. 1274; 19 Ruling Case Law, 987; 44 C. J., 138 and cases cited. One who contracts with a city or town, by which an indebtedness or liability is created, must, at his peril, take notice of its financial standing and condition and satisfy himself as to whether its debt limit is or will thereby be exceeded.

For still another reason, recovery was properly denied in this action. The Selectmen of Anson were not and could not be authorized to make the contract which they signed. The Portland Tractor Co., Inc., in leasing the snow plow to them, was bound to take notice, at its peril, of the extent of their authority. No liability attached to the town on implied assumpsit or otherwise on their unauthorized agreement. *Morse* v. *Montville*, 115 Me., 454, 99 A., 438; *Power Company* v. *Van Buren*, 116 Me., 119, 100 A., 371;

Michaud v. *St. Francis*, 127 Me., 255, 143 A., 56; *Buzzell* v. *City of Belfast*, 131 Me., 185, 160 A., 21.

No other points argued on the briefs show error in the ruling below. Upon the evidence, under the established rules of law, it was the duty of the presiding Justice to direct the jury to return a verdict for the defendant.

Exceptions overruled.

ERNEST PARADIS, APPELLANT

FROM DECREE OF THE JUDGE OF PROBATE

IN RE ESTATE OF DONAT J. PARADIS.

Oxford. Opinion, August 13, 1936.

EXECUTORS AND ADMINISTRATORS. PROBATE COURTS. DESCENT.

Under the common law rule as adopted in this State, title to real estate of a deceased person passes immediately upon the death to the heirs or devisees; the rents accruing after the death are incident to the reversion and go to such heirs or devisees; the administrator or executor as such has no right to enter upon the lands or take the rents, and the taxes accruing upon the real estate after the death of the deceased are payable by the heirs or devisees and are not chargeable by the administrator in his probate account.

An administrator may in some instances receive the income of real estate by request of the heirs or devisees, or with their acquiescence, and if so, should be allowed for the taxes paid.

Unless authorized by will, and except as above stated, executors and administrators c.t.a. have no legal right to take possession of real estate and collect rents until it becomes necessary to sell the real estate for payment of debts.

If one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his co-promisor for one half of the amount so paid.

The cause of action is founded, not upon the note itself, but upon an implied

contract of contribution. Such action must be commenced within six years after the cause accrues.

In the case at bar, there was no statement in either the exceptions or the findings that the administrator accounted to the Probate Court for rents and income from the real estate.

With reference to the note signed by the appellant and the decedent it appeared that the appellant did not sign for the accommodation of his brother, the decedent, neither did both sign as sureties or accommodation parties for another. They were principal debtors. They owed a joint and several note for $1,450, which was paid and taken up by the appellant. Having paid the whole of the note for which he and his brother were jointly liable, he had a just claim for contribution. The cause of action for contribution did not accrue until the note became payable, which was on January 30, 1919.

The payment cancelled and discharged the note. It no longer had life. The action should have been commenced within six years after the cause accrued.

With reference to the charge by the appellant for reimbursement for janitor service, the general rule applies that the expenses of management of real estate belonging to devisees are not to be charged out of the personal assets belonging to the estate of the decedent. The devisees were the owners. They were responsible for the proper expenses incurred in the management of the realty.

The appellant was not aggrieved by the disallowance of his several claims.

On exceptions to decree of Supreme Court of Probate disallowing certain items in the second account of the administrators c. t. a. of the estate of Donat J. Paradis. Exceptions overruled. The case fully appears in the opinion.

Ralph W. Crockett, for appellant.

Alice M. Parker,

Joseph R. Paquin,

Arthur J. Lesieur, for appellees.

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

MANSER, J. The case comes forward on exceptions to a decree of the Supreme Court of Probate disallowing certain items in the second account of the administrators c. t. a. of the estate of Donat J. Paradis, who died in 1929.

Ernest Paradis, the appellant, was first appointed special ad-

ministrator of the estate in April, 1930, and later in that year became co-administrator.

The Judge of Probate disallowed three items, two being claims for reimbursement to and charges of the appellant on matters arising after the death of the testator and the other his private claim against the estate.

The first item is a charge for reimbursement for one-third of the taxes for the year 1931, paid by the appellant upon real estate.

The finding of the presiding Justice upon this claim read as follows:

"As to taxes.

> The Judge of Probate disallowed the claim of Ernest Paradis, for ⅓ of taxes, 1931-1932, Blake Street property, $220.14.
>
> This Blake Street property is real estate which was owned in the lifetime of Donat J. Paradis, by the appellant, Ernest Paradis, and the deceased, Donat J. Paradis, who died on July 28th, 1929, testate.
>
> The appellant, Ernest Paradis, owned two-thirds, and the deceased, Donat J. Paradis, owned one-third, in common and undivided of said real estate. Ettienne Boisvert was appointed a special administrator of the estate of said Donat J. Paradis, deceased, on October 30th, 1929. Said Boisvert died March 19th, 1930. Said Ernest Paradis was appointed special administrator of the estate of said Donat J. Paradis on April 28th, 1930. Said Ernest Paradis and Fernand Despins were appointed administrators with the will annexed of the estate of said Donat J. Paradis, deceased, on August 22nd, 1930, and qualified as such on September 18th, 1930.
>
> From appellant's exhibit 1, it appears that the taxes for the year 1931 were assessed against Paradis Brothers. It does not appear that any of the taxes in question were assessed against the administrators under the provisions of Section 23 of Chapter 13 of the Revised Statutes of Maine, 1930.
>
> This item is disallowed."

From this concise statement of the situation it appears that no claim was made that the will authorized the administrators to deal

with the real estate. The taxes paid accrued after the death of the testator. The charge is made in the account of the joint administrators. No record appears that any taxes were paid by the special administrator. The appellant owned an undivided two-thirds interest of the real estate. The taxes were assessed against Paradis Brothers. The appellant sought reimbursement from the estate, in his capacity as administrator, for one-third of the amount paid.

The appellant can base no claim to such reimbursement under R. S., Chap. 76, Sec. 36. This empowers special administrators to control and cause to be preserved all real estate and to pay public rates and taxes. The taxes accrued in 1931 and the appellant completed his duties as special administrator in 1930.

Neither can he justify his position under R. S., Chap. 13, Sec. 23, which authorizes assessment of taxes to heirs or devisees of the deceased person, or in the alternative to the executor or administrator, and in the latter event provides that the charge shall be allowed by the Judge of Probate. No such assessment was made.

The question is thus narrowed to the proposition of whether an administrator c. t. a., as such, has the obligation to pay real estate taxes accruing subsequent to the death of his testator.

Under the common law rule as adopted in this State, title to real estate of a deceased person passes immediately upon the death to the heirs or devisees; the rents accruing after the death are incident to the reversion and go to such heirs or devisees; the administrator or executor as such has no right to enter upon the lands or take the rents, and the taxes accruing upon the real estate after the death of the deceased are payable by the heirs or devisees and are not chargeable by the administrator in his probate account.

An interesting and exhaustive annotation appears in 31 A. L. R., pages 4 to 46, from which it is manifest that this common law rule prevails throughout the country, except as modified in a few states by statute.

It is true that an administrator may in some instances receive the income of real estate by request of the heirs or devisees or with their acquiescence, as noted in *Kimball* v. *Sumner*, 62 Me., 305; and if so, should be allowed for the taxes paid.

In neither the exceptions nor the findings of the presiding Justice is there any statement that the administrator accounted to the

Probate Court for rents and income from the real estate. This being so, the language of the Court in *Lucy* v. *Lucy*, 55, N. H., 9, is pertinent: "It is plain that the administrator is accountable to the heirs, and not to the Judge of Probate, for the rents and profits; and if he gets any allowance for his services and expenditures, he must get it by a settlement with the heirs."

Administrators c. t. a. and executors have no legal right, unless authorized by the will, to take possession of real estate and collect rents until it becomes necessary to sell the real estate for the payment of debts. *Stinson* v. *Stinson*, 38 Me., 593.

Even in insolvent estates "it is the settled law of this State that rents and profits of the real estate of a deceased insolvent debtor, until it shall be sold for the payment of debts, belong to the devisee or heir-at-law and not to the executor or administrator.

"When an executor or administrator takes rents of real estate, by agreement with the devisee or heir, as assets, to save the real estate from sale, or for the advantage of all persons interested, then it is proper enough to include the same in the probate account; but by operation of law, independent of any agreement of the parties, such rents do not belong to the executor or administrator." *Brown* v. *Fessenden*, 81 Me., 522, 17 A., 709.

"Heirs and devisees have the rents of real estate until it is sold by an administrator or executor for the payment of debts, and for that reason they should pay the taxes. The taxes are a charge upon the rents." *Fessenden, Appellant*, 77 Me., 98.

This item was properly disallowed. If the appellant has not been reimbursed for taxes paid, his claim is against the devisees and not against the estate.

As to the second disallowed item, the presiding Justice made the following findings of fact and ruling of law:

> "Said appellant, Ernest Paradis, and the deceased, Donat J. Paradis, were joint and several makers of a certain witnessed promissory note for fourteen hundred and fifty dollars, dated January 30th, 1918, payable to the order of J. G. Chabot, one year after date, with interest at six per cent per annum, payable semi-annually, secured by a mortgage of real estate other than said Blake Street property. This note was

wholly paid by said Ernest Paradis, the appellant, on the second day of May, 1918. As stated above, Donat P. Paradis died July 28th, 1929. No evidence of part payment to said Ernest Paradis. This claim of Ernest Paradis is barred by the statute of limitations."

The exceptions recite that the facts so found were shown by evidence at the hearing and no claim of error is made in that respect, the exception being limited to the question of law involved. The appellant seeks the aid of the rule applicable to the right of contribution between co-sureties. He necessarily predicates his contention upon the ground that a witnessed promissory note is not barred by the statute of limitations until twenty years after the cause of action accrues, under R. S., Chap. 95, Secs. 94 and 97; that the appellant had a right of action upon the note itself against his co-maker, limited, however, to the contribution of his share of the joint obligation, and that the statutory limitation of twenty years is therefore applicable.

It is unnecessary to consider the application of legal principles relating to causes of action between co-surieties or co-guarantors, as that relationship is not shown to exist. The note was the joint primary obligation of both. The appellant did not sign for the accommodation of his brother, the decedent. Neither did both sign as sureties or accommodation parties for another. They were the principal debtors.

The principles stated in 17 R. C. L., 981, Sec. 358, which are cited as authority, have no application, for they refer entirely to the rights of a surety or guarantor. Even as to such parties, the supplement to the section cited, found on page 4372, materially modifies the text.

Simply stated, Ernest Paradis, the appellant, and Donat Paradis, his brother, the decedent, owed a joint and several note for $1,450, which was paid and taken up by the appellant. Having paid the whole of the note for which he and his brother were jointly liable, he had a just claim for contribution. *Hardy* v. *Colby*, 42 Me., 381.

The payment was voluntarily made before the note became due. It not being shown that it was at the request of the joint maker, the

cause of action for contribution did not accrue until the note became payable, which was on January 30, 1919. *Tillotson* v. *Rose, et al.*, 11 Metc., 299.

The payment cancelled and discharged the note. It no longer had life.

"When commercial paper is paid by the party whose debt it appears to be, it becomes *functus officio*, commercially dead, and no longer retains the character that it originally had. It is then but evidence of the transaction of its commercial life." *Bank* v. *Maxfield*, 83 Me., 576, 22 A., 479, 480.

The statute, which prescribed the period of limitation as to an action upon the note itself, no longer had application, as the note was extinguished. The payment created an implied contract, which gave to the payor his right of contribution, accruing, however, at the due date of the note.

The general rule is clearly expressed in *Rollins* v. *Taber*, 25 Me., 144, that "if one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his co-promisor for the one half of the amount so paid."

See also *Goodall* v. *Wentworth*, 20 Me., 322; *Soule* v. *Frost*, 76 Me., 119.

The cause of action is founded, not upon the note itself, but upon an implied contract of contribution. Such action must be commenced within six years after the cause accrues. R. S., Chap. 95, Sec. 90.

The promissory note was given in 1918. The Uniform Negotiable Instruments Act had then become effective in this State. The principles enunciated in the cited cases were established long before the passage of this Act, but the rights of the parties were not modified or changed by its provisions. As pointed out in *Owens* v. *Greenlee*, 188 Pac., 721: "Neither the Law Merchant nor the Negotiable Instruments Act attempted or attempts to prescribe or determine the rights of joint endorsers or joint makers as between themselves. These rights are left to be settled according to the principles of the common law and the equities between the parties."

The ruling of the presiding Justice was correct.

As to the third item disallowed, the findings of fact and ruling of the presiding Justice relative thereto, follow:

"Janitor service.

The Judge of Probate disallowed the private claim of said Ernest Paradis for 'janitor service, care of real estate of Donat J. Paradis, May 1, 1929 to November 1, 1931, 130 weeks at $6.00 per week,' $780.00.

Although this item speaks of 'real estate of Donat J. Paradis' . . . , yet the real estate referred to is the said one-third part in common and undivided of said Blake Street property, and being that one-third part thereof which said Donat J. Paradis owned in his lifetime. I do not find that said Donat J. Paradis, in his lifetime, ever expressly undertook, or promised, to pay said Ernest Paradis for any janitor service to be rendered by him in connection with their common property. The claim, as stated above, is in substance so stated in the reasons for appeal, although in the appeal it is stated 'To janitor service, care of real estate of Donat J. Paradis, May 1, 1931, 130 weeks at $6.00 per week,' $780. Whichever of these ways this claim is to be read and considered, it is disallowed."

It appears, therefore, that the administrator undertook to employ himself as janitor in connection with the real estate of which he owned two-thirds in common, and to charge the estate one-third of the expense.

The principles with reference to the ownership, control, management and expenses of devised real estate as stated with regard to the item of taxes herein considered, apply with equal force in this connection and need not be repeated. Ordinarily expenses of management of real estate belonging to the devisees are not to be charged out of the personal assets belonging to the estate of the decedent, and there is nothing to remove this instance from the general rule. The devisees were the owners. They were responsible for proper expenses incurred in the management of the realty.

The appellant is not aggrieved by the disallowance of this item.

Exceptions overruled.

FRANK B. CASSIDY, COLLECTOR OF TAXES

FOR THE TOWN OF HOULTON

vs.

AROOSTOOK HOTELS, INC.

Aroostook. Opinion, August 17, 1936.

TAXATION. ASSESSORS.

A lawful tax list requires the signatures of at least a majority of the Board of Assessors.

The tax list so signed may be the one retained by the assessors under Section 84, *Chapter* 13, *R. S.* 1930, *or another committed by them to the collector under Section* 81 *of the same chapter.*

If the list retained by the assessors is insufficient to constitute a lawful tax list because signed by only one assessor, yet if the list committed to the collector is lawful, so far as the tax list is concerned, recovery may be had of a judgment in personam for the tax.

Failure to describe the real estate in the tax list committed to the collector does not prevent recovery of a judgment in personam for the tax.

In order for a lien claimant to obtain a judgment in rem against a particular piece of real estate on which to levy to satisfy his lien, he must establish as a fact that the real estate specially attached is that on which his lien is a charge.

In the absence of any sufficient description in any valid tax list, either the one retained by the assessors or the one committed to the collector, there can be no enforcement of the tax lien.

A failure of the majority of the assessors to sign the tax list is fatal neglect to comply with the express provision of the statute and such a tax list can not be cured by amendment under Section 10 *of Chapter* 5, *R. S.* 1930.

In the case at bar, even though the recapitulation card when signed by only one assessor was insufficient to constitute a lawful tax list under Section 81, yet the list as contained in the collector's book was sufficient to permit recovery of a judgment in personam for the tax.

In the tax list there was insufficient description of the Snell House lot to charge it with a tax lien.

The error made by the assessors was not a matter of form, but of substance, and could not be corrected by amendment.

On exceptions by plaintiff. An action of debt to enforce the lien for taxes. Trial was had before a sitting Justice without jury, right of exception as to matters of law reserved. The presiding Justice entered judgment for the plaintiff for $1,355.00, being the amount of tax and interest, but refused to enter judgment against the real estate specially attached. To the latter ruling, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

J. Frederic Burns,
R. W. Shaw, for plaintiff.
Nathaniel Tompkins, for defendant.

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

HUDSON, J. This is an action of debt, based on Section 28 of Chapter 14, R. S. 1930, to enforce a real estate tax lien on the "Snell House Lot" in Houlton. By agreement, hearing was had by a single Justice without intervention of a jury. His decision was: "Entry may be judgment for plaintiff for one thousand three hundred fifty-five ($1,355.00) dollars. No judgment against real estate specially attached."

The plaintiff, his lien claim denied (and it was of vital importance to him because of prior incumbrances), presents to this Court four exceptions to rulings of the Trial Court, viz.:

1. "That the list of assessment did not constitute a statutory list by reason of the failure of the assessors to sign and to properly certify same."
2. "That this failure" (meaning to sign and certify) "was not corrected by the certificates dated December 5, 1935."
3. "That the plaintiff is not entitled to judgment against the real estate described in the writ because the attachment

and return thereof did not state that the property was attached for the purpose of enforcing a tax lien."

4. "Because the assessors'" (collector's) "book did not contain a description of the real estate, . . ."

These exceptions we will consider in their logical rather than their numerical order.

EXCEPTION 1

In 1932, when this tax was assessed, the Town of Houlton was using the "card system," so called. On an "orange card," sometimes called "the ten year card," was described and valued a single item of real estate with the name of the owner. If he had several taxable pieces of real estate, it took as many orange cards. The total valuation of one's real estate was entered on a white card, called the "final card," on which also appeared totals of his personal property valuations, his personal property taxes, real estate taxes, poll tax, the tax rate, and his total taxes. Neither the orange nor the white cards called for the signatures of the assessors but another, known as the "recapitulation card," did.

On the recapitulation card were entered totals of all taxable real estate and personal property valuations, totals of the real estate and personal property taxes, total poll taxes and the grand total of all taxes, including taxes on bank stock and automobile excise taxes, as well as an itemized statement of the town's appropriations. The recapitulation card for 1932 bore the signature and certificate of only one assessor until November 14, 1935, when two others signed it, the three assessors constituting a majority. The tax upon the Snell House lot was committed to the plaintiff for collection on December 9, 1932. His writ is dated December 15, 1933.

A lawful tax list requires the signatures of at least a majority of the assessors. *Belfast Savings Bank* v. *Kennebec L. & L. Co.*, 73 Me., 404, 406.

Section 81 of Chapter 13, R. S. 1930, provides:

> "The Assessors shall assess upon the polls and estates in their town all town taxes and their due proportion of any state or county tax, according to the rules in the latest Act for raising a state tax, and in this chapter; make perfect lists

thereof under their hands; and commit the same to the constable or collector of their town, if any, otherwise to the sheriff of the county or his deputy, with a warrant under their hands, in the form hereinafter prescribed."

Section 84 of the same chapter provides:

"They shall make a record of their assessment and of the invoice and valuation from which it was made; and before the taxes are committed to the officer for collection, they shall deposit it, or a copy of it, in the Assessors' office, if any, otherwise with the Town Clerk, there to remain; and any place, where the assessors usually meet to transact business and keep their papers or books, shall be considered their office."

The recapitulation card of 1932, when signed by only one assessor, did not comply with the requirements of Section 81, because it was not "under their hands."

"It is not important in what manner they" (meaning the lists of assessments) "are signed, whether at the beginning or the end of the list, but they must be signed in some form by at least a majority of the assessors, and in such a manner as to show that they intended to give them their official sanction. The signing of a warrant to the collector is not sufficient. The list of assessments must also be signed. *Colby* v. *Russell*, 3 Me., 227; *Foxcroft* v. *Nevens*, 4 Me., 72; *Johnson* v. *Goodrich*, 15 Me., 29; *Bangor* v. *Lancey*, 21 Me., 472." *Belfast Savings Bank* v. *Kennebec L. & L. Co.*, supra, on page 406.

So it is absolutely essential that there be a tax list signed by a majority of the assessors. It may be the one retained by them under Section 84, or it may be another committed to the collector under Section 81.

It is not questioned that the plaintiff received from the assessors with their warrant for collection a tax list signed by a majority of them. In this list in the tax collector's book appeared statement of this tax against this defendant. Preceding the names of the tax payers as listed in the book was a certificate signed by the three assessors on the sixteenth day of December, 1932, that this was a "list of assessment of taxes in and for the Town of Houlton for the

year 1932, made by the undersigned assessors of said Town, . . ." Following the list of names was another certificate, signed by the same assessors on the same day, "That the foregoing lists made by us, are perfect lists of assessments for the year 1932, which we have this day of December 16th, 1932, committed with a warrant of this date, under our hands, to Frank B. Cassidy, Collector of said Town of Houlton for collection."

Even though the recapitulation card when signed by only one assessor was insufficient to constitute a lawful tax list under Section 81, yet the list as contained in the collector's book, so far as the tax list is concerned, was sufficient to permit recovery of a judgment in personam for the tax. *Inhabitants of Norridgewock* v. *Walker*, 71 Me., 181. The plaintiff takes nothing under this exception.

EXCEPTION 4

In the tax list committed to the tax collector there was no designation nor description of the assessed real estate. The entry was simply this: "Aroostook Hotels Inc., value of real estate, 30,000.00, total tax, 1,500.00." This omission, however, would not prevent recovery of a judgment in personam for the tax.

But the plaintiff is attempting herein to enforce a lien and recover a judgment in rem. The statute under which this action is brought (Chapter 14, Section 28, R. S. 1930) states:

> "The lien on real estate . . . may be enforced in the following manner, provided, however, that in the inventory and valuation upon which the assessment is made, there shall be a description of the real estate taxed, sufficiently accurate to identify it."

In order for a lien claimant to obtain a judgment in rem against a particular piece of real estate, on which to levy to satisfy his lien, he must establish as a fact that the real estate specially attached is that on which his lien is a charge. A tax lien is statutory. At common law there was no lien.

> "A tax upon real estate is primarily a pecuniary imposition upon the owner. The lien upon the real estate is simply a

security established by statute of which the tax collector may avail himself in default of payment. Apart from statute no such lien exists. The lien thus created by statute is upon the land itself, not upon interest of the person assessed. The purpose of granting the lien is to allow the land to be taken and sold for non-payment of taxes. . . . 'The tax lien must be commensurate with the tax; it covers the thing for which the tax is assessed and it covers nothing else.'" *Collector of Taxes of the City of Boston* v. *Revere Building, Inc., et als.*, 276 Mass., 576, 578, 177 N. E., 577.

In *Hayden, Jr.* v. *Foster*, 30 Mass., 492, Chief Justice Shaw, on page 497, said:

"Each estate is made liable for its own tax and no more. . . ."

In the latter case it was held that where separate and distinct items of real estate were separately valued and assessed that each item of the real estate was subject to a lien for payment of that portion only of the owner's tax which was assessed on the particular item of real estate.

It must be kept in mind that we are now dealing with the question of enforcing a lien, not with the question of obtaining a judgment in personam for the tax.

This Court, in *City of Rockland* v. *Ulmer*, 84 Me., 503, 24 A., 949, 950, in which three separate pieces of land were grouped and appraised as grouped, said, on page 507:

"The grouping of these three lots of land in one appraisal may, perhaps, prevent a tax lien attaching to either, but it did not increase the valuation nor the burden of the tax payer."

Judgment was given for the tax but the Court took particular pains to indicate a doubt, even in that case, where the lots were described but assessed as a whole, whether there was an enforcible tax lien. *A fortiori*, in absence of any description in any valid tax list, there can be no enforcement of a tax lien.

In *City of Rockland* v. *Farnsworth, Ex'x*, 111 Me., 315, 89 A., 65, 67, Judge Cornish no doubt had reference to a judgment in

personam and not in rem to enforce a tax lien, when, on page 319, he said:

> "In the case of assessment of tax upon real estate, neither a description of the property, nor a separate valuation in case of various parcels is necessary *under like circumstances.*"

None of the cases cited by him involved enforcement of a tax lien. *Inh. of Bucksport* v. *Swazey*, 132 Me., 36, 165 A., 164, also was not an action to enforce a tax lien.

This record does not disclose the existence of any lawful tax list, containing a description of the Snell House lot, on which it is sought to charge the lien. In the tax list that was committed, there was no designation nor description of any real estate, and the other, the recapitulation card, with the signature of only one assessor upon it, did not constitute a lawful list. It had no more value as a tax list than a piece of blank paper. Until signed by a majority of the assessors, the description had no more efficacy than any other part of the document. Section 28, on which this plaintiff bases his action, specifically requires that there shall be a description of the real estate taxed "in the inventory and valuation upon which the assessment is made." Unless there be such description in a lawful inventory and valuation, the enforcement of the lien is impossible because it is not known to what it applies.

The plaintiff takes nothing under this exception.

Exception 2

Did the two assessors who, on November 14, 1935, signed the recapitulation card (not committed to the collector) have the right to do so, so as to correct their failure to sign in the first instance? The presiding Justice ruled that they did not and we think rightly. The provision for their signatures, in Section 81, is peremptory. An unsigned list is no list. A signature by one assessor gives the list no more authenticity than as though no assessor had signed it. It is no mere irregularity or omission; it is no trifling error or mistake. It is not a matter of form but of substance. It was a fatal neglect to comply with an express provision of the statute.

It can not be cured by amendment under Section 10 of Chapter 5, R. S. 1930, which provides that:

> "When omissions or errors exist in the records or tax lists of a town . . . they shall be amended, on oath, according to the fact, while in or after he ceases to be in office, by the officer whose duty it was to make them correctly. . . ."

This Court has already said, on page 183, in *Inhabitants of Norridgewock* v. *Walker*, supra:

> "Before one proceeds to amend errors or supply omissions in a tax list, there must be a tax list in existence, such as the law requires, under the 'hands of assessors.'"

In that case, a book, claimed to be the record of assessment, invoice and valuation of the plaintiff town, was offered. It did not bear the signatures of the assessors. Two of the assessors were present in court, and the plaintiff offered to amend by having them then sign. The case was reported to the Law Court, where it was held that the amendment was not allowable. But judgment in personam was rendered because in the *collector's* book there was a list properly signed. To the same effect also see *Inhabitants of Topsham* v. *Purinton*, 94 Me., 354, 358. The plaintiff can not prevail on this exception.

EXCEPTION 3

This exception does not require consideration, for our determination that the want of description of the Snell House lot in any lawful list necessarily prevents recovery of a judgment in rem, is decisive of the case.

Exceptions overruled.

DAMARISCOTTA-NEWCASTLE WATER COMPANY

vs.

ITSELF, RE: INCREASE IN RATES.

Lincoln. Opinion, September 1, 1936.

PUBLIC UTILITIES COMMISSION. WATER COMPANIES AND WATER RATES.

In cases heard by the Public Utilities Commission involving the question of proper rates to be charged by the utility, purchase price of the utility may be considered if the property was not sold under stress or unusual conditions, otherwise not.

In hearings before the Public Utilities Commission the ordinary rules of evidence apply, but the mere erroneous admission or exclusion of evidence will not invalidate an order of the commission. Substantial prejudice must be affirmatively shown.

Findings of fact by the Public Utilities Commission will not be disturbed, if supported by any substantial evidence.

In the case at bar, the evidence justified the rulings and findings of the commission in fixing the amount to be paid by the Town of Damariscotta for service.

On exceptions by the Town of Damariscotta to certain rulings, findings, and orders of the Public Utilities Commission, made in connection with the case of Damariscotta-Newcastle Water Company against itself, wherein the Town of Damariscotta was ordered to pay an increase in rates. Exceptions overruled. The case fully appears in the opinion.

Ernest L. McLean, for plaintiff.

George A. Cowan,

Pattangall, Williamson & Birkenwald, for defendants.

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

THAXTER, J. This case is before us on exceptions to certain rulings of the Public Utilities Commission. The Damariscotta-Newcastle Water Company, which furnishes water to the towns of Damariscotta and Newcastle, filed a complaint with the commission against itself seeking an increase in its rates. As a basis for such relief it asked the commission to determine the rate base and the investment on which it should be entitled to a fair and reasonable return. The Inhabitants of Damariscotta appeared in the hearings and claim to be aggrieved by the rulings of the commission.

There are three exceptions before this Court. The first is to the exclusion of evidence offered to show the price for which the utility was purchased in 1924 by its present owner. The second is to the failure of the commission to consider such price. These two exceptions are substantially the same and will be considered together. The third exception is to the order of the commission concerning the amount to be paid by the Town of Damariscotta for fire service.

The property here in question has been subject to numerous vicissitudes. In 1919 it was sold to the Twin Village Water Company; a receiver for this corporation was appointed in 1922; and the property was bought from the receiver in 1924 by its present owner. The commission excluded evidence as to the price paid at such sale.

It is unnecessary for us to decide whether or not such ruling was technically correct. Substantial prejudice by reason of the exclusion must be shown. In a recent case where the issue concerned the factors which determine value for purposes of taxation, this same question was discussed. It was there said that the purchase price might be considered, if the property was not sold under stress or under unusual conditions. The property there involved was sold at a receiver's sale, and the case holds that such price is of small consequence in determining its true worth. *Sweet* v. *City of Auburn*, 134 Me., 28, 180 A., 803. There is nothing in the case of *Fogg* v. *Hill*, 21 Me., 529, *Norton* v. *Willis*, 73 Me., 581 and *Mullen* v. *Eastern Trust and Banking Company*, 108 Me., 498, 81 A., 948, which conflicts with such principle.

A glance at the findings of the commission indicates that careful consideration was given to the essential elements which establish the

value of such a property. After the exhaustive analysis which the commission has made of the value, it would be futile to send this case back with directions to consider an element, which at best this Court has said is of minor importance, and especially where there is absolutely nothing to indicate that such procedure would have any tendency to change the result.

Though it is true that under the provisions of R. S. 1930, Chap. 62, Sec. 67, in hearings before the Public Utilities Commission the ordinary rules of evidence apply, yet the mere erroneous admission or exclusion of evidence will not invalidate an order of the commission. Substantial prejudice must be affirmatively shown. See *Northern Pacific Railway Company* v. *Department of Public Works of Washington*, 268 U. S., 39, 44; *United States* v. *Abilene & Southern Railway Company*, 265 U. S., 274, 288.

The commission found that some increase in the income of the company was justified, and also that the revenue from fire service had not produced a proper proportion of the total revenue. Findings of fact by the Public Utilities Commission will not be disturbed, if supported by any substantial evidence. *Hamilton* v. *Caribou Water, Light & Power Company*, 121 Me., 422, 117 A., 582; *In re The Samoset Company*, 125 Me., 141, 131 A., 692; *Gay* v. *Damariscotta-Newcastle Water Company*, 131 Me., 304, 162 A., 264. There is nothing to indicate that the findings of the commission on these points are not fully justified, for the evidence on which they are based is not before us.

The town, however, appears to center its attack on the method which the commission used to determine the amount of increase, which the town should pay for fire service. The town had twenty-one hydrants. The commission made no determination of the sum that should be charged per hydrant, but ruled that Damariscotta should pay $4,500 for fire service instead of $2,835 which it had been paying, and that the company should install nine additional hydrants without cost to the town. Counsel contend that this order in effect forced the town to take nine additional hydrants which it did not want and did not need. We can not accept this view. The number of hydrants is not controlling on what the town should pay. The size of mains, the pressure, and the amount of storage all are important factors which enter into the cost of this service.

Certainly in the absence of evidence we can not hold that the commission's method of arriving at the result was not proper.

Exceptions overruled.

ARETAS E. STEARNS, TRUSTEE

vs.

CHARLOTTE J. KERR THOMPSON, ET ALS.

Cumberland. Opinion, September 4, 1936.

EQUITY. DEEDS. MORTGAGES. ESTOPPEL.

A daughter, heir at law of her mother, is estopped to claim title to land owned by her mother at the time when the mother signed a mortgage of it given by her husband, the mortgage containing full covenants and a testimonium clause containing in part the following language: "I the grantor and . . . wife of the said grantor hereby agreeing to the terms of this mortgage, and in token of her relinquishment of all right of dower and all other rights in the premises, ..."

The daughter not taking by purchase has only such title as her mother had at the time of her death.

Constructive knowledge by reason of the recording of the deed to the mother does not necessarily control.

The mere fact that the truth can be ascertained by an examination of the records does not prevent the operation of the estoppel where there is a duty to speak, as where inquiries are made, or instead of merely remaining silent some positive affirmative act is performed which would actually have the effect of misleading and deceiving the grantee.

An owner of land knowingly standing by and suffering another to purchase it and expend his money thereon under an erroneous impression that the legal title is acquired thereby and without making his own title known is estopped later to exercise his legal right against such purchaser.

The court distinguishes the case at bar from Burnham v. Wing, *et al.*, 123 Maine 237, in that there was in that case no misrepresentation as a foundation for the doctrine of estoppel. In the case at bar, the doctrine of estoppel is held to apply.

On appeal by defendant Charlotte J. Kerr Thompson. A bill in equity for partition of certain real estate situated in the Town of Rumford. From the decree of the sitting Justice, dismissing the bill, defendant seasonably appealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Ralph T. Parker, for Rumford Falls Trust Company.

Freeman & Freeman, for Charlotte J. Kerr Thompson.

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

HUDSON, J. This is a bill in equity for partition of certain real estate in the Town of Rumford, brought by the Trustee in bankruptcy of one James H. Kerr against the bankrupt's daughter, Charlotte J. Kerr Thompson, his present wife, Alice F. Kerr, and the Rumford Falls Trust Company.

To be decided is whether or not the daughter, heir at law of her mother, Fannie M. Kerr, the former wife, is estopped to defend upon the title her mother had, by reason of the fact that while owner her mother signed a mortgage of it, given by her husband before his bankruptcy to the Rumford Falls Trust Company, containing full covenants and this testimonium clause, viz.:

> ". . . I the said grantor" (meaning James H. Kerr, the husband) "and Fannie M. Kerr wife of the said grantor hereby agreeing to the terms of this mortgage, and in token of her relinquishment of all right of dower and all other rights in the premises, have hereunto set our hands and seals this twenty-second day of July in the year of our Lord one thousand nine hundred and seven."

Mr. Kerr had conveyed this real estate to his wife, Fannie, by deed duly recorded on June 15, 1898. No question is raised as to the validity of her title at that time. On July 22, 1907, although without title to the real estate, he gave a first mortgage of it to the Rumford Falls Trust Company, the testimonium clause of which is as above set forth. Two years later, he gave a second mortgage to the same grantee with an identical testimonium clause. These mortgages have been foreclosed and the equity of redemption in each

has expired. Fannie M. Kerr died in April, 1910, intestate, leaving her husband, and Charlotte as her only child. The complainant claims title to one-third of the real estate in common and undivided and the daughter the other two-thirds as an inheritance from her mother, while the Rumford Falls Trust Company, the mortgagee, claims title to the whole. That the title of the one-third in common and undivided that came to Mr. Kerr upon the death of his wife vested at once in his former grantee, the Rumford Falls Trust Company, there can be no question. *Bennett* v. *Davis*, 90 Me., 457, 460, 38 A., 372, and previous Maine cases cited therein.

As to the two-thirds, the daughter, not taking by purchase, has only such title as her mother had at the time of her death. Did she by signing the mortgages estop herself from asserting title as against the mortgagee?

It is not claimed that the mortgagee had actual knowledge of title in Mrs. Kerr. Constructive knowledge by reason of the recording of the deed to Mrs. Kerr does not necessarily control the situation. This Court has said that "the mere fact that the truth can be ascertained by an examination of the records does not prevent the operation of the estoppel" in a case where there is a duty to speak, as where inquiries are made; or instead of merely remaining silent, some positive affirmative act is performed which would actually have the effect of misleading and deceiving the grantee.

> "While silence may be innocent and lawful, to encourage and mislead another into expenditures on a bad and doubtful title would be a positive fraud that should bar and estop the party." *Rogers* v. *Portland & Brunswick Street Railway*, 100 Me., 86, 94, 60 A., 713, 716.

Then what was the situation here? The notes secured by these mortgages were signed by Mrs. Kerr as well as by her husband and were as much her obligation, so far as the Trust Company was concerned, as his. She knew that she held the sole title to this real estate and therefore that he had no legal right to convey it in mortgage or otherwise. She knew she was not signing these mortgages as a grantor. She withheld knowledge from the Trust Company that she held the title, stood by and permitted her husband without title to mortgage it to secure not only his but her indebt-

edness. She must have had full knowledge of the facts set forth in the mortgages, for in each she said that she agreed to its terms. Not signing as a grantor, she did not convey her title by grant. Nevertheless, as against her, while living, and upon her death as against her daughter as her heir at law, Mrs. Kerr's title passed by estoppel to the mortgagee.

The daughter's counsel relies on *Burnham* v. *Wing, et al.*, 123 Me., 237, 122 A., 577. In that case the sole question was "whether James F. Burnham conveyed his interest in this estate obtained by deed from his wife when he signed his wife's deed to the plaintiff so that in effect it became their joint deed." The Court said, "We think not." (See page 239.) The language of the testimonium clause in the Burnham deed was as follows:

> "I the said Lucy A. Burnham and J. F. Burnham, husband of the said Lucy A. joining in this deed as grantor and relinquishing and conveying all rights by descent and all other rights in the above described premises, etc. . . ."

At the beginning of the deed, Mr. Burnham was not named as a grantor. The Court held that he did not convey his title but simply released his rights by descent. It was held that the words "all other rights in the above described premises" referred simply to his right of descent, formerly a right known as a right of curtesy, and that they did not refer in any way to any other title held by Mr. Burnham. Consequently, there was no misrepresentation as a foundation for the doctrine of estoppel. Title by estoppel was not discussed. Only considered was the passing of title by grant.

Another distinction is that in the deed in that case there was no such assertion as here in the words "hereby agreeing to the terms of this mortgage."

Almost a hundred years ago, this Court held that "if the owner of land knowingly stands by, and suffers another to purchase it and expend his money thereon, under an erroneous impression that the legal title is acquired thereby, without making his own title known, he shall not afterwards be permitted to exercise his legal right against such purchaser," and adopted this principle as set forth in a quotation from 1 Johns. R. Ch. R. 344:

"There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively by looking on, suffers another to purchase, and expend money on land, under an erroneous opinion of title, without making it known, he shall not afterwards be permitted to exercise his legal right against such person." *Hatch* v. *Kimball*, 16 Me., 146, 149.

In *Colby* v. *Norton, et al.*, 19 Me., 412, 418, Chief Justice Weston said:

"If it should be said the plaintiff acted under a mistake, there are cases, where ignorance of title will not excuse a party; 'for if he actually misleads a purchaser by his own representations, though innocently, the maxim is justly applied to him, that where one of two innocent persons must suffer, he shall suffer, who, by his own acts, occasioned the confidence and the loss.'"

Chief Justice Whitman, in *Rangeley* v. *Spring*, 21 Me., 130, on page 137, said:

". . . and so if a man will stand by and see another purchase real estate, believing that he is acquiring a good title thereto, and gives no intimation that the land is his, he shall not afterwards be allowed to make claim thereto." Also see *Matthews, In Equity* v. *Light*, 32 Me., 305.

In *Chapman, et al.* v. *Pingree*, 67 Me., 198, the same principle was enunciated. In that case, the holder of the title, "connusant of their transactions," witnessed the execution of a deed of it by one without title. The Court held that he sat by and knowingly suffered the conveyance to be made under an impression and belief upon the the part of the purchaser that the legal title thereby passed and that he did not make known his own title. It then concluded that the law will not permit him to be heard in setting up his claim under such circumstances.

In *Hill* v. *McNichol, Admr.*, 80 Me., 209, 13 A., 883, 887, Chief Justice Peters said that "as a general remark" by a judge in charg-

ing the jury the following language was a correct statement of law:

> "It is a general rule of law that when a person sees another conveying property which belongs to himself instead of to the person conveying, and makes no dissent when he should dissent, he is estopped from making a claim."

In *Martin* v. *Maine Central Railroad Company*, 83 Me., 100, on page 106, 21 A., 740, 742, the following language is employed:

> "Thus, while it is well established that the owner of land may by his conduct preclude himself from asserting his legal title, 'it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles, if they were allowed to be affected by parol evidence. It should appear that there was either actual fraud, or fault or negligence equivalent to fraud on his part in concealing his title, or that he was silent when the circumstances would impel an honest man to speak, or that there was such actual intervention on his part as in *Storrs* v. *Barker*, supra.'"

We should say that counsel for the daughter in his able argument stresses the language of Justice Cornish in *Burnham* v. *Wing*, supra, on page 240, wherein the Justice said:

> "To hold that those intending to bar rights of descent are also grantors would unsettle a large number of titles in this State" and noted the fact that "only the parties named as grantors in the beginning of the deed are so indexed" in the Registry of Deeds.

But that language was spoken of a title passing by grant and not by estoppel. Ability to discover true title from an examination of records should not enure to the benefit of one who by fraud, actual or constructive, has worked an injustice upon an innocent purchaser.

Mrs. Kerr's recitals in the mortgages were sufficiently precise,

clear and unambiguous with relation to material facts to satisfy the requirements of the law of estoppel.

> "Where these requirements are met the law will not permit one, who has in a solemn manner admitted a matter to be true, to allege it to be false." *Doten* v. *Bartlett*, 107 Me., 351, 355, 356, 78 A., 456.

Although named as a party, it is not contended that the present wife, Alice F. Kerr, has any interest in this property.

For reasons stated, we consider that the mortgagee holds the title to all of the real estate of which partition is sought and that this bill was properly dismissed by the Justice below.

Appeal dismissed.
Decree below affirmed.

JANE T. GOODALE, IN EQUITY

vs.

VIOLA S. WILSON AND THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

York. Opinion, September 4, 1936.

EQUITY. INSURANCE. UNDUE INFLUENCE. FINDING OF FACT. BURDEN OF PROOF.

The finding of fact by a single Justice must stand unless it is made clearly to appear that it is erroneous.

Unless in a policy of insurance there be reserved the right to change the beneficiary, the beneficiary named in an old line, as distinguished from a fraternal, policy has upon its issue a vested interest therein.

Where the right to change is reserved, the named beneficiary has simply a mere expectancy.

Such a mere expectancy is extinguished by the lawful substitution of another beneficiary.

It requires no more mental capacity to change a beneficiary in a life insurance policy than it does to make a will.

Acts of undue influence sufficient to invalidate a will, will invalidate a change in beneficiary.

Such a change must be accomplished understandingly by the insured's own act.

Influence, to be undue, must amount either to deception or else to force and coercion, in either case destroying free agency.

The mere existence of an illicit or unlawful relation between the insured and the substituted beneficiary is not enough per se *to raise a presumption that the change was procured by undue influence; but such a relationship is a fact to be considered along with other facts on the question as to whether or not the change was procured by undue influence.*

If the free agency of the insured is destroyed or affected so that the act is not done in accordance with a free will, the change of the beneficiary is invalid.

The burden of proof to establish undue influence is on the asserter of it.

The first-named beneficiary, even though there be a reservation of the right to change the beneficiary, may have an equitable interest in the policy as the result of a contract or by reason of acts or conduct of the insured subsequently to the issue of the policy.

In the case at bar, the interest of the first-named beneficiary was a mere expectancy which was extinguished by the insured's exercise of his lawful right to change the beneficiary.

On appeal by defendant Viola S. Wilson. A bill in equity seeking annulment and cancellation of a change of beneficiary in a policy of insurance. From the final decree declaring such change to be null and void because of undue influence exercised by the defendant on the policy holder, defendant seasonably appealed. Appeal sustained. Decree below reversed. Bill dismissed. The case fully appears in the opinion.

Lester M. Bragdon,
Spinney & Spinney, for plaintiff.
Arthur E. Sewall,
Oscar Neukom, for defendants.

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

HUDSON, J. On the second day of September, 1919, the Equitable Life Assurance Society of the United States, an old line company, issued a twenty-five year $5,000.00 endowment policy to Walter M. Goodale, then twenty-one years old. The plaintiff, wife of the insured, was named beneficiary but "the right to the insured to change the beneficiary" was reserved. On December 11, 1933, in exercise of this right, in accordance with the rules and regulations of the Society, the insured named the defendant, Viola S. Wilson, as beneficiary in place of his wife. He died November 28, 1934, leaving his widow and their three minor children.

In equity the plaintiff now seeks the annulment and cancellation of the change of beneficiary. Hearing was had before a single Justice, who, finding "that at the time of said alleged change of beneficiary the said Walter M. Goodale was unduly influenced and induced to change the beneficiary in said policy from said Jane T. Goodale to said Viola S. Wilson . . ." by the defendant, Viola S. Wilson, decreed that the change was "null and void and of no effect and no force; and that the proceeds of death benefit or moneys under said policy of insurance be and hereby is decreed to be paid to said plaintiff, Jane T. Goodale, the original beneficiary named in said policy; and that the Equitable Life Assurance Society of the United States is hereby ordered and decreed to pay the amount of said death benefit or moneys under said policy to the plaintiff, Jane T. Goodale, and not to the defendant, Viola S. Wilson."

The case now is before us on appeal from this decree.

The findings of fact by the Justice below must stand unless it is made clearly to appear that it is erroneous. *Young, In Equity* v. *Witham*, 75 Me., 536; *Sposedo, In Equity* v. *Merriman et als.*, 111 Me., 530, 538, 90 A., 387.

Unless in the policy there be reserved the right to change the beneficiary, the beneficiary named in an old line, as distinguished from a fraternal, policy has upon its issue a vested interest therein. Where the right to change is reserved, the named beneficiary has simply a mere expectancy. *Laughlin, Admr.* v. *Norcross, Admx.*,

97 Me., 33, 53 A., 834; *McManus* v. *Peerless Casualty Co.*, 114 Me., 98, 100, 101, 95 A., 510; *Tebbetts* v. *Tebbetts*, 124 Me., 262, 264, 127 A., 720; *Slocum, Admr.* v. *Metropolitan Life Insurance Co.*, 245 Mass., 565, 570, 139 N. E., 816; and the insured during his lifetime "may extinguish the beneficiary's expectancy by substituting another or by assigning the policy, and without the consent of the beneficiary he may deal with the policy as he sees fit, that is to say, he may enjoy every benefit and privilege given him under the policy." Richards on the Law of Insurance, 4th Ed., Sec. 333, page 565.

> "A change of beneficiary, to be given effect, must appear to have been made understandingly (*Smith* v. *Harmon*, 59 N. Y. Supp., 1044, 28 Misc. Rep., 681), and if it is shown that there was fraud or undue influence or lack of mental capacity, the attempted change will be regarded as inoperative." Cooley's Briefs on Insurance, Second Edition, Vol. 7, page 6467, and cases therein cited.

It is unquestioned that ". . . it requires no more mental capacity to change beneficiaries in a life insurance policy . . . than it does to make a will. . . ." *McAllister, et al.* v. *Security Benefit Association, et al.*, 261 S. W., 343, 345 (Mo.); *Grand Lodge A. O. U. W.* v. *Brown, et al.*, 125 N. W., 400 (Mich.).

Chief Justice Dunn has recently stated with relation to capacity required in the making of a will:

> "The law does not undertake to test the intelligence, and define the exact quality of mind which the 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 a 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." *Mitchell, et al., Exceptants In Re Will of Emma J. Loomis,* 133 Me., 81, 85, 86, 174 A., 38, 41.

Acts of undue influence sufficient to invalidate a will will invalidate a change of beneficiary. Whether a will be made or a change of beneficiary be effected, the testator or insured must exercise his own volition. It must be accomplished understandingly by his own act. To destroy his act, the undue influence must be "of such a degree as to take away . . . his free agency—such as he is too weak to resist—such as to render the act no longer that of a capable testator. . . . The influence must amount either to deception or else to force and coercion, in either case destroying free agency." *Barnes, Appellant* v. *Barnes,* 66 Me., 286, 297.

"It follows that the true test is to be found, not so much in the nature and extent of the influence exercised, as in the effect that such influence has upon the person who is making his will. Whatever the nature and extent of the influence exercised, if in fact it is sufficient to overcome the volition and free agency of the testator, so that he does that which is not in accordance with the dictates of his own judgment and wish, and what he would not have done except for the influence exerted, it is undue influence. But the mere fact that arguments and suggestions are adopted by the testator, and his will, on that account, is different from what it otherwise would have been, is not sufficient. It necessarily depends upon the further question as to whether such advice or suggestions are intelligently and freely adopted, because they have appealed to the judgment of the testator, so as to become in accordance with his own desires, or whether, because of the persistency of the importunity, or for any other reason, the testator is unable to resist and finally yields, not because of the voluntary action of his own judgment, but because, on account of the strength of the influence, or the weakness of his own judgment and will, he can not resist longer." *O'Brien, Appellant,* 100 Me., 156, 158, 159, 60 A., 880.

". . . acts of kindness and courteous attention are not undue influence." *Norton, et als., Appellants,* 116 Me., 370, 372, 102 A., 73, 74.

"By undue influence in this class of cases is meant influence, in connection with the execution of the will and operating at the time the will is made, amounting to moral coercion, destroying free agency, or importunity which could not be resisted, so that the testator, unable to withstand the influence, or too weak to resist it, was constrained to do that which was not his actual will but against it. . . . Undue and improper influence, . . . presupposes testamentary capacity. . . . Kindness, entreaty, or the offer of inducement to gain the making of a will in one's favor, is legitimate, so long as he who made the will had the free choice to make it or not. . . . Where there is understanding, where there is volition, what motivated the testator's act, even to pique or hostility, is no matter." *Rogers, Appellant,* 123 Me., 459, 461, 123 A., 634, 636.

"Fraud and undue influence in this connection mean whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammelled desire. . . . Mere suspicion, surmise or conjecture are not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. . . . Three factors are implied: (1) a person who can be influenced, (2) the fact of deception practiced or improper influence exerted, (3) submission to the overmastering effect of such unlawful conduct." *Neill et als.* v. *Brackett et al.,* 234 Mass., 367, 369, 370, 126 N. E., 93, 94.

As briefly as we may, we now tell the story of this regrettable triangle.

Walter was the only child of Charles W. Goodale of York, a man of some affluence, engaged in farming and an ice and milk business. Jane had worked on the father's farm two years before her marriage to his son. The boy was only nineteen when married, his wife twenty-nine. It was a forced marriage, a daughter having been born to them three weeks previously. Charles, the father, testified:

"I made him marry her in this way because I didn't want the disgrace in the family." The son denied paternity of the child but later, after the birth of two other children, did not disown it. For about seven years the couple lived on the father's farm, Walter working and driving trucks in the business. He never worked elsewhere; he received no specified wage or salary. He was paid out of the business, sometimes in currency of no regular amount, and by maintenance of his family. It does not appear that he ever had any settlement with his father.

When this policy was taken out, it was at the suggestion of the father, who paid all of the premiums. Whether these payments constituted gifts or were offset by the labor of the son, the record does not convincingly disclose.

Until Walter met Miss Viola Wilson, some eight years after the marriage, the wife said they got along "as well as the average." The evidence does not disclose any deep-seated affection between them. He first met Viola at a dance. That resulted in his taking her "around." For some time he did not inform her that he was a married man. Finally he volunteered the information to her. She said: "I felt I ought not to go with him any more." He rebelled. He told her the marriage was forced and that there was no affection between him and his wife. A divorce was discussed and on May 1, 1932, Mrs. Goodale started divorce proceedings against him. Before this and ever afterwards, as long as he lived, he was insistent that his wife obtain a divorce. She gave him to understand that she would, although she testified that it never was her intention so to do. The divorce case was continued term after term and the continuances were a source of vehement contention between them.

Jane admitted that Viola stayed at her home many nights after she knew of their affiliation. Walter and his wife had no marital relations for from two to three years before his death, the last year of which for the most of the time he lived in a camp near by the farm buildings. She knew that Viola was many times in the camp with her husband, late nights if not all night, but did nothing about it. He told her of his attachment to Viola and that he wanted his freedom so that he could marry her. He did not practice deception. His father, the wife's witness, testified he acted openly. Ex-

pecting the divorce to be granted and a marriage to Viola to result, he gave her a wedding ring.

The father and son both drank intoxicating liquors. In 1931 Walter had his first alcoholic fit. They were on their way hunting and his father gave him the liquor. Approximately two years later he had another fit in Perkins' Garage, and he died in the third on November 28, 1934. In 1932 he went to a sanatorium in Worcester, Massachusetts, but remained there only a few days. Viola's letters to him while there evince much solicitude for his recovery and welfare. It does not appear that his wife wrote him. Both the father and the wife testified that at mention of Viola's name he often would break down and cry.

There is no evidence to show that Miss Wilson ever knew of the existence of this policy until about six weeks before Walter died. That she knew it then is evidenced only by the plaintiff. Until she had actual knowledge of its existence, she could not have intended any act of hers to result in its change. It was at least six months before she knew there was a policy (if she knew of it as testified by Jane), that Walter had told his wife that he wanted to change it and make Viola its beneficiary.

There was considerable evidence as to the mental capacity of the insured and his susceptibility to influence. The plaintiff produced Dr. Cook, the family doctor, who had known and treated Walter for years when necessary and was his physician at the time of his death. In cross examination, the witness said that he saw much of him during the very important period of about two months preceding the change in the policy. It was changed, as already noted, on December 11, 1933. The doctor was treating Walter's mother from August thirtieth to December second of that year and was at her home, saw Walter and talked with him almost daily. He testified in part:

"Q. And how did you find his mind?

"A. He was very much troubled about his mother. . . .

"Q. And he talked perfectly coherently about his mother, didn't he?

"A. Yes.

"Q. And was there anything during all that time to lead you

to believe that Walter M. Goodale wasn't perfectly competent to make a will if he saw fit?

"A. I think he could make a will. Yes.

"Q. You think he could make a will all that time?

"A. Yes.

. . .

"Q. And the only thing that you saw about his mental condition was that he became more stubborn and less inclined to do what somebody else wanted him to do, and became more centered in his own affairs?

"A. Yes.

"Q. And in that condition would have been difficult to influence by any one?

"A. It would have been difficult to influence him in any way that he hadn't any desire to go. Yes. He would do as he had a mind to.

"Q. He had a mind of his own?

"A. He certainly did."

As to the change Walter consulted an attorney, obtained advice as to his right to make it and as to the means of its accomplishment. He had had his father's attorney draw up an agreement, signed by his father, whereby his wife and children, so long as she should remain unmarried after the divorce, would have the home in which they had lived, title to which was in the father. He told his attorney that his father was very fond of his wife and the children, that he was the only heir and that upon his father's death his wife and children would receive all of his property. He said that he had been going around with Miss Wilson for several years and that he felt that he ought to protect her to some extent. At none of the confernces with his counsel did he show any signs of intoxication. His talk was "absolutely rational."

He had three conferences with the local agent through whom the change was made, at all of which, it would appear from the agent's testimony, the insured acted understandingly. When asked whose name was to be substituted and what the relationship was, he said: "No relationship now but there is a divorce suit pending and as soon as that is completed Miss Wilson will be my wife."

The record does not disclose that she knew the change had been made until sometime in the following January, when Walter, telling her that he had some business to transact in Portsmouth (some checks to deposit), asked her if she wanted to ride over. Upon arrival there, he told her that he had something that he wanted her to know about and said: "I have an insurance policy here that is in your name. If anything happens to me, that belongs to you." Miss Wilson then said she started to argue with him but he replied: "It is no use. I knew you would argue anyway; it has been already done and it is mine to do as I please."

That following the cessation of his marital relations with his wife, if not before, he was intimate with Miss Wilson is very probable, although there was no direct evidence to substantiate it; but, says the learned annotator, in 66 A. L. R. on page 243:

> "It is generally held that the existence of an illicit or unlawful relation between the testator and the beneficiary is not enough, *per se*, to raise the presumption that the will was procured by undue influence." Citing very many cases from many states.

Pennsylvania had held to the contrary (see *Dean* v. *Negley*, 80 Am. Dec., 620; *Reichenbach* v. *Ruddach*, 127 Pa., 564, 18 A., 432, and *Snyder* v. *Erwin*, 79 Atl., 124); but in a later Pennsylvania case, decided April 12, 1926 (*In Re Wertheimer's Estate*, 133 Atl., 144) the Court doubted if the earlier ruling were still law in that state.

In *Waring* v. *Wilcox, et al.*, 96 Pac. 910 (Cal.), a son, whose policy carried his mother as a beneficiary subject to a reserved right of change, falsely represented to the Company and to his mother that he had married a woman with whom he was living illicitly. It was held that even under those facts the change was legal. The Court said, on page 912:

> "It is regrettable that a son should so far forget the duty he owes to the mother who bore him that he should become willing to divert a fund intended for her support to the use of a mistress who could but dishonor him yet the right to manage and control his own confers upon him absolute dominion over

his property, and even confers upon him the right to perform this unfilial act." Also see Cooley's Briefs on Insurance, Vol. 7, pages 6467-6469; *Fulton* v. *Freeland et als.*, 118 S. W., 12 (Mo.).

In *Norton* v. *Clark et al.*, 97 N. E., 1079, it is said on page 1084:

"The existence of an illicit relation does not raise any presumption of undue influence, unless other improper influence is shown to have been exerted to induce the making of the will, such as the supposed threat; but it is a fact to be considered by the jury along with other facts in the case, provided there is proof, in addition to the fact of the unlawful relation, tending to show constraint or interference or undue influence. If there is proof that the beneficiary has exercised influence, the existence of an unlawful relation may be considered for the purpose of determining whether the influence was undue, but not otherwise."

In *New York Life Insurance Company* v. *Andrews*, 167 Ill. App. Ct. Rep., 182, the insured, a woman, possessed of a reserved right to change the beneficiary, exercised it and named as the new beneficiary the daughter of a man with whom the insured had had illicit relations. It was claimed that the paramour exercised undue influence over the insured resulting in the change. The Court said:

"To sustain that contention, the fraud or undue influence must be shown to be such as to practically deprive deceased of her free agency, *and be particularly directed toward securing the desired and accomplished result.*"

Whether the influence, if employed, be brought to bear by a paramour or another having a different relationship, the question is: What effect, if any, does it have? Is free agency destroyed or affected so that the act done is not in accordance with a free will? No doubt it is true the closer the relationship, the more likely it is that the influence attempted to be exerted will be effective. A mistress may at times have unusual influence; a wife, too, where there is no illicit relationship; so also children. Others as well, without any relationship, may possess influence. Sometimes

even strangers, because of reputation and standing in a community, have it. Influences are everywhere prevalent, but, whatever be the relationship, if the person were one who could be influenced and it be proven that an improper influence was exerted upon him, the question is, did he submit to the influence so that that which he did was not an act done in the exercise of his own will? Diverse relationships may afford different possibilities of exerting undue influence, but, nevertheless, there is no dividing line in law on one side of which certain relationships will justify a presumption of undue influence and on the other not. The burden of proof is on the asserter of it.

Application of these principles of law to the facts in this case forces us to conclude that the insured, possessed of sufficient mental capacity, understandingly exercised his own will without undue influence when he made this change in this policy. There is naught in the record to show that Miss Wilson did anything, directly or indirectly, to procure this change. The most that can be said is that if she had knowledge of the fact of the existence of the policy, and she denies it, she, probably having influence, had an opportunity to employ it, did she desire so to do. According to the plaintiff's testimony, she had accidental knowledge of its existence not exceeding six weeks before the change. Long before that, at least six months, the insured had told his wife that he wanted to make the change. Accordingly, she could not have been instrumental in causing him to form an intention to have this change made. It was his own original idea. It was not something done by him impulsively but following many months of reflection. As he saw it, it was a duty he owed Miss Wilson. It was not a secret act, for he disclosed his intention to his wife. He consulted counsel, his father's counsel. He had several interviews with the local agent of the insurer. The use of liquor, if it had had any particular effect on him, according to the doctor's testimony made him more obstinate, more wilful, and more likely to do that which he wanted to do, uninfluenced by anybody. He had always felt, the record indicates, that a grievous wrong had been done him when his father compelled him to marry a woman ten years his senior and for whom he professed no affection. Later, unfortunately for his wife and children, he found this other woman of about his own age with whom, of course wrongly because he

was married, he fell in love. Still, to a certain extent he recognized the rights of his wife and children, for he was solicitous as to their future in providing a home for them. On the death of his father, his considerable property was to go to the wife and the children. But he also wanted to make some provision for Miss Wilson and in her interest he perfected this change in the policy. At the very time that he signed the request for it, he said that upon the granting of the divorce between him and his wife he should marry her. His intention, then, was to make it possible for his future wife to have the proceeds of this policy upon his death. The facts did not justify a finding that in the accomplishment of that purpose he was not acting as a free agent.

But the plaintiff claims that the insured had no right to make the change for another reason. She says that she had an equitable right, based on a contract between the father and son, providing for the issue of this policy with her inclusion as beneficiary and so there could be no change without her consent. It probably is true that Mr. Goodale conceived the idea of the policy and that it was through his suggestion that Walter was insured. No doubt he desired that not only his son, for it was an endowment policy, but his wife and children should be benefited by it. It would have been a very unnatural father and grandfather who would not have had such a desire. Nevertheless, the evidence does not show that any actual contract was made to that end. Mr. Goodale himself explicitly stated on the witness stand: "There was no agreement at all." If the payment of the premiums by the father were a gratuity, it did not evidence a contract. If, on the other hand, the father paid them as he did other bills of Walter's out of the business in which Walter was engaged, no contract was indicated. The significant thing is that the father, having knowledge of the terms of the policy, knew that it stipulated that *the insured* reserved the right to change the beneficiary. This reserved right tends strongly to negative the claim of the plaintiff that it was agreed between the father and son that the plaintiff should have any equitable right in the policy. It is inconsistent with the claim that there was any impressment of a trust.

The cases cited by the plaintiff have been carefully examined by us and we find no one of them enunciating any principle that will

support her contention on the facts as they appear in this case. She also relies upon this quotation from 37 C. J., Sec. 349 on page 583:

> "Where the policy reserves to insured the right to change the beneficiary, a change of beneficiary may be made at his instance, without the knowledge or consent of the original beneficiary, or notice to him, unless the insured has divested himself of the right, as by assigning all his rights under the policy, agreeing to keep the policy in force for the beneficiary or making a completed gift of the policy to the beneficiary by delivery to him, or unless a change of beneficiary has been enjoined and the injunction has not been dissolved."

The plaintiff does not bring herself within any of the within stated exceptions.

Particular reliance is placed upon *Travelers' Insurance Company* v. *Gebo, et al.*, 170 Atl., 917 (Vt.), decided February 6, 1934. It was held in that case that the wife had subsequently obtained an equitable interest in the policy so that no change could thereafter be made without her consent. The insured supplanted her by designation of his mother as beneficiary. While her husband was sick, she had worked out and used her earnings and other funds for the general family expenses, it being represented to her that she was to be reimbursed from the proceeds of the policy. She had no knowledge of any intended change. The Court, on page 919, said:

> "Where, as here, a contract of insurance so provides, the beneficiary may be changed at the instance of the insured, and no vested right, but only an expectancy, exists in the beneficiary, in the absence of facts or circumstances tending to establish an equitable interest in the proceeds of the policy. . . . Where, however, sound equities exist in favor of the beneficiary, such rights will be protected against the substitution of a second beneficiary who is a volunteer or who has no superior equities in his favor. . . . It is a general rule that such an equitable interest may arise as the result of a contract between the beneficiary and the insured, for while the right of the designated beneficiary is not one of property, being only an

expectancy, 'it is of sufficient potentiality at law or in equity to permit contracts and other obligations in reference thereto which are binding and enforceable in equity after the happening of the event which automatically enlarges the contingent interest to a vested right.'"

We accept the decision in *Travelers' Insurance Company* v. *Gebo*, supra, as sound law; but it is inapplicable to the facts in this case, for herein it has not been made to appear that previously to the issue of the policy either as between the father and the insured or between the insured and the plaintiff as beneficiary there was any contract or that subsequently to its issue there were any acts or conduct which gave to her any equitable interest in the policy. Her interest was a mere expectancy which was extinguished by the insured's exercise of his lawful right to change the beneficiary.

Appeal sustained.
Decree below reversed.
Bill dismissed.

THOMAS A. COOPER, BANK EXAMINER, IN EQUITY,

vs.

CASCO MERCANTILE TRUST CO.

PETITION OF TRUSTEES OF PREBLE CORPORATION FOR DETERMINATION OF CLAIM.

Cumberland. Opinion, September 8, 1936.

LANDLORD AND TENANT. RECEIVERS. DAMAGES.

A covenant to pay rent for leased premises constitutes an executory contract. It is to pay sums of money as rent accruing at stated times in the future.

Future rent can not be the basis of a claim.

In the absence of an express covenant, contract or stipulation in a lease providing for damages in contingencies similar to a termination by a receivership, the common law doctrine applies that no claim for such anticipated damages arises on breach of the covenant for rent of real estate.

By the great weight of authority the appointment of a receiver does not work a dissolution of a corporation.

In the case at bar, the conservator was simply a ministerial officer of the court. His appointment did not terminate the lease. The order of the court directing him to abandon it created no liability against the estate in his charge.

Under the terms of stipulation and report, the cause is remanded for determination of the amount due to petitioner from the conservator for rent from March 18 to July 31, 1933, and the right of the conservator to set-off.

On report, on an agreed statement of facts and stipulation. Proceedings in equity to determine the right of the Preble Corporation to a claim for damages alleged to have been sustained by it by reason of breach of rental covenant under lease to the Casco Mercantile Trust Co. Cause remanded for determination of the amount of the particular claim of petitioner for use and occupation of the premises by the conservator from March 18 to July 31, 1933, only, and the right of conservator to set-off. The case fully appears in the opinion.

Ralph O. Brewster,
Edgar B. Simpson, for petitioner.
Leon V. Walker,
Richard K. Gould, for conservator.

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

MANSER, J. On report. The Preble Corporation as petitioner in these proceedings seeks to establish a claim for damages sustained by it, alleged to be by reason of breach of rental covenant under its lease of banking rooms in the Chapman Building in Portland. The petitioner was the lessor and the lease was granted originally to the Chapman National Bank and later assumed by the Casco Mercantile Trust Company. Some other questions are raised by the pleadings, not dependent for determination upon the principal issue involved, and under the final stipulation of the parties

and the order of Court for report of the case, these become non-essential of extended consideration.

The lease, and a separate written agreement, incorporated by reference, together provided for a term of thirty years from July 1, 1924. The rent reserved was $21,500 per annum for the first five years, $26,500 for the second five years, $31,500 for the third period of five years, and for the remaining fifteen years an amount to be determined by mutual agreement or arbitration.

The Casco Mercantile Trust Company, hereinafter for convenience referred to as the Bank, took possession on October 1, 1930, and assumed the obligations of the original lessee. It paid the stipulated rental to March 31, 1933, and occupied the premises until March 18, 1933. On the latter date, by order of the Supreme Judicial Court, a temporary conservator for the Bank was appointed, who on April 14, 1933, became permanent conservator by further order. The appointment was made under authority of the Emergency Banking Act, P. L. 1933, Chap. 93, and the conservator had all the rights, powers and privileges of receivers of banks and trust companies. (Sec. 4 of the Act.) The conservator upon his appointment occupied the premises, but on March 31, 1933, notified the petitioner that such occupancy was not to be considered as an affirmance or disaffirmance of the terms of the lease, and on June 30, 1933, further informed the petitioner that, as it was then apparent the lease would not be an asset for the creditors of the Bank, he intended to vacate. On July 31, 1933, the conservator, acting under an order of Court, did so vacate the premises and abandoned the lease. The petitioner relet the premises and from August 1, 1933, they have been occupied, for four months by a committee engaged in organizing a new bank and from December 1, 1933, by the bank so organized. A lease was given to the new bank for two years with option of renewal for three years, and the rental provided was at a greatly reduced rate.

The petitoner, by letter of July 31, 1933, acknowledged notice of abandonment by the conservator and agreed that he should not be liable for further use and occupancy, but such acknowledgment and agreement were stated to be without prejudice to the claim for damages against the Bank for breach of the lease.

The brief for the petitioner states its contention thus: The ap-

pointment of a conservator to wind up the Bank and the subsequent abandonment of the lease and vacation of the premises by the conservator under authority of the Court is a breach of the executory contract of the Bank, and the petitioner is entitled to prove its damages for breach of the rent covenant, measured by the difference between the rental value of the premises for the remainder of the term and the present worth of the rent reserved in the lease.

The precise question has not heretofore been considered by our Court but numerous cases involving similar situations have been adjudicated in both state and federal courts, and there is a wealth of judicial reasoning upon the subject. A review of the opinions in these cases makes it seem advisable to point out certain distinctions in factual conditions arising therein, as results apparently conflicting may thus often be reconciled.

At the outset it is to be noted that some attention is given in the decided cases to the effect of receivership of the lessee, and as the conservator here is endowed with the rights and duties of a receiver, the terminology is applicable.

The lease was in force when the receiver was appointed on March 18, 1933. There had been no default in payment of rent. It had been paid in advance to the end of the current month.

There is no provision in the indenture which provided for its termination in event of bankruptcy or receivership, either automatically or at the election of the lessor. Neither was there any contract or covenant that in such event or on such abandonment by the receiver the lease should be terminated and the lessor be entitled to a penalty, or damages, either liquidated or based upon a rule of computation therein adopted.

The only provision in the lease relating to cancellation was the usual and ordinary one that the lessor might enter "to expel the Lessee if it shall fail to pay the rent aforesaid, whether said rent be demanded or not, if it shall make or suffer any strip or waste thereof, or shall fail to quit and surrender the premises to the Lessor at the end of said term, in manner aforesaid, or shall violate any of the covenants of this lease by said Lessee to be performed."

In the absence of a contract or covenant provision in the lease, the determination is affected in some jurisdictions by consideration

of a statute in force in the particular state, which, however, is without influence in the present case, as there is no legislative enactment in this State which is operative upon the situation.

Again, cases of this character arising in bankruptcy have sometimes been considered and decided by Federal Courts with direct reference to the provability of such claims in view of their contingent character. These cases, with the effect of changes in the Bankruptcy Act, are reviewed at length in the recent case of *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S., 320, 54 S. Ct., 385, in an opinion by Justice Roberts.

With this preliminary presentation we find that in the consideration of the issues as presented by the petitioner it must be kept in mind that the lease was in full force and effect when the conservator was appointed; that officer seasonably and by order of Court declined to assume it as an obligation of the estate under his charge; the lease contained no provsiion for cancellation, and no contract or covenant for penalty or damages in event of receivership; no statute creating such liability exists in this State, and the issue is not affected by any Bankruptcy Act relating to provability of the claim.

Thus narrowed, the issue is presented of whether under the principles of the common law there is an allowable claim.

The facts show that a substantial actual and expectant loss has resulted to the petitioner. Was there a breach of the covenant of the lease which creates a claim? If so, do damages flow as a matter of law from such breach? Is it such loss as entitles the petitioner to prove its claim as an unsecured creditor against the assets of the lessee in the hands of the conservator?

There is no doubt that a covenant to pay rent for leased premises constitutes an executory contract. It is to pay sums of money as rent accruing at stated times in the future.

Ordinarily a breach of an executory contract gives rise to an action for anticipated damages. This doctrine is applied uniformly to contracts concerning personalty. Many cases have upheld the principle. They are cited by the petitioner as supporting and controlling the contention in the instant case.

Illustrative decisions in Maine are *Sibley* v. *Rider*, 54 Me., 463; *Fales* v. *Hemenway*, 64 Me., 373; *Crooker* v. *Holmes*, 65 Me., 195;

Sutherland v. *Wyer*, 67 Me., 64; *Dixon* v. *Fridette*, 81 Me., 122, 16 A., 412; *Alie* v. *Nadeau*, 93 Me., 282, 44 A., 891; *Brackett* v. *Knowlton*, 109 Me., 43, 82 A., 436; *Eugley* v. *Sproul*, 115 Me., 463, 99 A., 443.

And so in Massachusetts: *Amos* v. *Oakley*, 131 Mass., 413; *Parker* v. *Russell*, 133 Mass., 74; *Foternick* v. *Watson*, 184 Mass., 187, 68 N. E., 215. See also *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S., 581.

None of these cases were concerned with the breach of a covenant to pay rent, and this distinction is important. It is clearly and aptly stated in an article in 46 Harvard Law Review, 1117:

> "For reasons grounded in the history of our land law, it is necessary to distinguish between the affirmative rights of a contract creditor and those of a lessor on rejection by a receiver. From an early date a covenant to pay rent has been treated differently from contracts generally. In the early common law, a rent covenant did not give rise to a present obligation (even contingent) to render performance in the future, as did, for example, a promise to pay in instalments for goods purchased. No obligation was held to exist until the rent day. Furthermore, if the tenant failed to pay rent when it accrued, his failure did not accelerate the rent in the absence of a provision in the lease to that effect. If a right of entry was reserved and the lessor entered, his only right against the lessee was for payment of the rent which had accrued prior to entry. There was no doctrine in the common law to the effect that a material breach of a lease would give rise to a cause of action for breach of the entire lease, and there was, *a fortiori*, no doctrine of anticipatory breach of a lease.
>
> These early common-law rules have left a definite mark on our modern law, and (although it is not free from doubt) are probably enforced today in a majority of common-law jurisdictions. When a receiver rejects a lease providing for entry and termination upon certain defaults, the lessor may, upon such a default, enter and terminate. While he has then been allowed to prove for all rent which accrued prior to entry, he cannot prove for rent accruing thereafter. Similarly, except

where the land law gives to the lessor a cause of action for a material breach (either actual or anticipatory) of the lease, a claim for damages arising from a receiver's rejection cannot be proved."

From the time these early rules were established there have been numerous decisions which refer to, and in most instances are grounded upon, the principles above stated, and go back to Lord Coke in his comment on Littleton, 292b, that the rights of the parties under a contract relating to personalty and one relating to realty are different, because of "the diversity between duties which touch the realty and the mere personalty."

The Massachusetts case of *Bordman* v. *Osborn*, 23 Pick., 295, puts the distinction and diversity in this wise:

"Rent is a sum stipulated to be paid for the actual use and enjoyment of another's land, and is supposed to come out of the profits of the estate. The actual enjoyment of the land is the consideration for the rent which is to be paid, and, therefore, if the lessee is evicted before the rent becomes due, in whole or in part, it is a good answer to a claim for rent, by an action of debt or covenant, or by distress. 1 Saunders, 204, note. From this it seems clear, that although there be a lease, which may result in a claim for rent, which will constitute a debt, yet no debt accrues until such enjoyment has been had; because, says Lord Coke, in discussing the effect of a release, a debt is merely a thing in action, and, therefore, if a man be bound to the payment of a debt, at a future time, a release of all actions by the obligee, is a perpetual bar, for 'albeit no action lyeth for the debt, because it is *debitum in presenti, quamvis sit solvendum in futuro*, yet because the right of action is in him, the release of all actions is a discharge of the debt itself.' Co. Lit. 292b."

In 1910 the Circuit Court of Appeals for the Second Circuit, *In re Roth & Appel*, 181 Fed. Rep., 667, amplifies the rule and its reasons thus:

"Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration

for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in presenti solvendum in futuro*. On the contrary, the obligation upon the rent covenant is altogether contingent. *Watson* v. *Merrill*, 136 Fed., 362, 69 C. C. A., 185, 69 L. R. A., 719. See also, Coke on Littleton, 292b; *Wood* v. *Partridge*, 11 Mass., 492; *Bordman* v. *Osborn*, 23 Pick. (Mass.), 299."

So in *Watson* v. *Merrill*, cited supra, the Court said:

"The use and occupation of the premises during the term of the lease were the consideration for the payment of the monthly rents, and the payment of the rents was the consideration for the use of the premises. If the rent for any month was not paid, or if waste was permitted, the lessor had the option to reposses himself of the premises, and to withhold from thenceforth the consideration for future installments of rent, or to permit the lessee to continue in possession of the property, and to enforce the collection of the rents by an action or by some other proceeding. He could not, however, do both."

This inherent character of rent is accepted and adopted by the courts in most jurisdictions. It is not controverted in the brief for the petitioner. In fact, there is express disavowal that future rent is the basis of the claim.

Many instances arose of evident inability of the lessee to pay rent accruing in the future, and where the right to repossess and

relet the premises, if exercised, would result in financial loss, due to the lessened rentals obtainable. It was then sought to have the doctrine of anticipated damages, already adopted by the courts in contracts concerning personalty, applied to contracts for the use of land. The courts, however, generally declined to make such application, and to accomplish the result resort was had to the introduction into leases of provisions having that effect. Such stipulations in leases are discussed in *Re McAllister-Mohler Co.*, 46 Fed. (2d) 91; *Liggett Co.* v. *Wilson*, 224 Mass., 456, 113 N. E., 184; *Woodbury* v. *Sparrell*, 187 Mass., 426, 73 N. E., 547; *Cotting* v. *Hooper, Lewis & Co.*, 220 Mass., 273, 107 N. E., 931; *Gardiner* v. *Parsons*, 224 Mass., 347, 112 N. E., 958. Such stipulation also throws light upon the decision in *Reading Iron Works*, 150 Penn. St., 369, 24 A., 617, and is the determining factor in the decisions of Justice Holmes in *Filene* v. *Weed*, 245 U. S., 597, and the accompanying case of *Gardiner* v. *Butler*, 245 U. S., 603. As noted in this opinion, no such provisions were incorporated in the lease under consideration.

The petitioner further urges that the appointment of a conservator for the Bank is equivalent to a decree for its dissolution, terminated its contractual relations and effected a cancellation of the lease; and having sustained loss thereby, it should not be relegated to its rights against a defunct corporation, but should be entitled to share in the distribution of its assets.

Even if this were true, there is authority for the proposition that where the lessee corporation is dissolved, the claim for future rent or for damages for its non-payment may not be allowed. *Fidelity Co.* v. *Armstrong*, 35 Fed., 567.

There are a few decisions where courts have recognized the right to prove such a claim against the estate of the lessee in the hands of a receiver, on the ground of dissolution of the lessee corporation. The principal one is *Kalkhoff* v. *Nelson*, 60 Minn., 284, 62 N. W., 332. In that case, however, the Court construed the statute under which the receiver was appointed as entirely different from the former insolvency law and as providing for dissolution.

In *Steenrod* v. *Gross Co.*, 334 Ill., 362, 166 N. E., 82, it was held that the appointment of a receiver to take possession of the assets

of a corporation and distribute them was tantamount to dissolving the corporation.

By the great weight of authority, "The appointment of a receiver for a corporation is a suspension of its functions and authority over its property and effects." "The appointment of a receiver does not, however, work a dissolution of the corporation." "This doctrine applies to the appointment of a permanent receiver." 23 R. C. L., Receivers, 46, and cases cited.

Moreover, these proceedings are under P. L., 1933, Chap. 93, the provisions of which negative such a contention. Sec. 1, provides that "Whenever, in the opinion of a majority of the directors or the executive committee of any trust company organized under the laws of the State of Maine and the bank commissioner, it will be for the benefit of the depositors and the public for the assets of the trust company to be revalued, the bank reorganized and put in sound condition, any Justice of the Supreme Judicial Court shall . . . issue decrees necessary to carry out the provisions of this act." Sec. 4 provides for the appointment of conservators, and "Such conservatorships may be terminated at any time by order of the court." By Sec. 6, "The court may order the merger or consolidation of said trust company with any other banking institution, State or Federal, with the consent of said latter banking institution."

It is clear that the appointment of a conservator under this Act is not equivalent to an order of dissolution. This ruling is not inconsistent with the *Newport Savings Bank* case, 68 Me., 396, relied upon by the petitioner. There the Court, passing on the provisions of the statute relating to insolvent savings banks and the authority given to reduce or scale down savings deposits, said: "The bank is insolvent. It comes into court and asks for the privilege granted in this section. *But for its provisions* the court must pass a decree of sequestration, and cause its affairs to be wound up, and it would *then* cease to exist as a corporation." In other words, the intent of the statutory provision there construed was to keep the bank alive and not to dissolve it. So here.

On the other hand, the statute upon which the decision in *Jones* v. *Winthrop Savings Bank*, 66 Me., 242, was based was of an en-

tirely different character. Its purpose was for dissolution and distribution of assets. The statement of the Court that "No debt can accrue against the bank after the decree of sequestration. This is the end of its existence," must be read in the light of the statute (R. S. 1871, Chap. 47, Sec. 99), which authorized trustees or depositors of an insolvent savings institution to file a bill in equity "praying for a sequestration and an equitable distribution of its assets."

As pointed out in the recent case of *Cooper* v. *Fidelity Trust Co.*, 132 Me., 260, 170 A., 726, 728, the conservator "takes no title to the property or assets and receives his authority to act solely from the Court."

We adopt, as applicable to a receivership in this connection, the principles stated by our Court with respect to bankruptcy in *Holding Company* v. *Bangor Veritas*, 131 Me., 421, 163 A., 655, 656.

> "It is well settled that upon the bankruptcy of the tenant, provided that by the terms of the lease the tenancy is not thereby terminated, the leasehold interest of the bankrupt passes to the trustee, if he elects to accept it, as an asset of the estate to be reduced into money by assignment or otherwise for distribution among the creditors. (Cases cited.)
>
> "It is equally well settled that, if the Trustee does not accept the property of the bankrupt as an asset of his estate within a reasonable time, he is deemed to have elected to reject it, and the title to the asset, whatever it is, remains in the bankrupt. A lease is not terminated by the adjudication in bankruptcy of the tenant unless there be provision to that effect in the indenture, and, if the Trustee renounces the lease, the relations of landlord and tenant between the bankrupt and his lessor are not disturbed, the bankrupt retaining 'the term on precisely the same footing as before, with the right to occupy and the obligation to pay rent.' *In re Roth*, 181 Fed. Rep., 667; *In re Scruggs*, 205 Fed. Rep., 673; *In re Sherwoods, Inc.*, 210 Fed. Rep. 754; *English* v. *Richardson*, 80 N. H., 364, 117 A., 287."

We subscribe to the common-law doctrine enunciated by many courts with the underlying reasons therefor, and hold that no claim

for anticipated damages arises on breach of covenant for rent of real estate in the absence of a provision in the lease to that effect. Indeed, there was no breach of such covenant in the lease in question at the time of the appointment of the conservator.

A fortiori, no claim exists against the assets in the hands of the conservator. He is a ministerial officer of the court. His appointment did not dissolve the corporation or terminate the lease. The order of the court directing him to abandon it created no liability against the estate in his charge.

One further matter was submitted by the report. This is the claim of the petitioner for use and occupation of the premises by the conservator from March 18 to July 31, 1933. The answer admits liability, but asserts the right of set-off. Under the terms of the stipulation and report, the cause is remanded for determination of the amount of this particular claim only and the right of the conservator to set-off.

So ordered.

INA M. BUSWELL *vs.* THOMAS C. WENTWORTH, ET AL.

York. Opinion, September 9, 1936.

LANDLORD AND TENANT. EQUITY. NOTICE.

No particular form of words is necessary to constitute an instrument a lease. The criterion is the intention of the parties, to be derived from the whole instrument. Reservation of the payment of rent is not essential to create the relation of landlord and tenant. Courts are liberal in sustaining intent if it can be shown consistently with the rules of law.

By reason of record of an instrument in the Registry of Deeds a party affected thereby is chargeable with notice of its existence and contents.

Courts of equity will order to be cancelled, or set aside, or delivered up, deeds or other legal instruments, fraudulent, fictitious and void, which are a cloud upon the title to real estate.

The party claiming it, however, should show clearly and beyond all reasonable doubt, not only that the instrument is void at law and can never be enforced

there, but that in equity also it never ought to be enforced or attempted to be made use of for any purpose against it.

The prayer for relief is as essential in a bill in equity as is the statement of facts. The Court can not go beyond the one any more than the other. The respondent need not anticipate a decree that is not asked for.

Prayers for relief must be unavailing, unless preceded by allegations showing a complete case, authorizing the exercise of equity jurisdiction. Evidence without allegation is as futile as allegation without evidence.

In the case at bar, the Court holds that the instrument itself, aside from extrinsic evidence as to its purpose, in terms grants to the defendant a ten-year leasehold interest.

In the plaintiff's bill the allegations and prayers for relief did not meet the situation properly. If equity can afford any relief it must be by way of reformation of the instrument, so that it will express in apt terms the actual agreement and undertaking of the parties.

On appeal by plaintiff. From the decree of the sitting Justice dismissing her bill in equity, brought to remove cloud upon title, plaintiff seasonably appealed. Appeal dismissed, without prejudice and without costs. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

Clifford E. McGlauflin,

Elias Smith, for defendants.

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

MANSER, J. Appeal from decree dismissing bill in equity, brought to remove a cloud on the title to real estate. The sitting Justice made no findings of fact; but from an examination of the record and the allegations in the bill the case for the plaintiff may be stated as follows:

As a result of negotiations for purchase, the plaintiff received a warranty deed dated May 23, 1935, of land and buildings in Cornish, Maine, free of encumbrances except three mortgages upon which there was then due an aggregate sum of $1,875. The purchase price was $3,000, and the plaintiff paid the difference between the two sums for the equity, and took possession of the property.

There was, however, of record in the Registry of Deeds an instrument dated December 15, 1933, in which the grantors in the deed to the plaintiff, describing themselves as lessors, "in consideration of one dollar and other sufficient consideration do hereby let, remise and release unto Thomas C. Wentworth of said Cornish, the receipt whereof is hereby acknowledged, the following described premises." The description is substantially that contained in the deed.

The document then continued: "Also said lessors are to have a right of way to pass and repass from Trail No. 25 to Trail No. 205, on the east side of the barn of said lessors, and adjoining thereto, and shall be over a strip twenty feet wide along the westerly boundary line of the leased premises, for the term of ten years, from December 15, 1933, reserving to the Texas Company such rights as it now has under a certain lease, recorded in said Registry, Book 836, Page 44, or may hereafter have under said recorded lease, and shall come into the full possession and enjoyment of said leased premises upon the termination of said recorded lease, whether it be an operation of law or otherwise." Then follows the testimonium clause.

The evidence shows that the prior lease referred to and which was given to the Texas Company on April 3, 1933, for a period of five years, had been terminated by the parties thereto at the time of the purchase by the plaintiff.

The first contention is that the lease is ambiguous and uncertain and when judicially construed it must be determined that no term is prescribed and no rent reserved, that nothing more than a tenancy at will was created, which was determined by alienation of the premises, and in consequence the alleged lease should be declared null and void.

The second contention of the plaintiff is that assuming the document sufficient in terms to convey a leasehold interest, the defendant is estopped by his conduct prior to the purchase of the property by the plaintiff from asserting any rights thereunder.

Upon this phase the plaintiff claims support from the record for the following asserted facts: Thomas C. Wentworth, the defendant, was the mortgagee in two of the mortgages referred to in the deed and the amount due thereon at the time of the sale was $1,020. There was a gasoline filling station upon the premises and the

purpose of the plaintiff was to operate the station, and this constituted the real inducement for the purchase. The defendant was also the agent for the sale of Texas Company products, principally gasoline and oils. During negotiations, the plaintiff interviewed the defendant for two purposes, one relative to the purchase of gasoline and the other as to encumbrances. She inquired of him concerning the latter, and he replied there were none to his knowledge except the three mortgages above referred to; but that he did have a writing to assure or protect him in the exclusive sale of Texas Company products to the owner of the station. Replying that this was satisfactory, as it accorded with her intention, she then inquired as to the margin or "spread" between the wholesale and retail prices of gasoline, to ascertain the gross profit to her, and was informed that it was four cents per gallon. The defendant made no other reference, direct or indirect, to the document under which he now claims. He knew she was negotiating with the owners, who were in apparent possession of the property; that the purchase would require the assumption of the mortgages in addition to the payment of whatever sum might be agreed upon for the equity; that she was intending to occupy and operate the premises; that she was seeking information from him as to encumbrances, and the amount of the gross profit on purchases of products from him. He informed her also from his own records as to volume of business transacted in former years. He made no claim to her that he was in actual or legal possession of the premises, or that the owners were occupying as his agents or tenants.

After the sale had been consummated and her own agent put in charge and possession, the defendant, with the first delivery of gasoline, insisted upon the payment of one cent per gallon in addition to the wholesale price under the claim that he was the lessee of the premises, and that if she desired to remain as a tenant under him, this amount would be exacted as rental upon all gasoline sold by her. If the plaintiff submitted to this charge, her gross profit was immediately reduced twenty-five per cent, and evidence was offered that the defendant asserted that the lease upon that basis was worth $5,000 to him for the remainder of the term.

Payment was at first made under protest; but upon later refusal of the exaction, suit was brought by the defendant against the

plaintiff to collect the amount charged under guise of rental. This suit was discontinued when the present proceedings were brought.

The explanation of the defendant as to his failure to inform the plaintiff of the claims he later asserted under the lease was that he did not want to spoil the trade.

The position of the defendant is that his actual representations were not as positive as claimed; that concerning his failure to inform the plaintiff as to the nature of the lease, he was under no legal obligation to speak; that the lease was of record and the plaintiff thus had constructive knowledge of its contents; and further, that the plaintiff procured the services of an attorney before the sale was completed, who searched the title and found the record of the lease, thereby imputing actual knowledge to the plaintiff of its contents.

The reply by the plaintiff to these assertions is that, if chargeable with notice, the lease being silent as to rental and ambiguous in other respects, the defendant is bound by his own explanation as to the purport and intent of the instrument.

The defendant in his testimony refers to similar leases, presumably as constructive or implied notice of the usual terms or obligations thereof.

It does appear that the owners had given a lease to the Texas Company, as before noted, which appeared in the chain of title, perhaps warranting the inference that the one given the defendant was of similar intent. The distinction, however, is that while the Texas Company became party to an indenture which on its face was a lease, still the owners remained in possession, and the evident purpose was to secure the exclusive sale of its products, for which privilege the Texas Company paid or allowed the owner one cent per gallon upon the price of gasoline as rental. In other words, the owner received the benefit of a discount of one cent per gallon so long as the Texas Company products were used exclusively. The defendant, however, instead of paying one cent per gallon for a similar privilege, undertakes to charge that amount against the plaintiff for allowing him to furnish her with these products.

The third proposition asserted by the plaintiff is that if the defendant is not estopped from asserting any rights whatsoever under the instrument, then it should be held that he was estopped from

asserting rights other than as security for the payment of his mortgage indebtedness.

The plaintiff urges that the record shows the defendant testified he was the owner of two mortgages, subject to a prior one of about $850, that any equity in the property was of doubtful value, and the lease was taken as security for the payment of his loans.

As set forth by the plaintiff, her plight is, if the document constitutes a valid lease unmodified by any statement made by the defendant as to its purpose, then she holds possession of the premises by his sufferance or permission and subject to ouster unless she complies with his demand for rent, the amount of which can be fixed arbitrarily by him; and if ousted, she would get no benefit from the property for a period of more than seven years, the remainder of the term of the lease, although meanwhile compelled to pay interest and principal of the mortgages. All these considerations are urged as ground for the application of the doctrine of estoppel by conduct.

Summarized therefore, the insistence of the plaintiff is,

(1) That the lease is invalid because no term is created.

(2) That if valid, the defendant is estopped from asserting any rights thereunder.

(3) That in any event the defendant is estopped from asserting any rights other than for security.

The plaintiff invokes relief upon the well-settled principle that courts of equity will order to be cancelled, or set aside, or delivered up, deeds or other legal instruments, fraudulent, fictitious and void, which are a cloud upon the title to the real estate. *Gerry* v. *Stimson*, 60 Me., 189; *Chafee* v. *Fourth National Bank of N. Y.*, 71 Me., 514.

Was the lease void *ipso jure?* The plaintiff maintains it is an instrument of doubtful import, denominated an indenture, but signed only by the grantors and under which they "let, remise and release unto Thomas C. Wentworth" the described premises. No rent is reserved. The only mention of a term is confined, according to a literal construction, to the reservation of a right of way over a strip of land twenty feet wide along the westerly boundary "for the term of ten years."

The instrument is inartificially drawn. It is ambiguous, and a proper subject for judicial interpretation.

Applying the fundamental rules of construction, it must be borne in mind that no particular form of words is necessary to constitute an instrument a lease.

The criterion is the intention of the parties, to be derived from the whole instrument.

No covenants on the part of the lessee are incorporated, and his signature was not necessary.

Reservation of the payment of rent is not essential to create the relation.

Courts are liberal in sustaining intent if it can be shown consistently with the rules of law. 16 R. C. L., Landlord and Tenant, pp. 541, 542; *Pike* v. *Munroe,* 36 Me., 309 at 315; *Hodgdon* v. *Clark,* 84 Me., 314, 24 A., 862; *Morse* v. *Phillips,* 108 Me., 63, 78 A., 1125; *Perry* v. *Buswell,* 113 Me., 399, 94 A., 483.

The phrase "for the term of ten years" is not in correct juxtaposition, but as has been well said, juxtaposition is a very unsafe criterion of continuity. It is more reasonable to interpret the phrase as defining the period for which the lease is granted and the right of way coincidently reserved, than to adopt the strained construction that the lease is silent as to its term, although a right of way is reserved to the lessors for ten years.

Sufficient has been said to warrant the conclusion that the instrument itself, aside from extrinsic evidence as to its purpose, in terms grants to the defendant a ten-year leasehold interest. It therefore can not be regarded as a legal nullity.

The lease, being for more than two years, was recorded, as required by R. S., Chap. 87, Sec. 14. By reason of such record, the plaintiff is chargeable with notice of its existence and contents, and in addition, as stated, an attorney employed by her to examine the title found the lease on record.

The plaintiff does not gainsay such notice, but insists that the import of the instrument was uncertain and she was entitled to rely upon the representations of the defendant with respect thereto.

Under this doctrine is the defendant estopped from asserting *any* rights under the lease?

The general principles of estoppel are clearly and fully enunciated in *Rogers* v. *Street Railway*, 100 Me., 86, 60 A., 713.

In *State* v. *Page* (S. C.), 40 Am. Dec., 608, cited in 16 R. C. L., 542, the Court said: "It is true, rent is not essential to a lease; for, from favor, or valuable consideration, the tenant may have a lease without any render. Yet that must be in a case where a lease was clearly intended. When, upon construction, it is doubtful whether a lease was intended or not, then it constitutes a very important circumstance, that rent was not reserved, *eo nomine* or substantially."

In *Hurd* v. *Chase*, 100 Me., 561, 62 A., 660, Emery, J., said: "True, the reservation of the life estate in the deed is not in terms conditioned or otherwise than absolute, but since this Court has possessed full equity powers it has had full power to go beneath the terms of a conveyance, or reservation of an estate to ascertain whether it is in fact unconditional or only for security for some obligation. *Reed* v. *Reed.*, 75 Me., 264, *McPherson* v. *Hayward*, 81 Me., 329, 17 A., 164. And for this purpose the Court may even resort to oral evidence. *Knapp* v. *Bailey*, 79 Me., 195," 9 A., 122.

In *Briggs* v. *Johnson*, 71 Me., 235, it is stated: "The Court will only intervene when the controverted deed or other instrument appears on its face to be valid and extrinsic evidence is required to show its invalidity."

If proved, the estoppel would be a bar to a suit at law to recover rent from the plaintiff as a tenant of the defendant, or to an action of ejectment. She is entitled, however, to seek appropriate equitable relief, and is not relegated to her defenses at law nor need she take the risk of an assignment of the lease by the defendant.

Yet the difficulty with the plaintiff's case is that the defendant is not estopped from asserting *any* rights whatsoever, because by her own proof the purpose of the instrument was to secure to the defendant certain rights, i.e., his own investment under his mortgages and the continuation of a gasoline station exclusively for sale of the products handled by him.

Speaking of the authority for cancellation of instruments, the Court, in *Farmington Village Corp.* v. *Bank et als.*, 85 Me., 46, at 54, quotes with approval the following language: "The party claiming it should show clearly and beyond all reasonable doubt,

not only that the instrument is void at law and can never be enforced there, but that in equity also it never ought to be enforced or attempted to be made use of *for any purposes against him.*"

If the instrument is cancelled, then the defendant is left without an effective weapon to assure the sale of his products and without its added security for the protection of his mortgages.

The bill by its allegation and prayer seeks cancellation only. As said in *Loggie* v. *Chandler*, 95 Me., 220, 49 A., 1059, 1060, "The prayer for relief is as essential a part of a bill in equity as is the statement of facts. The Court cannot go beyond the one any more than the other. The respondent need not anticipate a decree that is not asked for."

In Whitehouse Equity Practice (1915), Vol. I, Sec. 408, the rule is stated: "A decree in equity can grant only such relief as is justified by the allegations and the evidence. The Court will only decree on the case made by the pleadings even though the evidence may show a right to a further decree. A decree granting relief outside the issue raised by the leadings is a mere nullity and open to collateral attack."

So in *Merrill* v. *Washburn*, 83 Me., 189, 22 A., 118, the opinion says: "Equity decrees must be based upon the allegations in the bill. Prayers for relief must be unavailing, unless preceded by allegations showing a complete case, authorizing the exercise of equity jurisdiction. The most ample evidence is useless without sufficient statements in the pleadings. Evidence without allegation is as futile as allegation without evidence."

If equity can afford any relief it must be by way of reformation of the instrument, so that it will express in apt terms the actual agreement and undertaking of the parties. Such reformation is not sought. As to whether relief of this character is obtainable, the Court is not now called upon to decide. Upon the present record the decision of the sitting Justice must be sustained, except that under authority given in R. S., Chap. 91, Sec. 53, it is deemed proper that the decree be modified so that the dismissal of the bill shall be without prejudice and without costs.

Appeal dismissed.
Decree in accordance with this opinion.

KEITH THEATRE INC. *vs.* WILBUR J. VACHON, ET ALS.

Cumberland. Opinion, September 24, 1936.

LABOR UNIONS. STRIKES.

A trade union or labor organization is "a combination of workmen usually (but not necessarily) of the same trade or of several allied trades for the purpose of securing by united action the most favorable conditions as regards wages, hours of labor, etc., for its members."

Labor unions "when instituted for mutual help carrying out their legitimate objects" are lawful organizations.

A strike is "a combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand."

Only such strikes as are called for the purpose of obtaining that which is lawful are lawful strikes.

A strike necessarily assumes the existence of a grievance. To right the asserted wrong is its purpose.

Strikes to accomplish certain ends are lawful although they hamper the employer and put him to financial loss.

While out on strike, strikers have not abandoned their employment but rather have only ceased from their labor.

As the free flow of labor is subject to interruption by a lawful strike, so is it by picketing by employees if they refrain from threats, coercion, intimidation, force and violence.

"It is the right of every man, unless bound by contract to serve for a definite period, to leave at any time an employment which for any reason is distasteful to him; and this right is as perfect and complete as the correlative right of all men to seek employment wherever they can find it."

A strike for both a legal and an illegal purpose is an illegal strike.

Employees have a lawful right to strike to obtain an increase in wages even though as increased they are on a level with the union schedule.

Were it held that employees have the right to strike to secure unionization for their own benefit (and herein it is not necessary so to hold), it does not follow that strangers may picket, though peaceably, to secure unionization.

The fact of ownership of property and responsibility therefor should give the owner all reasonable rights of control and management in order to preserve it, else in the end the right to have and to hold property will be seriously impaired.

"The right to conduct a lawful business is a property right, protected by the common law and guaranteed by the organic law of the state."

A laborer, whether union or not, in absence of contract to the contrary, has the right to work where and for whom he pleases, provided the work is lawful and agreement is reached upon terms of employment.

An employer's right to carry on its lawful business can not be interferred with without just cause or excuse.

Picketing is defined to be "posting members at all the approaches to the work struck against for the purpose of reporting the workmen going to or coming from the work; and to use such influence as may be in their power to prevent the workmen from accepting work there."

Rights of society do not justify peaceable picketing by strangers when the employees are not on strike, have no grievance against their employer, and are satisfied with their wages and the conditions under which they are working.

Representatives of unions have the right by free speech and persuasive argument to attempt the conversion of an employer to their belief that unionization should be effected.

Social welfare does not demand that non-related persons or organizations be given the right, even by peaceable picketing, to attempt to break down and destroy a satisfactory relationship between an employer and its employees in order to supplant it by another whose terms are satisfactory only to the dictators of it, there being no relationship between the picketers and the employer and its employees, nor labor dispute nor strike.

On exceptions and appeal by plaintiff. A bill in equity in which plaintiff sought to restrain and enjoin defendants from picketing of plaintiff's theatre. To certain rulings of the sitting Justice, who heard the bill, and to his dismissal of the bill, plaintiff seasonably excepted, and filed an appeal. Appeal and exceptions sustained. Decree below reversed. Bill sustained. Case remanded for issue of writ of injunction. The case fully appears in the opinion.

Jacob H. Berman,
Julius Greenstein, for plaintiff.
Leo J. Mahoney,
Walter M. Tapley, Jr., for defendants.

SITTING: DUNN, C. J., STURGIS, BARNES, HUDSON, MANSER, JJ.

HUDSON, J. The plaintiff, lessee and operator of Keith's Theatre in the City of Portland, complains in equity against eight men of Portland, two men of South Portland (all union officials), three local unions, to wit, Local No. 458 of the International Alliance of Theatre Stage Employees and Moving Picture Machine Operators of the United States and Canada, The Portland Stage Employees Union No. 114, and the American Federation of Labor of Musicians Local Union No. 364 (voluntary and unincorporated labor organizations in Portland), and seeks injunctive relief from the picketing of its theatre by the defendants, their agents and servants. Hearing upon bill, answer and replication was had before a single Justice of this Court, who refused to issue an injunction. The case now is before us on appeal and exceptions, the plaintiff excepting to the rulings of law as made by the presiding Justice and appealing from his decision. The appeal and exceptions permit of one discussion.

The evidence as presented is not before us for the reason that the plaintiff is content to accept "the Court's findings of facts . . . ."

These findings may be thus summarized:

1. When the plaintiff started to operate its theatre, conferences were held with union representatives at which were discussed the adoption of the union wage schedule and operation of the theatre as a "closed shop" but no agreement for either was made.

2. The plaintiff conducted its theatre as an "open shop."

3. The wages it paid were materially lower than those of the union schedule, while the latter were considerably higher than the manager said the plaintiff could "afford to pay and live."

4. The plaintiff's employees were entirely satisfied with the wages they received. They neither struck nor picketed. They had no grievance against the plaintiff.

5. While the plaintiff did not have in its employment members of any unions, yet it did not refuse to employ union help. It would not consent, however, to employ only union laborers.

6. The picketing complained of commenced in August, 1935, and the Court found that it was "for the sole purpose of compelling the

plaintiff to adopt the so-called closed shop agreement and the union schedule of wages."

7. The picketing consisted mostly of walking "back and forth in front of the theatre with signs on which was printd a statement to the effect that Keith's Theatre is unfair to organized labor, that it does not employ union stage hands, musicians and operators, and urging the public not to patronize the house." For a time the same sentiments were expressed by word of mouth. It also is conceded that the musicians' union passed a vote fining any of its members $10.00 who attended the theatre, and that this fine was imposed in at least two cases.

8. The single Justice stated "with the exception of the action of the musicians' union, which involved only its own members, I find no evidence of any boycott, any threat, any intimidation of either the public or employees. The activities of the pickets have been an annoyance; but the pickets have not accosted patrons or employees; and their actions have not resulted in the collection of any crowds, which have blocked the entrances of the theatre or the approaches thereto. When they have talked in too loud a voice, they have stopped on being admonished. The evidence indicates that the public has paid very little attention to them; and there is nothing to show what, if any, effect their efforts have had in reducing the patronage of the theatre."

Having thus found the facts, the Justice then said: "The problem in this case resolves itself into the simple issue whether the picketing of this theatre by these defendants as carried on should be restrained. An injunction should be granted, if, first, the end sought to be gained is unlawful, or, second, if the means used are oppressive" and then held that the end sought was lawful and the means employed not oppressive, to both of which rulings the plaintiff excepted and from the decision based on such rulings it appealed.

In this State we have been remarkably free from labor conflicts which might foment strikes, boycotts and picketing. Common sense, control of temper and application of the Golden Rule upon the part of both employers and employees have made possible peaceable adjustments of their difficulties, so that until now this Court

has never had occasion to consider or discuss the use of the injunction in labor disputes. From other state, as well as federal courts, have come down many able opinions, displaying much lack of unanimity in labor law. This Court, then, both unaided and unhampered by prior Maine decisions, but well served by the reasoning of other courts, is free to declare as law herein that which it considers best calculated in accordance with legal principles to effect justice.

Many of the older opinions dealt with questions about which now there seems to be no particular controversy. Not many years ago it was claimed that labor unions were illegal and the Court of Queen's Bench, in the case of *Hornby* v. *Close* (1867) 2 L. R. 2 Q. B. 153, decided that a trade union was illegal, even, though it existed only to secure higher wages and shorter working hours, because it was in restraint of trade. This continued to be the law in England until changed by an Act of Parliament in 1871. In this country, the courts have held fairly uniformly that labor unions "when instituted for mutual help carrying out their legitimate objects" are lawful organizations. *Yates Hotel Co., Inc.* v. *Meyers, et al.*, 195 N. Y. S., 558; *American Steel Foundries* v. *Tri-City Central Trade Union, et al.*, 257 U. S., 184.

A trade union or labor organization has been defined to be "a combination of workmen usually (but not necessarily) of the same trade, or of several allied trades, for the purpose of securing by united action the most favorable conditions as regards wages, hours of labor, etc., for its members." *Stone* v. *Textile Examiners and Shrinkers Employers' Association*, 122 N. Y. S., 460.

> "Workingmen may combine for their mutual benefit and protection and to improve their economic and social condition, including the improvement of working conditions, the obtaining of such wages as they choose to demand, and the establishment of a standard of wages throughout the country, without incurring either criminal or civil liability, even though they know that their action will necessarily cause loss to their employers, or to other persons." Oakes, Organized Labor and Industrial Conflicts, Sec. 3, and cases cited thereunder.

The performance of work is vitally necessary to existence. Usually it is a matter of contract between employer and employee.

Without question, fair and just compensation should always be paid for the work performed. The ideal contract is one in which the parties are able to determine and agree upon a wage that shall fairly and justly compensate the employee.

But the contracting parties are not always in exact equality in education and experience, influence and mentality, so that one of them may not have an advantage over the other in the making of the contract. Freedom to contract plays an important part. One who has no choice but must work at whatever wage he can obtain is an easy prey for an unfair and unjust employer.

Thus inequality of position between the employer (and often it is a corporation of vast power) and a single employee, is sufficient justification for the creation of trade unions.

Work being necessary, the labor market should be as free as possible, both to employer and employee.

> ". . . The right freely to contract with one's fellow-men without interference other than may arise from the exercise by others of some equal or superior right" should be granted in a free labor market. Oakes, *supra*, page 406.
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> "The right to the free flow of labor is not an absolute right; it is limited by the right of employees to combine for purposes which in the eye of the law justify interference with the plaintiff's right to a free flow of labor. A combination which interferes with a plaintiff's right to a free flow of labor is legal if the purpose for which it is made justifies the interference with that right. On the other hand it is illegal if that purpose does not justify the interference (which ensues from the making and enforcing of the combination in question) with the plaintiff's right to a free flow of labor." *Haverhill Strand Theatre, Inc.* v. *Gillin, et als.*, 229 Mass., 413, 118 N. E., 671, 673.

A strike has been defined to be "a combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand." *Farmers Loan & Trust Co.* v. *Northern Pac. R. Co., et al.*, 60 Fed., 803, 821.

A strike may be legal or not, depending upon its purpose.

"Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the Court. To justify interference with the rights of others the strikers must in good faith strike for a purpose which the Court decides to be a legal justification for such interference. To make a strike a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the Court holds to have been a legal purpose for a strike." *De Minico* v. *Craig, et als.*, 207 Mass., 593, 598, 94 N. E., 317, 319.

A strike necessarily assumes the existence of a grievance. To right the asserted wrong is its purpose. No one is known ever to have struck because his wage is too high or his work day too short. Only such strikes as are called for the purpose of obtaining that which is lawful are lawful strikes. Strikes to accomplish certain ends are lawful, although they hamper the employer and put him to financial loss. While out on strike it is not considered that the strikers have abandoned their employment but rather have only ceased from their labor.

"Neither strike nor lockout completely terminates, when this is its purpose, the relationship between the parties. The employees who remain to take part in the strike or weather the lockout do so that they may be ready to go to work again on terms to which they shall agree,—the employer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or a lockout, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment." *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 Fed., 45, 52.

As the free flow of labor is subject to interruption by a lawful strike, so is it by picketing by employees if they refrain from threats, coercion, intimidation, force and violence. A controversy having arisen between the employer and its employees, whether it

has resulted in cessation of labor or not, that to be accomplished is to end the dispute either by a resumption of their former contractual relationship or, if that be impossible, by an accepted modification of it. The end sought is reconciliation. Strikes and picketing are simply means to that end.

> "It is the right of every man, unless bound by contract to serve for a definite period, to leave at any time an employment which for any reason is distasteful to him; and this right is as perfect and complete as the correlative right of all men to seek employment wherever they can find it. . . . A strike is not therefore, in itself an unlawful act, even though its effect is to cause loss to the employer. The legality or illegality of a strike depends, first, upon the purpose for which it is maintained, and, second, upon the means employed in carrying it on. The fact that the combination is for a lawful purpose does not render it less unlawful where the end is to be attained by the employment of improper means, and a strike for an unlawful purpose may not be carried on by means that otherwise would be legal." Oakes, *supra*, Sec. 312, page 419.

With these general observations we come now to the case at bar. The Justice held that the end sought by this picketing was lawful. As to what that end was is not in dispute, for it is conceded that it had a twofold purpose, first, to compel the plaintiff to adopt to so-called "closed shop" agreement, and, second, to adopt the union schedule of wages.

> "Without question a strike for both a legal and an illegal purpose is an illegal strike . . . ." *Baush Machine Tool Co.* v. *Hill, et als.*, 231 Mass., 30, 36, 120 N. E., 188.

Then, were both of these purposes lawful? Unquestionably employees have a lawful right to strike to obtain an increase in wages and we think so even though as increased they are on a level with the union schedule.

The other and no doubt the principal purpose inducing this picketing was to compel the plaintiff "to adopt the so-called closed shop agreement." Was this a lawful purpose justifying even peaceable picketing by the defendants? Here it becomes necessary to call

particular attention to the fact that this picketing was not done by the plaintiff's employees, who were entirely satisfied with their employment still pursued, but by agents and servants of the defendant unions who had no contract nor relationship, direct or indirect, either with the plaintiff or the plaintiff's employees. Had there been a grievance and had a strike by the plaintiff's employees resulted from it, even if it were held that they could picket peaceably *to secure unionization for their own benefit, non constat* that these defendants, their agents and servants, could picket though peaceably. While we need not go so far in this case as to hold that the employees themselves could not picket peaceably or strike to secure unionization, yet there is much eminent authority to that effect.

> "Strikes to secure recognition of the union, to force discharge of non-union men, or to effect a closed shop have been held illegal. *Plant* v. *Woods*, 176 Mass., 492, 57 N. E., 1011; *Berry* v. *Donovan*, supra; *Folsom* v. *Lewis*, 208 Mass., 336, 94 N. E., 316; *W. A. Snow Iron Works, Inc.* v. *Chadwick*, 227 Mass., 382, 388, 389, 116 N. E., 801; *Baush Machine Tool Co.* v. *Hill*, supra; *Folsom Engraving Co.* v. *McNeil*, 235 Mass., 269, 276, 277, 126 N. E., 479; *Moore Drop Forging Co.* v. *McCarthy*, 243 Mass., 554, 137 N. E., 919." *Stearns Lumber Co.* v. *Howlett, et als.*, 260 Mass., 45, 60, 61, 157 N. E., 82, 87.
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> "The question whether the closed shop is a legitimate subject of industrial dispute is one of considerable difficulty. In the majority of cases it has been held that, on account of its tendency to give union labor a monopoly, it is not a legitimate aim." Oakes, *supra*, Sec. 292, page 392.

Many cases pro and con are collated in Oakes, *supra*, and appear in footnotes 71, 72 and 73 to Section 292, on pages 392 to 397 inclusive.

In *Sarros, et al.* v. *Nouris, et al.*, 138 Atl., 607, (Del.), the Court said:

> "The real object of the strike being as I have said to compel the complainants to unionize their business by subjecting it to control and domination by the labor organization, an object

which the law does not recognize as legitimate, the complainants are entitled to protection against the continued picketing of their place of business by the defendants or their agents. If it is lawful for the defendants to destroy a part of the complainant's business by the picketing and its incidental boycott, it would be lawful for them if possible to destroy in toto. As I read the authorities, their weight is to the effect that such calamitous consequences can not be visited upon the complainants as punishment for their refusal to surrender the right which is theirs to employ non-union labor if they choose. This being true, the picketing which has been going on is unlawful, whether peaceful or otherwise. I am not, therefore, called upon to go into the question of whether picketing if peacefully conducted is permissible in labor controversies, for if the object of the picketers is unlawful, picketing of all kinds is likewise so."

Also, *Elkind & Sons Inc. et al.* v. *Retail Clerks' International Protective Assn., et al.*, 169 Atl., 494; *George Jonas Glass Co.* v. *Glass Blowers' Assn., et al.*, 79 Atl., 262; *Hughes et al.* v. *Kansas City Motion Picture Machine Operators, et als.*, 221 S. W., 95 (Mo.); *Goldberg, Bowen & Co.* v. *Stablemen's Union*, 86 Pac., 806 (Cal.); *Pierce* v. *Stablemen's Union*, 103 Pac., 324 (Cal.); *McMichael* v. *Atlanta Envelope Co.*, 151 Ga., 776, 108 S. E., 226; *Levy & Devaney, Inc.* v. *International Pocket Book Workers' Union*, 158 Atl., 796; *Sterling Chain Theatres, Inc.* v. *Central Labor Council*, 155 Wash., 217, 283 Pac., 1081; *St. Germain et ux.* v. *Bakery, etc. Union*, 97 Wash., 282, 166 Pac., 665; *Music Hall Theatre* v. *Motion Picture Machine Operators, et al.*, 249 Ky., 639, 61 S. W. (2nd), 283; *Jefferson & Indiana Coal Co.* v. *Marks*, 287 Penna., 171, 134 Atl., 430; *Citizens' Co.* v. *Asheville Typographical Union*, 187 N. C., 42, 121 S. E., 31; *Lehigh Structural Steel Co.* v. *Atlantic Smelting & Ref. Works*, 111 Atl., 376 (N. J.).

In an article in the Yale Law Journal, entitled "Labor and the Courts" (Vol. 39, page 683, on page 696, it is stated:

"Courts are hopelessly divided as to whether a strike to unionize a shop or in pursuance thereof to compel the discharge of a non-union employee is legal or illegal. New York,

Illinois, California, Minnesota, and a substantial group of other states hold such a strike legal. But there are important states, such as Massachusetts, Pennsylvania, and New Jersey, which hold the strike to unionize a shop illegal. The holding of such a strike illegal seems manifestly unjust. Under the existing law it is clear that employers have the unquestioned right, acting singly or in association, to discharge employees because they belong to a union. If the employers have this right, why should the employees not possess an exactly similar right, acting singly or in association, to cease working for an employer because he runs a non-union shop? In other words, employees should be as free to strike as the employer is free, under the existing law, to discharge, in order to accomplish the unionization or the de-unionization of a shop, trade, or industry."

What would appear to be the fallacy in the above reasoning, it would seem, is that equality results. It seems to us that it does not, for the employee upon his discharge may work for whomsoever he chooses, while the employer after compulsory unionization is restricted to the employment of only union help. Besides, the employer has an established business which should have the right of continued existence, if conducted lawfully. The fact of ownership of property and responsibility therefor should give the owner all reasonable rights of control and management in order to preserve it, else in the end the right to have and to hold property will be seriously impaired.

"The right to conduct a lawful business is a property right, protected by the common law and guaranteed by the organic law of the state. See *L. D. Willcutt & Sons, Co.* v. *Driscoll*, 200 Mass., 110, 117," 85 N. E., 897. *Godin* v. *Niebuhr*, 236 Mass., 350, 351, 128 N. E., 406, 407.

Different reasons are given for the conclusion reached that unionization is an unlawful purpose but chief among them, it would seem, is the fact that to hold otherwise would give union labor a monopoly which is against public policy. Public policy, it is said, demands free competition. To restrict the field of competition by exclusion of non-union labor would not only destroy in large meas-

ure freedom of contract but deny to non-union labor its lawful right to earn its subsistence as it desires. The laborer, whether union or not, in the absence of contract to the contrary, should be accorded the right to work where and for whom he pleases, provided the work be lawful and agreement be reached upon terms of employment. This is not saying that laborers may not unite in their efforts to obtain their lawful rights. It simply means that those who do not see fit to unite may have preserved to them their freedom to contract.

But be it as it may (as to whether *employees themselves* can lawfully strike or picket peaceably to secure unionization), we do not think that it was lawful for *these defendants* to picket even peaceably to secure unionization by the employer of its satisfied and non-striking employees.

> "When necessary to prevent irreparable injury, an injunction will be granted to prevent third persons having no connection with employer or employees, and no interest in the relations existing between them, from inciting or coercing strikes among employees who are not dissatisfied with the terms of their employment and are not seeking an increase of wages." 32 C. J., Sec. 225, page 164, and cases cited in footnote 57.

Reasons urged are (1) that "persons who have no agency for the employees of the company can not set up any rights that the employees might have. The right of the latter to strike would not give to the defendants the right to instigate a strike. The difference is fundamental. *Hitchman Coal, etc., Co.* v. *Mitchell*, 245 U. S., 229, 38 S. Ct., 190, 62 L. ed., 260. (2) Also, the fact that employees were at liberty to quit the employment at pleasure did not deprive the employer of its right to injunctive relief against interference with its employees by third persons seeking to unionize them. *Eagle Glass, etc., Co.* v. *Rowe*, 245 U. S., 275, 38 S. Ct., 80, 62 L. ed., 286." Footnote 57a, 32 C. J., 164.

The employer's right to carry on its lawful business can not be interfered with without just cause or excuse. As to its own employees, it may be said to have opened the door to negotiations with them and the door is not closed, even after they have gone out on

strike. Having taken them into its employment, it may be said to have consented by implication to reasonable discussion of their disagreements and possibly even to peaceable picketing, but it contravenes the fact, express or implied, to say that it has made any such concession or surrender to strangers.

In this case the picketers not only had no grievances of their own against the plaintiff but were not picketing by permission of the employees, or any one else, whether belonging to a union or not, who had any relationship with the theatre company. They were simply attempting to advance the cause of trade unions generally by forcing unionization. That effected might result not only in the incurrence of indebtedness that the business would not warrant, but in giving to strangers at least substantial partial control and management of the plaintiff's business. These picketers, instead of attempting by their conduct to reconcile a difference that had already arisen between the plaintiff and its employees, sought to create trouble between them to the end that the union might indirectly derive a benefit from such newly created trouble. They were not content simply to display the signs stating that the plaintiff was unfair to organized labor, of which there is no proof in the case, but urged the public not to patronize the theatre.

What justification or excuse is there for such interference? The defendants can not justify as agents of the plaintiff's employees for they had no authority. Their belief that it would be better for these employees to join the union, even if true, gives them no right to compel the employees to accept such an alleged betterment. Their intentions might be most laudable but still freedom of thought and action upon the part of the employees is their right without dictation from those of different opinion. The legislature, if it acts constitutionally, may enact law that will compel all employers to unionize; but that result should not be obtained by the compulsory act of strangers. While these defendants no doubt believed that these employees should join the union, the employees themselves were of a different mind, as well as the employer. The plaintiff and his employees had as much right to their views as had these defendants. We do not think it equitable to compel the employees and their employer, all satisfied that no wrong exists between them, to adopt and put into effect the desire of these de-

fendants, who have no property or contractual rights to lose, as have the employer and its employees, if the injunction be denied. Unionization obtained, these employees would lose their jobs unless they joined the union. This Court should neither deprive a laborer of his lawful employment nor force him to join a union at the behest of them who by some courts are called "intermeddlers."

> "Defendants set up, by way of justification or excuse, the right of working men to form unions, and to enlarge their membership by inviting other working men to join. The right is freely conceded, provided the object of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. *Gompers* v. *Buck's Stove and Range Co.*, 221 U. S., 418, 439. The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. *Brennan* v. *United Hatters*, 73 N. J. L., 729, 749." *Hitchman Coal & Coke Co.* v. *Mitchell*, supra, pages 253 and 254.
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> "The strike agitators were mere volunteers. They sought mainly to advance their own personal interests by demonstrating to their superiors their usefulness in inciting strikes and their ability to enforce their demands. They assumed the role of those aptly characterized by Vice Chancellor Fallon in *Bayonne Textile Corporation* v. *American Federation of Silk Workers et al.*, 114 N. J. Eq., 307, 168 A., 799, 803, as 'intermeddlers.'" *Elkind & Sons Inc. et al.* v. *Retail Clerks' International Protective Assn., et als.*, 169 A., 494, 496 (N. J.).

In *Harvey* v. *Chapman et als.*, 226 Mass., 191, 115 N. E., 304, it was held that a provision dealer was entitled to an injunction against officers and members of a labor union with whom he had no trade dispute from boycotting his business by means of a false statement that the plaintiff's employees were out on a strike and from seeking by picketing, by displaying banners and by the distribution of circulars to compel the plaintiff to discharge his em-

ployees or to coerce them into paying fees demanded of them by the defendant association. The Court, on page 195, said:

> "It needs no discussion to show that such intentional and harmful interference with the plaintiff's business renders the defendants liable, unless there appears a legal justification for their conduct. No such justification is disclosed. There was no real trade dispute between the parties. As there was in fact no strike at the plaintiff's store at any time since July 9, 1915, it is unnecessary to consider what the defendants properly might do under a legal strike."

Also, *Cornellier* v. *Haverhill Shoe Mfg. Assn.*, 221 Mass., 554, 109 N. E., 643; *M. Steinert & Sons Co.* v. *Tagen*, 207 Mass., 394, 93 N. E., 584.

Harvey v. *Chapman*, supra, has been cited with approval many times, as in *Olympia Operating Co.* v. *Costello, et als.*, 278 Mass., on page 130, 179 N. E., 804; *Stearns Lumber Co.* v. *Howlett*, supra, on page 65; *Moore Drop Forging Co.* v. *McCarthy*, supra, on page 563, 137 N. E., 919; *Godin* v. *Niebuhr*, supra, on page 352, 128 N. E., 406. In the latter case the Court said, on page 351:

> "One who interferes with another's business, for the purpose of compelling present or prospective customers to withhold their patronage, is responsible for the harmful consequences, unless he shows a legal justification for such interference and to constitute such justification, it must appear not only that the interference was in pursuance of a lawful purpose, like trade competition, but that it was carried on by lawful means. The harmful circulation of libelous statements for the purpose of injuring the business of another, is a malicious interference with that other's property rights, for which the wrong doer is answerable in damages."

Also, *Martineau et al.* v. *Foley, et als.*, 231 Mass., 220, 120 N. E., 445.

In the recent case of *Driggs Dairy Farms, Inc.* v. *Milk Drivers' Dairy Employees Local Union No. 361, et al.*, 197 N. E., 250 (Ohio), decided January 28, 1935, it was held that injunctive relief would be given to a wholesale and retail marketer of milk, restraining the

officers and members of a labor union with whom it had no trade dispute from picketing its place of business and the places of business of its customers and from boycotting them by displaying banners and circulating handbills bearing false statements and by other methods. In that case no controversy had arisen between the plaintiff and its own employees. The picketers were strangers, members of a union. They displayed banners on which it was stated that the plaintiff company was unfair to organized labor, that it had violated the provisions of N. I. R. A. and it contained an earnest solicitation for support of the purchasing public to refuse to purchase any products which the plaintiff company distributed, the concluding sentence of which was, "Patronize only those men who display a union button." The Court, while granting the injunction against picketing as not justified, did say that the injunction should not "prevent the defendants from reasonable and peaceable persuasion, using only the truth." No doubt by "reasonable and peaceable persuasion" the Court meant fair argument that might successfully carry its appeal to and convince the mind without the use of coercion of any sort.

The defendants rely strongly upon the decision in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S., 184, in which the opinion was written by the late Chief Justice Taft. In that case the Justice in his opinion asked the question: "Is interference of a labor organization by persuasion and appeal to induce a strike against low wages *under such circumstances* without lawful excuse and malicious?" And he answered it: "We think not." Clearly Justice Taft was not generalizing but speaking of the facts in that particular case. He had just said: "Each case must turn on its own circumstances." The facts therein were quite different from those in this case. In that, unionization was not involved. There was a lawful strike by the employees because of the reduction of their wages, while in this case there not only was no strike but no controversy between the employer and its employees. Furthermore, in that case the defendants represented the strikers, while here the defendants are complete strangers. Speaking of the right of communication between the employees on the job and the defendant picketers, some of whom were ex-employees, Justice Taft, on page 204, said:

"How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free."

Thereafter, on page 206, the Justice said:

"A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerve and physical strength and courage. . . . Regarding as primary the rights of the employees to work for whom they will, and, undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor, and keeping in mind the right of the employer incident to this property and business to free access of such employees, what can be done to reconcile the conflicting interests?"

Then, dealing with the facts in that case (from which it appeared that at capacity the plant employed sixteen hundred people), the Court permitted "the strikers and their sympathizers" to have "one representative for each point of ingress and egress in the plant or place of business" and it enjoined all others "from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special

admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases."

In the later case of *Truax et al.* v. *Corrigan et al.*, 257 U. S., 312, Justice Taft commented on his decision in the Tri-City case and said that it held "it was lawful for ex-employees on a strike and their fellows in the labor union" to picket peaceably. We see no warrant for construing the decision as holding that complete strangers, without any relationship to the employees still on the job, could picket, though peaceably, to obtain accomplishment of a purpose, as here unionization, not desired by the employees themselves and contrary to the wishes of their employer.

In addition to *American Steel Foundries* v. *Tri-City Central Trades Council,* supra, the Justice, in denying the issue of the injunction in this case, relied on the decision in *Bomes* v. *Providence Local No.* 223, 51 R. I., 499, 155 A., 581, 582, and from it quoted this language:

> "The respondents have the right to persuade the public by any lawful means to patronize or to refuse to patronize complainant's theatre. But this right is not superior to the right of complainant to conduct his business free from unlawful interference. The attempt to unionize complainant's theatre may result in actual injury to complainant but it is not a legal injury unless the damage resulting therefrom is caused by a violation of a legal right of the complainant. There is a violation of such a legal right when the methods used are coercive."

Certain distinctions are to be noted between the Bomes case and the one at bar, for in the former the theatre's former employees were not only members of the defendant union but that union had had a contract with the complainant whereby the complainant had agreed to employ only union help and so the union, it may be said, was speaking with some authority for ex-employees of the com-

plainant. The union in reality by the picketing was attempting to secure a renewal of the former contract in behalf of union members who had previously been employed by the complainant. And yet in that case the judgment appealed from by which the injunction had been granted was affirmed and Chief Justice Stearns said:

> "In the circumstances and in view of the deliberate violation by respondents of the rights of complainants, we think that to now permit any picketing in the limited space near the theatre would inevitably result in the obstruction of the public use of the street and sidewalk and added injury to complaint. For the reason stated we are of the opinion that the injunction was warranted in this case."

In *Stillwell Theatre Inc.* v. *Kaplan*, 259 N. Y., 405, 182 N. E., 63, cited by defendant's counsel, the picketers were not only ex-employees but there had been a contract whereby the employer had agreed to employ only members of their union. The theatre company made a new contract of like effect with another union so the real controversy was between the two unions. There did not enter into it the question of unionization. It was simply a question whether the union and its members who had been employees under the contract not renewed could picket to the end that they might be re-employed. The Court held that it would not decide such a controversy and enjoin the picketing unless it were shown that violence, deceit or misrepresentation was employed to bring about the desired results.

New York is one of the states that holds a strike to unionize is lawful, but as we understand the Stillwell case, it does not go so far as to hold that strangers who have had no contractual relationship either with the employer or the employees have the right to picket, though peaceably. That the New York Court might so hold is indicated by its fairly recent decision in *Julie Baking Co., Inc., et al.* v. *Graymond, et al.*, 274 N. Y. S., 250, in which, although it was a case not involving organized labor, it was held that members of a neighborhood organization could peaceably picket against a bakery in protest of alleged extortionate prices for necessities. Still, the same Court granted an injunction in *A. S. Beck Shoe Corp.* v. *Johnson*, 274 N. Y. S., 946, enjoining picketing by some

negroes who by their picketing were attempting to compel the shoe corporation to employ a certain percentage of negro help in place of white persons. In the latter case, the Court having commented on its decisions revealing the history of that state's judicial attitude toward labor injunction, said, on page 952:

> "In other words, this broad liberal policy permitting concerted action to interfere with the business of employers is specifically limited to labor disputes."

As indicated in the note to the Beck case in Harvard Law Review, Vol. 48, page 691, it is difficult to justify such a distinction.

Counsel for the defendants have cited other cases which have been carefully examined but in no one of them do we find authority for denying the issue of the injunction under the facts in this case, unless we take the ultra-liberal view (and there is no evidence in this case to support it) that social values and necessities justify such interference upon the part of strangers.

> "In determining whether this justification exists, the social value of the ends sought and the necessity for picketing to secure them should be weighed against the prospective injury to both the public and the person picketed." Harvard Law Review, Vol. LXVIII, page 691.

Are the ends sought of sufficient social importance to justify peaceable picketing by these strangers under the facts in this case? We do not feel that they are.

Picketing is defined in Bouvier's Law Dictionary, Baldwin's Century Edition, page 935, as "posting members at all the approaches to the works struck against for the purpose of reporting the workmen going to or coming from the work; and to use such influence as may be in their power to prevent the workmen from accepting work there."

In *Jones* v. *Van Winkle Gin & Machine Works*, 62 S. E., 236 (Ga.), it is said that "The very word 'picket,' is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude towards the individual or corporation against whom the labor union has a grievance."

In *Union Pacific Railroad Co.* v. *Ruef, et als.*, 120 Fed., 102,

121, it is declared that "'picketing' has been condemned by every Court having the matter under consideration. It is a pretence for 'persuasion' but is intended for intimidation. Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion."

Even peaceable picketing is not intended to affect only the employer and its employees. Its purpose is also to involve the public in the controversy. It seeks to use the public as a cudgel. Besides desiring to secure its approval on the merits of the issue, its particular purpose is so to arouse and inflame it that it will not patronize the employer unless under compulsion the employer accedes to the demands of the picketers. Fair argument failing, loss of patronage by its incited customers must make the employer abandon its lawful right to manage, control and perhaps save its business. If public opinion thus obtained, resulting beneficially to union labor, affected adversely only the employer and employees, it would not be quite so harmful, but the natural tendency of such public opinion, created in a forge of white heat, is to manifest itself in ways decidedly against the best interests and welfare of society itself.

Sir Basil Thomson, author of "The Story of Scotland Yard," in speaking of riots (natural products of bitter labor conflicts) has quoted from an American writer, Mr. Melville Lee, as follows:

> "When this moment arrives all self-control is repudiated; decent and orderly men become desperadoes; cowards are inspired by a senseless bravado; the calm reason of common sense gives place to the insanity of licence, and unless the demoralizing tendency is checked, a crowd rapidly sinks to the level of its most degraded constituent. The explanation of these phenomena is probably to be found in an excessive spirit of emulation, aroused under conditions of excitement, which makes a man feel that the responsibility of his actions is no longer to be borne by himself but will be shared by the multitude in which he has merged his identity."

Peaceable picketing, so called, is conceived in battle; its real purpose is to conquer. It would compel acquiescence, not induce it by mere persuasion. Unquestionably its tendency is always militant. Then is it really in the interest of society to foster it? Disregarding its effect upon the contractual and property rights of the picketed and conceding its efficacy as an aid to unions in securing victories in labor conflicts, are the ends thus obtained of sufficient social value to justify it? Peace and contentment between employer and employee are to be recognized, commended and safeguarded. There were such between this plaintiff and its employees. The interests of society do not require their termination at the hands of these non-related defendants. This interference, even if it had not reached the stage of threats, intimidation or coercion, force or violence, can not be justified as society-required.

We do not wish to be understood as denying the right of the representatives of the unions by proper speech and persuasive argument to attempt the conversion of any employer to their belief that unionization is best; we would not so limit freedom of speech; but we see a distinction between peaceable persuasion by speech and peaceable picketing. True, the latter is said not to have in it force or violence, threats, intimidation or coercion, yet in all picketing there is an element not appearing in fair argument and a reasonable appeal for justice.

The picketer, in this case, however peaceable, in effect says to the employer: "Here I am at the entrance of your theatre and here I shall remain until you accede to my demands. I shall brand you as unfair to labor and so prejudice the public and your present satisfied employees against you and your business that you must choose between submission and its possible destruction."

Recently a Maine writer of distinction has truly stated: "Justice, defined correctly, . . . is the largest measure of individual liberty consistent with the rights of others."

Would we give the right to picket peaceably to the employer's own employees (and this we do not decide), we can not grant it to these defendants without destroying that consistency of rights absolutely essential to effect justice.

Social welfare does not demand that non-related persons or organizations shall have the right, even by peaceable picketing, to

attempt to break down and destroy a satisfactory relationship between an employer and its employees in order to supplant it by another whose terms are satisfactory only to the dictators of it. To permit such an enforced and unwanted substitution would violate that right of contract and freedom of action that in large part have made possible the industrial development of this nation. It would tend to thwart ambition and destroy initiative. It would be taking a long step toward socialistic control of private business and industry. To allow any organization, whether a union or not, without warrant of constitutional legislative action, to dictate the business policy of an industry, whether owned by an individual or a corporation, even though that which is dictated would benefit the members of the organization compelling it, there being no relationship between the organization and the employer and its employees, nor labor dispute, nor strike, would tend to destroy very materially that liberty which under our democratic form of government the people are entitled to have and retain.

Appeal and exceptions sustained.
Decree below reversed. Bill sustained.
Case remanded for issue of writ of injunction.

LEON H. KELLEY ET ALS.

vs.

BRUNSWICK SCHOOL DISTRICT ET ALS.

Cumberland. Opinion, September 28, 1936.

MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW.

Consistent with the threefold division of governmental power, political divisions, other than cities and towns, may be erected by the Legislature for public purposes.

Towns must provide funds for the support of public schools within their limits, but it does not follow that the Legislature can do no more for the same general purpose.

Municipal corporations organized for different purposes may include the same territory, as a city and a county, or a school district. Two authorities cannot exercise power in the same area, over the same subject, at the same time. But identity of territory, putting one municipal corporation, full or quasi, where another is, is immaterial, if the units are for distinct and different purposes.

A school district is a public agency or trustee established to carry out the policy of the State to educate its youth. The Legislature may change such agencies, and control and direct what shall be done with school property. The length of time this district may exist, is, because capable of being made certain, definite from the beginning. A municipal corporation owes its existence to the legislative will. The Legislature may, in its discretion, abolish or dissolve such a corporation at any time. When the district is at a end, the town shall, in succession, take the property, impressed with the duty of carrying on the trust.

The property held by school districts for public use is subject to such disposition in the promotion of the objects for which it is held, as the supreme legislative power may see fit to make.

Over property acquired and held exclusively by an agency of State government for purposes deemed public, the Legislature may exercise control to the extent of requiring the agency, without receiving compensation, to transfer such property to some other governmental agency, to be used for similar purposes, or perhaps for other purposes strictly public in their character.

School property is public property, the property of the incorporated district and not of the taxpayers residing within it.

A statute cannot be invalidated because it seems to the court to inaugurate an inexpedient policy. All questions as to the expediency of a statute are for the Legislature.

The constitutional debt-limit provision confines the indebtedness of cities and towns within prescribed bounds. Loose construction should not be allowed to weaken the force or broaden the extent of that provision.

The courts may not, however, absent express constitutional limitations, entirely deny the power of the Legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations.

The Constitution of Maine contains no specific provision that wherever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebt-

edness of all the separate units should be taken, in ascertaining the debt limit of one of them.

The Maine Legislature, with regard to incorporating corporations purely public, is of virtually unlimited power.

A legislative act should not be declared unconstitutional unless it is clearly so.

In the case at bar, the court holds that Chapter 70 of the Special Laws of 1935 creating the Brunswick School District does not palpably contravene the Maine Constitution.

On report on an agreed statement of facts and stipulation. A bill in equity brought under R. S., Chap. 91, Sec. 36, Clause XIII, by taxable Inhabitants of the Town of Brunswick against the Brunswick School District, and trustees thereof, seeking to enjoin the corporation and its trustees from incurring any indebtedness, paying any money or doing any acts in pursuance of certain votes passed by the trustees of the corporation. Bill dismissed on the merits. The case fully appears in the opinion.

Spinney & Spinney, for complainants.

Verrill, Hale, Booth & Ives, for respondents.

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

BARNES, J., MANSER, J., dissenting.

DUNN, C. J. In 1935 the Legislature, by special act (P. & S. L., Chap. 70,)—the law became effective July 6—created the Brunswick School District, which, for brevity, will be spoken of as district. The first section of the act, so far as recital is essential, reads as follows:

> ". . . the inhabitants and territory within the town of Brunswick are hereby created a body politic and corporate under the name of Brunswick School District for the purpose of acquiring property within the said town for school purposes; erecting, enlarging, repairing, equipping and maintaining on said property a school building; and for the purpose of maintaining a secondary school, with the right to lease or let said property to said town; all for the benefit of the inhabitants of said town."

Legislative action was made to depend upon the wishes of the listed voters in the proposed district. The vote of a majority of the electors, in case of an election for the expression of their choice, and an annual meeting of the inhabitants of the town of Brunswick, hereinafter generally called town, being held on the same day, was defined as necessary to decision; whereas if the election was on any day before that of the next town meeting, (such meetings are by statute—R. S., Chap. 5, Sec. 12—in March,) vote of one third of all the voters in the territorial division would suffice. The latter method was followed October 14, 1935.

At the same election, five trustees were chosen by plurality vote.

The legislation empowers borrowing on the faith and credit of the district a sum not in excess of $250,000, to be met, together with interest, from the levying, annually, over a period of years, of taxes upon its polls and estates.

The borrowed money must be expended for the erection and equipment of a building in the district for a secondary school.

When the money shall have been repaid, and every indebtedness of the district discharged, the property whatsoever which it may at that time hold, is, under the terms of the act, to be transferred to the town. The trustees shall then cease to function, the district itself become legally defunct, and "all of the duties, management, care and maintenance shall revert to the school board of the town of Brunswick . . . ." 1935 Laws, *supra.*

The trustees have made part payment of the purchase price of a building site; they purpose to complete that transaction, and, on making loans in supplement to an expected grant from the Federal Public Works Administration, to contract for a high school, the total expense, inclusive of any grant, to be within the sanction of the act.

Ten individual taxpayers, alleging themselves inhabitants of the town, and of the district superimposed upon it, the area of the two being identical, instituted this suit against the district, and, by designation, its trustees, to test the validity of the statute; and for relief by injunction.

Jurisdictional allegations are sufficient. R. S., Chap. 91, Sec. 36, Cl. XIII; *Crabtree* v. *Ayer*, 122 Me., 18, 118 A., 590; *Hamilton* v. *District*, 120 Me., 15, 112 A., 836.

The cause was heard on the bill, answers, replication, and facts agreed on, and reported to the full court.

It is too clear to require argument that, consistent with the threefold division of governmental power, political divisions, other than cities and towns, may be erected for public purposes. There is no dispute in the briefs that the body whose business with regard to such policy it is in the first place, is the Legislature.

The present case is insisted governed by no decision of the court of last resort. Counsel for the complainants say that our cases deal chiefly with incorporations partaking in their incidents the nature of municipalities, whose continuing and definite activities are distinct from those which a single city or town, of like space, is at the same time performing.

Hamilton v. *District*, cited before, sustained this situation: Corporate existence of a district comprising the territory and population within two cities, was to continue until the acquirement by that district, not for itself but for another, by issuing and selling bonds, repayable in money to come from taxes, of a location for a public pier.

The case is not authority to support fully the legislation now under consideration. The point on which the decision there depended was that of laying taxes for a purpose not ordinarily municipal, on the theory that, from state-wide use of the pier, special benefit, not disproportionate to burden, would result to the tax district.

For the support and maintenance of schools, school districts embracing fractions of towns were early set up in Massachusetts. *Fourth District* v. *Wood*, 13 Mass., 193. Such districts were continued in Maine. The Act of 1821, Chap. 117, to provide for the education of youth, made each school district a "body corporate." *Whitmore* v. *Hogan*, 22 Me., 564.

School districts were, for certain purposes, considered a form of municipal corporation, within the meaning of that generic term. *Fourth District* v. *Wood*, supra; *Andrews* v. *Estes*, 11 Me., 267. They were abolished in 1893. *School District* v. *Deering*, 91 Me., 516, 40 A., 541.

The districts were auxiliary to towns in effecting an intense belief on the part of the public in the virtue of popular education. The

powers of those districts were commensurate with their duties as part of such a system. They might, among other limited and specific things, hire money on the tax liability of their polls and estates, to build schoolhouses. P. L., 1846, Chap. 208. District debts were not debts of the town. *Gaskill* v. *Dudley*, 6 Met., 546, 552.

The whole territory of the town, whether divided by the Legislature, as it pleased, (*Parker* v. *Titcomb*, 82 Me., 180, 19 A., 162,) or by the town itself, optionally, under legislative warrant, (*Gaskill* v. *Dudley*, supra,) was embraced within different districts. *Fry* v. *School District*, 4 Cush., 250. So far as districts were corporations—quasi-municipal corporations was the usual denomination—they were of the same kind as towns, organized for the same purposes, and charged with duties which would otherwise have devolved upon the town. *Gaskill* v. *Dudley*, supra.

It is objected that the act in question does not incorporate a district separate from the town; that the district must depend on the town, not only for pupils but for teachers. Argument does not do more than suggest that if the question had been debatable, the Legislature, by passing the act, decided the issue. This action is not reviewable in the courts.

Nothing in the act attempts to dissolve the town; to divide it; or to repeal, curtail, or regulate any duty or responsibility resting on it. On the contrary, to do more for the cause of education than the town, in measuring to requirement, is already doing, might be said to be the main purpose of the act. *Cushing* v. *Newburyport*, 10 Met., 508.

Towns must provide funds for the support of public schools within their limits, but it does not follow that the Legislature can do no more for the same general purpose. *Call* v. *Chadbourne*, 46 Me., 206, 222.

Municipal corporations organized for different purposes may include the same territory, as a city and a county, or a school district. McQuillin, Mun. Corp. (2nd ed.), Vol. 1, Sec. 283. Two authorities cannot exercise power in the same area, over the same subject, at the same time. Dillon, Mun. Corp. (4th ed.), Vol. 1, Sec. 184; *Rex* v. *Passmore*, 3 T. R., 199; *Paterson* v. *Society*, 24 N. J. L., 385. But identity of territory, putting one municipal corporation, full or quasi, where another is, is immaterial, if the units

are for distinct and different purposes. *South Park* v. *Chicago, etc., Co.*, 286 Ill., 504, 122 N. E., 89.

A purpose of the act incorporating the Brunswick district is that of maintaining a secondary school. Territory of district and town being alike, the maintenance in the district of such school will necessarily be "for the benefit of the inhabitants of said town." The case is not presented in the phase of leasing the schoolhouse to the town; nor does it involve how money may be had for paying teachers, the act being silent on the topic. Teachers might be paid otherwise than by taxes.

The act provides that title to all the property which the district may eventually have shall vest in the town.

A school district is a public agency or trustee established to carry out the policy of the State to educate its youth. The Legislature may change such agencies, and control and direct what shall be done with school property. The length of time this district may exist, is, because capable of being made certain, definite from the beginning. A municipal corporation owes its existence to the legislative will. *Bank* v. *Rome*, 18 N. Y., 38, 43. The Legislature may, in its discretion, abolish or dissolve such a corporation at any time. 43 C. J., p. 171. When the district is at an end, the town shall, in succession, take the property, impressed with the duty of carrying on the trust. *Town of Barre* v. *School District*, 67 Vt., 108, 30 A., 807; *School District* v. *Concord*, 64 N. H., 235, 9 A., 630; *In re School Committee*, 26 R. I., 164, 58 A., 628.

The property held by school districts for public use is subject to such disposition in the promotion of the objects for which it is held, as the supreme legislative power may see fit to make. *Rawson* v. *Spencer*, 113 Mass., 40.

Over property acquired and held exclusively by an agency of State government for purposes deemed public, the Legislature may exercise control to the extent of requiring the agency, without receiving compensation, to transfer such property to some other governmental agency, to be used for similar purposes, or perhaps for other purposes strictly public in their character. *Mount Hope Cemetery* v. *Boston*, 158 Mass., 509, 33 N. E., 695.

School property is public property, the property of the incor-

porated district and not of the taxpayers residing within it. *Water Company* v. *Wade*, 59 N. J. L., 78, 35 A., 4.

The confiscation or diversion of the property of strictly public corporations is prohibited by both Federal and State constitutions. Cooley, Con. Lim. (7th ed.), Vol. 1, pp. 499-502; *Dartmouth College Case*, 4 Wheat., 518, 694, 4 Law ed., 629. Judge Dillon, in his monumental work, after adverting to the power of the legislature over municipal corporations, states his conclusion to be that while, concerning the property of such corporations, regulative power is broad, yet it is not absolute or unlimited; such property is, as long as the municipality lives, burdened with a trust for its benefit; and, if the corporate entity shall be dissolved, for the benefit of the people of the locality. Dillon, Mun. Corp. (5th ed.), Vol. 1, Page 192, Sec. 112.

A statute cannot be invalidated because it seems to the court to inaugurate an inexpedient policy. All questions as to the expediency of a statute are for the Legislature. This is a line of inquiry which courts cannot pursue in determining the validity of a law.

> "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago etc., R. R. Co.* v. *McGuire*, 219 U. S., 549, 55 Law ed., 328.

The departments of government, it has been said, are naturally divided into three classes: the legislative, the law-making; the judicial, the law-expounding; and the executive, the law-enforcing. The boundary lines between them were as distinctly marked as the situation would admit. Each was made sovereign in sphere, but powerless beyond it. They are all agents of the people, and the Constitution their power of attorney. All acts beyond this are nugatory; but within it, binding on all, whether politic or impolitic. *Louisville, etc., R. R. Co.* v. *County Court*, 1 Sneed, 637, 62 Am. Dec., 424, 438.

Complainants stress that the act infringes the Thirty-sixth Amendment to the Constitution of Maine, that taxes upon tangible property "be apportioned and assessed equally, according to the just value thereof."

Hamilton v. *District*, supra, is, on the doctrine of *stare decisis*, precedent to the contrary. It may be said here, as there, that for anything shown, benefit and burden are reasonably proportionate.

And finally the act is assailed as having no purpose other than to permit accomplishing, indirectly, what, because of the five per centum limit of present indebtedness organic in our law, (provisos are not of relevancy,) the town of Brunswick could not do directly. Thirty-fourth Amendment, Constitution of Maine.

The constitutional debt-limit provision confines the indebtedness of cities and towns within prescribed bounds. Loose construction should not be allowed to weaken the force or broaden the extent of that provision. *Browne* v. *Boston*, 179 Mass., 321, 60 N. E., 934; *Reynolds* v. *Waterville*, 92 Me., 292, 42 A., 553.

Where some independent board or commission, which, though technically a separate corporation, is only an agency of the town or city, incurs or seeks to incur a debt, the courts ought to look behind fiction to see what the real fact is. *Browne* v. *Boston*, supra; *Reynolds* v. *Waterville*, supra. See, too, Opinion of Justices, 99 Me., 515, 60 A., 85.

Such is the correct rule and principle; but the courts may not, absent express constitutional limitations, entirely deny the power of the Legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations. *Wilson* v. *Board of Trustees*, 133 Ill., 443, 27 N. E., 203; *Board of Education* v. *Upham*, 357 Ill., 263, 191 N. E., 876; *Kennebec Water District* v. *Waterville*, 96 Me., 234, 52 A., 774; *Augusta* v. *Augusta Water District*, 101 Me., 148, 63 A., 663. The statement in the case latest cited, as to the same territorial coexistence of two public corporations, while *obiter dictum*, is in point.

The Constitution of Maine contains no specific provision that wherever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebtedness of all the separate

units should be taken, in ascertaining the debt limit of one of them.

The Maine Legislature, with regard to incorporating corporations purely public, is of virtually unlimited power. It has created, to speak only of some, a local police corporation, (*Dyar* v. *Farmington Village Corporation*, 70 Me., 515); fire protection corporations, (*Dyar* v. *Farmington Village Corporation*, supra; *Mayo* v. *Village Fire Company*, 96 Me., 539, 53 A., 62); a forestry district, (*Sandy River Plantation* v. *Lewis*, 109 Me., 472, 84 A., 995); a bridge district, (*Crabtree* v. *Ayer*, supra); water districts, (*Kennebec Water District* v. *Waterville* and *Augusta* v. *Augusta Water District*, both of earlier citation); and authorized them to administer public affairs. The Legislature has even incorporated a village corporation enabled, with other prerogatives, to build a hall, part of which it occupies, and part of which it rents. *Camden* v. *Village Corporation*, 77 Me., 530, 1 A., 689.

In *Malaley* v. *Marysville*, 37 Cal. App., 638, 174 P., 367, 369, the Court, quoting from a previous case, says:

> "'What, therefore, the Wetmore Case and the Law Case decided was that the erection of schoolhouses within the corporated limits of a muncipality was justly to be regarded as a municipal affair, and that the city therefore, as such, could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows therefore that the declaration of this court that the issuing of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity — the school district — may, under the general school system of the state, do the same thing for the same purpose.'"

The case proceeds:

> "That, notwithstanding that they are different and separate or distinct corporate entities, a municipality and a school district, the territorial boundaries of which are the same as

those of the city, may, if a Legislature elects to give them the right to do so, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system . . . ."

In Detroit, Michigan, the city and the school district coincide geographically. Each is an independent corporation. *Kuhn* v. *Thompson*, 134 N. W., 722, 726. The Michigan Court, recognizing that there cannot be, over the same territory, at the same time, two legal and effective corporations with the same governmental powers, points out that where the corporations are organized for different purposes, have different rights and duties relating to different matters, they may, and often do, occupy one territory, working in harmony, each within its scope. *Kuhn* v. *Thompson*, supra. See McQuillin, Mun. Corp., *supra*.

McCurdy v. *Bloomington*, 194 N. E., 287, holds that a school district and a city with conterminous boundaries are, in the law, apart from each other.

In *People* v. *Bowman*, 247 Ill., 276, 93 N. E., 244, 248, it is said:

"While two municipal corporations cannot have jurisdiction and control, at one time, of the same territory for the same purpose, no constitutional objection exists to the power of the Legislature to authorize the formation of two municipal corporations in the same territory at the same time for different purposes, and to authorize them to co-operate, so far as co-operation may be consistent with, or desirable for, the accomplishment of their respective purposes."

An able annotator thus expresses the result of his examination of the reported cases throughout the country:

"The general rule is that, in applying to constitutional or statutory debt-limit provisions to separate and distinct political units with identical boundaries, exercising different functions, only the indebtedness of the political unit in question can be considered, and the debts of the other independent political units should be excluded." 94 A. L. R., 818.

The annotation collects and discusses, among others, cases from Illinois, Indiana, Kentucky, Maine, Michigan, North Dakota, Pennsylvania, South Dakota, Washington and Wisconsin.

In departure from the general rule, Texas holds that the indebtedness of all the separate coterminous political units must be added together, to find out whether one of them has exceeded its debt limit. *Simmons* v. *Lightfoot*, 105 Tex., 212, 146 S. W., 871. This rule has been necessarily applied in South Carolina, by reason of the language of its constitutional debt-limit provision. *Todd* v. *Laurens*, 48 S. C., 395, 26 S. E., 682.

A legislative act should not be declared unconstitutional unless it is clearly so. *Ulmer* v. *Lime Rock R. R. Co.*, 98 Me., 579, 57 A., 1001.

This Court cannot say that chapter 70 of the Special Laws of 1935 palpably contravenes the Maine Constitution.

On the whole case, which has been argued on both sides with ability and zeal, the complainants' bill is not sustainable.

The mandate should be:

Bill dismissed, on the merits.

DISSENTING OPINION

MANSER, J. With the statement of legal principles contained in the majority opinion, I agree. In undertaking to apply these principles, my mind is compelled to a different conclusion.

The contention of the plaintiff is that the school district created by the act, though technically a separate corporation, is only an agency of the town of Brunswick, and when such district incurs or seeks to incur a debt, the Court ought to look behind fiction to see what the real fact is. This is conceded to be the correct rule and principle, although the majority opinion properly points out that, "Courts may not, absent express constitutional limitations, entirely deny the power of the legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations."

Another fundamental principle enunciated is that two authorities can not exercise power in the same area, over the same subject, at the same time, although municipal corporations organized for

different purposes may include the same territory, as a city or a county, or a school district.

An analytical examination of the act shows that it makes little attempt to give to the district the similitude of corporeal entity other than that of the town itself.

It is stated in the majority opinion that "a purpose of the act incorporating the Brunswick district is that of maintaining a secondary school. Territory of district and town being alike will necessarily be for the benefit of the inhabitants of said town. The case is not presented in the phase of leasing the schoolhouse to the town; nor does it involve how money may be had for paying teachers, the act being silent on the topic. Teachers might be paid otherwise than by taxes."

I am convinced that it is not a purpose of the act that the district should maintain a secondary school.

Sec. 1 provides: "Subject to the provisions of section 7 hereof, the inhabitants and territory within the town of Brunswick are hereby created a body politic and corporate under the name of Brunswick School District for the purpose of acquiring property within the said town for school purposes; erecting, enlarging, repairing, equipping and maintaining on said property a school building; and for the purpose of maintaining a secondary school, with the right to lease or let said property to said town; all for the benefit of the inhabitants of said town."

It is significant to note that the clause upon which emphasis is placed and which is set out separately and distinctly, reads: "And for the purpose of maintaining a secondary school, with the right to lease or let said property to said town." The entire act discloses that the real purpose and the actual grant of power is for the erection and maintenance of a physical structure to be turned over to the town for its use. There is no provision for employment or payment of teachers by the trustees or of any of the usual and necessary incidents connected with the education of youth. It seems hardly an answer to say that the act being silent on the subject of payment of these expenses, the legislature may have intended that in a free public high school for the benefit of all children of eligible age and scholastic attainments in the town of Brunswick the teachers would be paid otherwise than through taxation.

Taken in connection with the other positive provisions of the act, the meaning of the particular clause is clearly shown by reversing the order of the phrases, as follows: "And with the right to lease or let said property to said town for the purpose of maintaining a secondary school."

The district is authorized and indeed is limited to the leasing of the property to the municipality alone, thus enabling the municipality to maintain a secondary school.

The record as presented admits that the town itself by reason of present indebtedness is constitutionally prohibited from borrowing the necessary funds for the building of the school. The charter of the district gives it authority to incur such indebtedness. Is it in fact doing so simply as an agency of the town of Brunswick?

Examination discloses that the town surrenders no function or duty with respect to secondary education, and the district assumes none except the actual building of a school structure and the procurement of funds for the purpose.

Territory of the district and town is coincident. Trustees are elected by the legal voters of the town. The result of the election is declared by the municipal officers. The term of office of the trustees expires at the end of successive municipal years. No trustee is entitled to compensation except the treasurer and his salary is fixed, not by the trustees, but by the board of selectmen of Brunswick. The trustees must make yearly reports to be filed with the municipal officers of the town. After providing for a bond issue come sections of the act relating to the retirement of such bonds. Each year the trustees compute the amount needed and certify the same to the assessors of the town. A tax sufficient to cover the amount is then assessed and committed to the town collector who is given all the powers provided by the general law for the enforcement of collection.

Finally there is a mandatory provision that when the school building has been paid for, the district shall automatically cease to function, the president and treasurer must execute a deed of the property to the town, and all money in the treasury goes to the town treasurer.

The town is undertaking to purchase a school building and to pay for it on the installment plan. It becomes obligated to raise

money by taxation to pay a present debt which is can not lawfully incur.

Taken all together, the case appears to warrant the conclusion reached by Chief Justice Peters in *Reynolds* v. *Waterville*, 92 Me., 292: "The commission as created by the act was naked of all authority excepting in just one respect, and that was as a formal medium through which the city could secure to the bondholders its debt."

BARNES, J., joins in dissent.

CITY OF EASTPORT *vs.* EDWIN B. JONAH.

Washington. Opinion, October 3, 1936.

MUNICIPAL CORPORATIONS. TAXATION. PLEADING & PRACTICE.

R. S. 1930, *Chap.* 14, *Sec.* 64, *provides that "the Mayor and Treasurer of any city, the Selectmen of any town, and assessors of any plantation to which a tax is due may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable." Compliance with such statutory provision is a condition precedent to the maintenance of such action.*

In the case at bar, the City of Eastport had adopted a charter providing for city manager form of government. Under the terms of its charter the court holds that the city manager is but an administrative officer who acts under the direction and control of the city council. He did not succeed to the powers formerly exercised by the mayor. His direction to bring the action in question was not a compliance with the statute, and the action was therefore not properly commenced.

On exception by plaintiff. An action of debt to recover taxes. The action was dismissed by the presiding Justice on the ground that no notice in writing by the mayor and treasurer of the city had been given as required by R. S., Chap. 14, Sec. 64. Plaintiff seasonably excepted. Exception overruled. The case sufficiently appears in the opinion.

George B. Pike, for plaintiff.

Jonah & McCart, for defendant.

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

THAXTER, J. This is an action of debt brought by the City of Eastport to recover taxes in the sum of $423 assessed against the defendant. On motion of the defendant, the Court dismissed the action and the plaintiff excepted.

R. S. 1930, Chap. 14, Sec. 64, provides that "the mayor and treasurer of any city, the selectmen of any town, and the assessors of any plantation to which a tax is due may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable." Compliance with such statutory provision is a condition precedent to the maintenance of such action. *Wellington* v. *Small*, 89 Me., 154, 36 A., 107; *Inhabitants of Cape Elizabeth* v. *Boyd*, 86 Me., 317, 29 A., 1062.

The sole question in this case is whether the statute was complied with.

The written direction to commence the action in this instance was given, as set forth in the writ, by the president of the city council, the city manager and the city treasurer. The plaintiff contends that the city manager under the new city charter has the authority formerly conferred on the mayor, and was the proper official together with the city treasurer to direct the commencement of the action.

In the city charter, Priv. & Sp. Laws 1935, Chap. 66, Sec. 6, the powers and duties of the city manager are given as follows:

> "The city manager shall be the executive and administrative head of the city and shall be responsible to the city council for the administration of all departments. The powers and duties of the city manager shall be as follows:
>
> (a) To see that the laws and ordinances are enforced, but he shall delegate to the chief of the police department the active dutices connected therewith regarding crimes and misdemeanors.
>
> (b) To exercise control over all departments and divisions created herein or that may hereafter be created.

(c) To make appointments as provided in this charter.

(d) To assign the duties of 2 or more officers to 1 officer.

(e) To divide the duties of any office between 2 or more offices.

(f) To attend meetings of the city council, except when his removal is being considered, and recommend for adoption such measures as he may deem expedient.

(g) To keep the city council fully advised as to the business and financial condition and future needs of the city and to furnish the city council with all available facts, figures and data connected therewith, when requested.

(h) To perform such other duties as may be prescribed by this charter or required by ordinance of the city council."

It is plain from a reading of this section that the city manager is but an administrative officer who acts under the direction and control of the city council. He does not succeed to the powers formerly exercised by the mayor. His direction to bring the action in question was not a compliance with the statute.

Exception overruled.

ANNIE M. WARD, ADMX.

vs.

CUMBERLAND COUNTY POWER & LIGHT CO.

Cumberland. Opinion, October 5, 1936.

MOTOR VEHICLES. NEGLIGENCE. PLEADING & PRACTICE.

It is well settled in this jurisdiction that a motion by the defendant for a directed verdict is equivalent to a demurrer to the evidence. Exceptions raise the question, not whether there is sufficient evidence to take the case to the jury, but whether upon all the evidence as it appears in the record a verdict for the plaintiff could be permitted to stand.

Under R. S., Chap. 96, Sec. 50, a defendant pleading contributory negligence

has the burden of establishing it. The statute does not, however, change the substantive law of negligence. Under it, the tribunal hearing the case must still be satisfied on all the evidence that the deceased was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury. The statutory presumption in favor of the deceased does not compel the submission of this class of cases to the jury.

In the case at bar, the contention of counsel for the plaintiff that the trolley car may have been far enough away when the decedent left the curb, to justify him as a reasonably prudent man in attempting to drive out into the street ahead of it, was not supported by any evidence of probative value. It was at best only an inference based on mere conjecture, which can never support a verdict.

The evidence in the case clearly preponderated in favor of the contention of the defendant that the plaintiff's intestate was injured largely, if not wholly, by his own negligence. The statutory presumption of his due care was clearly rebutted. The last clear chance doctrine had no application in this case. It being apparent in the trial Court that a verdict for the plaintiff could not be sustained, it was the duty of the trial Judge to direct the jury to return a verdict for the defendant.

On exceptions by plaintiff. An action on the case for negligence in which the plaintiff, an administratrix sought to recover from the defendant damages for injuries which plaintiff's intestate received, when a trolley car operated by an employee collided with the automobile driven by the plaintiff's intestate. At the conclusion of the testimony the defendant moved for a directed verdict. To the granting of this motion by the presiding Justice, plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Bernstein & Bernstein, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

STURGIS, J. In this action of negligence, the trial Judge at *nisi prius* ordered the jury to return a verdict for the defendant, and exceptions were reserved.

As is well settled in this jurisdiction, a motion by the defendant for a directed verdict is equivalent to a demurrer to the evidence.

Exceptions raise the question, not whether there is sufficient evidence to take the case to the jury, but whether upon all the evidence as it appears in the record a verdict for the plaintiff could be permitted to stand. *Dyer* v. *Power & Light Company*, 119 Me., 224, 110 A., 357. See also *Mills* v. *Richardson*, 126 Me., 244, 246, 137 A., 689.

The facts established by the weight of the evidence are that early in the afternoon of Saturday, March 23, 1935, Fred Ward, the plaintiff's intestate, parked his car nearly opposite the Park Fruit Store and on the southerly side of Congress Street in Portland. He was joined by his brother, who came from a near-by drugstore, and immediately turned his car out from the curb towards the center of the street with the intention of proceeding easterly towards Munjoy Hill. As he was swinging out sufficiently to pass a car parked directly in front of him, the intestate's automobile was struck by a trolley car travelling easterly on Congress Street, shoved against the automobile behind which he had been parked, and carried along more than sixty feet into the Franklin and Congress Street intersection. The plaintiff's intestate was thrown against the wheel of his automobile, injured in and about his chest, and about two weeks later died.

It was a stormy day, rain and snow were falling, and the street and especially the car rails were slippery. The trolley car was one of the larger type in operation in the city, heavy and more than forty feet in length. It was a one-man car and operated by an experienced motorman then in the employ of the defendant corporation. There is abundant credible evidence that it was travelling at a speed of not more than eighteen miles an hour when the collision occurred. Contention that it had attained a greater speed is based only on conjecture. The motorman is corroborated in his assertion that the plaintiff's intestate, without signal or warning, swung his automobile out in front of the trolley car and so near to it as it approached that, although he threw on his brakes, put on the sand and threw the motor into reverse, the car could not be stopped in time to avoid the accident.

The plaintiff's intestate died before the trial of this action. He is presumed to have been in the exercise of due care when he was injured. The defendant, having pleaded contributory negligence,

has the burden of establishing it. R. S., Chap. 96, Sec. 50. The statute does not, however, change the substantive law of negligence. Under it, the tribunal hearing the case must still be satisfied on all the evidence that the deceased was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury. *Cullinan* v. *Tetrault*, 123 Me., 302, 305, 122 A., 770; *Field* v. *Webber*, 132 Me., 236, 169 A., 732. The statutory presumption in favor of the deceased does not compel the submission of this class of cases to the jury. *Levesque* v. *Dumont*, 117 Me., 262, 103 A., 737.

It is claimed by the brother, who was in the automobile when the accident happened, that the decedent looked out the window and to the left just before he turned from the curb into the street, but in what direction he looked or what he saw does not appear. It is apparent that he either failed to see the trolley car moving rapidly towards him and but a short distance away, or took the chance of swinging out and driving up the street before it reached him. The contention of counsel for the plaintiff that the trolley car may have been far enough away when the decedent left the crub to justify him as a reasonably prudent man in attempting to drive out into the street ahead of it is not supported by any evidence of probative value. It is at best only an inference based on mere conjecture, which can never support a verdict. *Mahan* v. *Hines*, 120 Me., 371, 115 A., 132; *Alden* v. *Railroad*, 112 Me., 515, 92 A., 651; *Seavey* v. *Laughlin*, 98 Me., 517, 57 A., 796.

We are of opinion that the evidence in this case clearly preponderates in favor of the contention of the defendant that the plaintiff's intestate was injured largely, if not wholly, by his own negligence. The statutory presumption of his due care is clearly rebutted. The last clear chance doctrine has no application in this case. It being apparent in the trial Court that a verdict for the plaintiff could not be sustained, it was the duty of the trial Judge to direct the jury to return a verdict for the defendant. *Day* v. *B. & M. Railroad*, 97 Me., 528, 55 A., 420; *Field* v. *Webber*, 132 Me., 236, 169 A., 732. The mandate must therefore be

Exceptions overruled.

PORTLAND TERMINAL COMPANY

vs.

LEO P. HINDS, FRED S. JORDAN AND ANDREW JACKSON,

ASSESSORS OF THE CITY OF PORTLAND.

Cumberland. Opinion, October 8, 1936.

TAXATION. RAILROADS. CONSTRUCTION OF STATUTES.

In construing statutes relating to assessment of taxes it must be borne in mind that taxation is the rule and exemption the exception, and that the intention to exempt property from taxation must be expressed in clear and unambiguous language.

In the case at bar, the Court holds that, considering the history of railroad legislation in this state, it is apparent that in the mind of the legislature the right of way of the railroad was at all times regarded as something distinct from its terminal facilities and from property acquired for incidental purposes. The methods prescribed for its taking and location were different from those designated for the taking of property for general purposes. When the legislature exempted from local taxation land within the located right of way, it seems clear that there was no intent to exempt such property as that involved in this case, and that the right to tax land employed for terminal facilities outside the four-rod strip was in the local communities. The Court therefore holds that the decision of the presiding Justice dismissing the appeal of the railroad from the assessment of this tax, was correct.

On exceptions by appellant. To certain rulings of a Justice of the Superior Court, dismissing an appeal by the Portland Terminal Company from the Board of Assessors of the City of Portland which had imposed taxs for the year 1934, upon certain real estate of the appellant, exceptions were seasonably taken. Exceptions overruled. The case fully appears in the opinion.

Edward W. Wheeler,
William B. Skelton,
Perkins & Weeks, for appellant.

Harry C. Wilbur,
Eben Winthrop Freeman, for appellees.

SITTING: STURGIS, BARNES, THAXTER, HUDSON, MANSER, JJ.

THAXTER, J. This case is before the Court on exceptions to certain rulings of a Justice of the Superior Court dismissing an appeal of the Portland Terminal Company from a decision of the assessors of the City of Portland refusing to abate certain taxes assessed against the company for the year 1934. It is unnecessary to consider the three exceptions in detail as the rulings attacked all relate to one general question.

The Portland Terminal Company, a railroad corporation, by legislative authority acquired by deed in 1911 all the rights which the Boston and Maine Railroad had in the property here involved. The Boston and Maine Railroad had been authorized by Priv. & Special Laws 1871, Chap. 630, to extend its line from Berwick or South Berwick to Portland and to maintain and operate such extension. In so doing it was to have all the rights, powers, privileges and immunities and be subject to the liabilities and duties of similar railroad corporations under the laws of this state. Pursuant to such authority and in the exercise of the right of eminent domain granted by R. S. 1871, Chap. 51, Sec. 2, it acquired the lands here in question. There are eleven different parcels all of which with the exception of a part of the first the appellant claims are exempt from taxation under the provisions of R. S. 1930, Chap. 13, Sec. 4, on the ground that they are within the located right of way of the railroad. This particular land was acquired for depot grounds, side-tracks, storage tracks, repair shops, freight houses and for such other uses as are vital to the operation of a railroad terminal. All of the land is outside of the four-rod strip referred to in R. S. 1930, Chap. 63, Sec. 24; and the tax on it, which was paid under protest, amounted to $4,025.58.

The statutory provisions with which we are here concerned are as follows:

R. S. 1930, Chap. 13, Sec. 4:

> "The buildings of every railroad corporation or association, whether within or without the located right of way, and its lands and fixtures outside of its located right of way, are subject to taxation by the cities and towns in which the same

are situated, as other property is taxed therein, and shall be regarded as non-resident land."

R. S. 1930, Chap. 63, Sec. 24:

"A railroad corporation for the location, construction, repair, and convenient use of its road may purchase, or take and hold, as for public uses, land and all materials in and upon it; through woodland and forest the land so taken shall not exceed six rods in width unless necessary for excavation, embankment, or materials, and through all land other than woodland and forest, the land so taken shall not exceed four rods in width unless necessary for excavation, embankment, or materials."

The decision of this question, which is of importance to both parties to this litigation, hinges on the interpretation of the words "located right of way" as used in R. S. 1930, Chap. 13, Sec. 4, *supra.*

Counsel for the City of Portland contend that the "located right of way" is limited to the four-rod strip referred to in R. S. 1930, Chap. 63, Sec. 24, and that accordingly all land outside of it is taxable. Counsel for the appellant claims that "the located right of way" comprehends all lands which the railroad corporation has appropriated and holds for public use under the exercise of its power of eminent domain for its authorized and essential purposes. Under such interpretation there would be included land taken for side-tracks, spur tracks, freight and passenger yards, stations, grounds, and approaches to stations, repair shops, storage warehouses, in fact for any of the uses for which the railroad is authorized to take lands under the provisions of R. S. 1930, Chap. 63, Sec. 26.

A consideration of the history of these statutory provisions is of great aid in determining their meaning. The earliest enactment is just a century old. P. L. 1836, Chap. 204. It reads in part as follows:

"Rail Road Corporations, which have been, or may be granted, shall have the right to take and hold so much of the Land, and other real estate of private persons, as may be

necessary for the location, construction, and convenient operation of their Rail Roads; and they shall, also, have the right to take, remove, and use for the construction and repair of said Rail Roads and appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken,— *Provided, however*, that said land, so taken, shall not exceed four rods in width, except, where greater width is necessary for the purpose of excavation, or embankment."

This, with the exception of a modification which does not concern us, is substantially the same as R. S. 1930, Chap. 63, Sec. 24. It was enacted at a time when terminal yards were unheard of, when the business of a railroad was largely the transportation of passengers, and the ground which it occupied was a narrow strip of land comparable to a highway. In fact, damages for the taking of such land were to be assessed by the county commissioners in the same manner as was by law provided in the case of the assessment of damages for laying out highways.

P. L. 1845, Chap. 165, repealing P. L. 1845, Chap. 159, Sec. 3, provided for the taxation of the real estate of railroads in the same manner as other real estate was taxed but the track and the land on which it was laid was exempt.

These provisions were incorporated in the revision of the statutes in 1857. R. S. 1857, Chap. 6, Sec. 4; Chap. 51, Sec. 2.

It is apparent that at that time what would now be called the "located right of way" of the railroad was the four-rod strip referred to in the statutes. For all purposes which were then essential this constituted the railroad itself. As railroads were then run, what land might be held outside of this area was of small consequence. It is apparent that Section three of Chapter 51 which provided for the filing of the location of the railroad with the county commissioners referred to nothing but the four-rod strip. By 1865, however, it had become apparent that, if railroads were to handle the increasing traffic, they must control more land outside of the original location. In that year by P. L. 1865, Chap. 21, they were given the right to take by eminent domain additional land for depot purposes; but the provisions with respect to tax exemption remained as before.

The revision of the statutes in 1871 contained important changes. R. S. 1871, Chap. 51, Secs. 1-6. Section 2 reads in part as follows:

> "A railroad corporation, for the location, construction and convenient use of its road, for necessary tracks, side-tracks, depots, wood sheds, repair shops, and car, engine and freight houses, may purchase or take and hold, as for public uses, land and all materials in and upon it; but the land so taken shall not exceed four rods in width for the main track of the road unless necessary for excavation, embankment or materials; but shall not take, without consent of the owners, meeting houses, dwelling houses, or public or private burying grounds."

It is significant that, under the provisions of Sections three and four which follow, a different procedure was provided for the taking of land for side-tracks and buildings and for the taking of land for the use of the main line. Land for such side-tracks and buildings could be taken by eminent domain only after application to the railroad commissioners and after their certification that such land was necessary for the business of the company. Land for the so called main line referred to in the act as the "roadway" could be taken by filing the location with the county commissioners and obtaining their approval. This distinction is important because it shows that the legislature, though including in one section all the land which the railroad could take by eminent domain for its necessary purposes, did not intend that all such land should be treated in the same manner. The provisions with respect to taxation remained as before; and the only property exempt was the track and the land on which it was built. R. S. 1871, Chap. 6, Sec. 4.

Bearing in mind the fact that up to this time the legislature had consistently differentiated between land acquired for the main line or roadway of the railroad and that taken for other purposes, let us consider the changes in taxation which became effective in 1881. We find at this time the first use of the words "located right of way." P. L. 1881, Chap. 91, Sec. 1, provided as follows:

> "The buildings of every railroad corporation or association, whether within or without the located right of way, and

its lands and fixtures outside of its located right of way, shall be subject to taxation by the several cities and towns in which such buildings, land and fixtures may be situated, as other property is taxed therein."

The subsequent sections required the payment by railroads of an excise tax to the state treasurer, which with the tax provided in Section one above was in lieu of all taxes upon said railroad, its property and its stock.

The conclusion seems inescapable that, in using the words "located right of way" at this time, the legislature intended to refer to the four-rod strip which had been regarded as the right of way, roadway, or main line of the railroad. It exempted that from taxation but not the buildings on it. Such land as it might take for sidetracks, depots, and buildings outside of this strip was clearly intended to be taxed.

In the revision of the statutes of 1883, the amendment of 1881 was incorporated, R. S. 1883, Chap. 6, Sec. 9; but there is a significant rearrangement of the provisions of R. S. 1871, Chap. 51, Sec. 2, relating to the taking of land for railroad purposes. R. S. 1883, Chap. 51, Sec. 14, provided for the taking of land for the location, construction, repair and convenient use of the road. Then followed Section 15, which provided for the filing of the location with the county commissioners. Then in Section 16 we find the provision for the acquiring land for other purposes and for the approval of such taking by the railroad commissioners.

Counsel for the railroad argue that this rearrangement was not intended to change the statute as it was enacted in 1871 when all these provisions were included in one section. With this conclusion we agree, but with the contention that the statute as it existed in 1871 made no differentiation between land taken for the main track and land taken for other purposes, we disagree. We are convinced that the legislature in making the rearrangement in 1883 merely intended to make more definite what had at all times prior thereto been the distinction between land included within the four-rod strip and land outside of it.

The course of this legislation to 1883 indicates that the legislature at all times, both with respect to the method of acquiring land

by railroads and to the taxation of it, distinguished between the four-rod strip or main line of the railroad and land outside of it. When in 1881 the words "located right of way" were used as designating such land as should be exempt from taxation, the intent was to refer to the four-rod strip which was then regarded as the railroad right of way. The statute as it existed in 1883 has come down to us through the revisions of 1903, 1916 and 1930 substantially intact, and what it meant then it means today. The fact that railroad business may have so changed as to make advisable a different rule is a matter with which the Court is not concerned. Nor is the fact that railroads are subject to an excise tax of any consequence, for such tax, by the very terms of the act imposing it, is to be in addition to that provided by Section four of Chapter thirteen with which we are here concerned.

Furthermore it must be borne in mind in construing this statute that taxation is the rule and exemption the exception and that the intention to exempt property from taxation must be expressed in clear and unambiguous language. *Portland, Saco & Portsmouth R. R. Co.* v. *City of Saco*, 60 Me., 196; *Inhabitants of Mechanic Falls* v. *Millett*, 121 Me., 329, 117 A., 93.

Counsel for the appellant have cited numerous cases which they claim hold that a railroad right of way is the entire tract of land which a railroad owns or is entitled to use for railroad purposes. It is difficult to generalize from cases in other jurisdictions, for we are concerned with the meaning of words used in a particular statute of our own. A glance at the cases cited will indicate this.

St. Louis, R. C. & C. R. Co. v. *Wabash R. Co.*, 152 Fed., 849, was not a case relating to taxation but concerned the interpretation of a decree of court under which one railroad claimed the right to use the tracks and terminal facilities of another. It was perfectly obvious from the terms of the decree that the Court intended to give such right.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *Cass County*, 8 North Dakota, 18, 76 N. W., 239, the Court held that under a statute authorizing the taxing of "the franchise, roadway, roadbed, rails, and rolling stock of all railroads" side-tracks, turn outs, connecting tracks, station houses, freight houses and other accommodations were included.

Pfaff, Auditor v. *The Terre Haute and Indianapolis Railroad Company*, 108 Ind., 144, 9 N. E., 93, is substantially the same.

In the case of the *Chicago and Alton Railroad Company* v. *The People ex rel Joseph Dennison Collector*, 98 Ill., 350, it is perfectly apparent that for purposes of taxation the intention was to include within the railroad right of way all the land owned by the railroad and the buildings on it.

In *St. Louis Iron Mountain & Southern Railway Company* v. *Miller County*, 67 Ark., 498, 55 S. W., 926, 927, the Court specifically points out that the statute by its very terms designated that the right of way should "include all grounds necessary for side tracks, turn outs, depots, shops, water stations, and other necessary buildings."

Not one of these cases is an authority for holding that the exemption from taxation of the "located right of way" includes all land held by a railroad for public use and for its essential structures.

Counsel further cite the case of *In re Maine Central Railroad Co.*, 134 Me., —, 183 A., 844, where the incidental statement is made that "A railroad location, but not the buildings on it, it is true, is exonerated from local taxation." The Court clearly was there referring to the "located right of way" as defined in the opinion and not to any lands outside of such area.

Numerous cases have been cited by counsel for the City of Portland, the opinions in which indicate that ordinarily a railroad right of way does not include side-tracks, freight depots and similar terminal facilities.

In *Akers* v. *The United New Jersey Railroad and Canal Company*, 43 N. J. L., 110, the question was what constituted the "road of the defendants as constructed on their right of way as located." The opinion says, page 111: "It seems to me that the prosecutors justly insist that this expression denotes the strip of land, of prescribed width, upon which the defendants have their routes of railway, and does not include mere side tracks or spurs, which are but appendages of their railway, designed to reach freight depots or engine-houses, or such other incidental structure. This, I think, is the idea which would ordinarily be gathered from the language."

In *Smith* v. *The Missouri Pacific Railway Company*, 90 Kan., 757, 136 P., 253, the question was what constituted the right of way of a railroad as such word was used in the Kansas constitution. The Court held that lands acquired for side-tracks, depots, work-shops and such other facilities were no part of the right of way unless included within the one-hundred-foot strip which the legislature had designated as the route of the proposed railroad.

In *San Francisco and San Joaquin Valley Railway Company* v. *City of Stockton*, 149 Cal., 83, 84 P., 771, the question was as to the validity of a tax assessment. The city had assessed the railroad on certain land on which had been built sidings, spur tracks, round houses, machine shops, and similar buildings. The constitution of the state provided that "the franchise, roadway, roadbed, rails and rolling stock" should be assessed by the state board of equalization. The railroad contended that the term "roadway" included such side-tracks, and the land devoted generally to railroad uses. The Court held that "roadway" was synonymous with "right of way" and that the property was properly assessed by the city. The Court said, page 91: "The only remaining class of property named in the constitutional provision is 'roadway.' According to the ordinary and popular meaning of this term as applied to railroads, it includes simply the continuous strip of land, within which the railroad is constructed. This Court has said that it is synonymous with 'right of way,' and includes 'whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track.' (*San Francisco* v. *Central Pacific R. R. Co.*, 127 U. S., 1, [8 Sup. Ct., 1073]), which is but another way of saying that it is the continuous strip of land, not exceeding in width the nine rods permitted by law (Civ. Code, sec. 465, subd. 4), which the company acquires and uses for the construction and maintenance of its roadbed and railroad track."

When we consider the history of this railroad legislation of our own state, it is apparent that in the mind of the legislature the right of way of the railroad was at all times regarded as something distinct from its terminal facilities and from property acquired for incidental purposes. The methods prescribed for its taking and location were different from those designated for the taking of

property for general purposes. When the legislature exempted from local taxation land within the located right of way, it seems clear that there was no intent to exempt such property as is here involved, and that the right to tax land employed for terminal facilities outside the four-rod strip was in the local communities. Such being the construction which we place on the legislative enactments here involved, we hold that the decision of the presiding Justice dismissing the appeal of the railroad from the assessement of this tax was correct.

The conclusion to which this Court has come renders it unnecessary for us to comment on the further claim of the City of Portland that no legal location was ever made of certain of the parcels of land here involved.

Exceptions overruled.

DUNN, C. J., took no part in the decision of this case.

RALPH B. JELLERSON

vs.

BOARD OF POLICE OF THE CITY OF BIDDEFORD (No. 647).

OSCAR G. PARENT

vs.

BOARD OF POLICE OF THE CITY OF BIDDEFORD (No. 648).

York. Opinion, October 10, 1936.

CERTIORARI. PLEADING & PRACTICE. DEMURRER.

Certiorari *is a writ issued by a superior court to an inferior one commanding it to certify up its record of some proceeding, not according to the course of the common law, that it may be seen and determined whether there is any error therein for which the record should be quashed.*

An inspection of the record alone must determine the sufficiency of the proceedings.

Certiorari *does not bring up for review the evidence, decisions and rulings but only the record of the proceedings and orders which are in the nature of a record.*

The record may be adjudged of and acted upon by the examination of a copy as well as of the original.

When the writ issues, the Court can act only on the record as produced. No evidence aliunde is receivable.

The petitioner has the burden to show irregularities and errors in the record.

A copy of the record sought to be quashed must be included in or annexed to the petition; or, if the petitioner can not include or annex it, he must allege his reasons for his inability so to do.

It is necessary that there be in the petition an averment that the alleged causes of error are errors which appear on the records of the lower tribunal.

It is essential that the petition should clearly, definitely and completely assign and set forth the claims of irregularity and error that appear in the record.

The allegations in the petition must be sufficient to show that the record is necessarily erroneous.

An allegation in the petition that "said charges were in fact frivolous and without merit" and "that the petitioner did not in fact receive a fair impartial hearing" without statement of the facts revealing the asserted frivolity, lack of merit and impartiality of hearing, is insufficient upon special demurrer because of uncertainty and indefiniteness.

The sustaining of certain causes in a special demurrer is equivalent to overruling all others assigned therein.

On exceptions by respondent. Petitions for writs of *certiorari*. To the overruling of special demurrers filed by respondent, exceptions were seasonably taken. Exceptions in both cases sustained. The cases fully appear in the opinion.

Armstrong & Spill, for petitioners.

Louis B. Lausier,

William P. Donahue, for respondent.

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

HUDSON, J. Petitions for issue of writs of *certiorari.*

Both actions involve identical questions of law. In each the respondents filed a special demurrer, to the overruling of which exceptions were taken. They are not presented prematurely. *Tripp* v. *Park Street Motor Corporation,* 122 Me., 59, 118 A., 793.

Of the twenty-two causes relied upon by the respondents, the sixth is the first of merit. It is that the petitioners failed to set forth in or to annex to their petitions a copy "of the proceedings wherein alleged errors of law and unlawful acts on the part of the Board of Police appear."

> "*Certiorari* is a writ issued by a superior court to an inferior one commanding it to certify up its record of some proceeding, not according to the course of the common law, that it may be seen and determined whether there is any error therein for which the record should be quashed. The error must appear in the record of the inferior court." *Inh. of Nobleboro, Petitioners* v. *County Commissioners of Lincoln County,* 68 Me., 548, 551.
>
> "The usual function of a writ of *certiorari* is to enable a party without remedy by appeal, exception or other mode of correcting errors of law committed against his rights, to bring the true record of an inferior tribunal, whose proceedings are judicial or quasi-judicial in nature, properly extended, so as to show the principles of the decision, before a superior court for examination as to material mistakes of law apparent on such record. Only errors of law can be reviewed." *Mayor of Medford* v. *Judge of First District Court of Eastern Middlesex,* 249 Mass., 465, 468, 144 N. E., 397.
>
> "An inspection of the record alone must determine the sufficiency of the proceedings." *Stevens* v. *County Commissioners,* 97 Me., 121, 123, 53 A., 985, 986.

Certiorari does not bring up for review the evidence, decisions and rulings but only the record of the proceedings and orders which are in the nature of a record. *Pike* v. *Herriman,* 39 Me., 52. It "May be adjudged of, and acted upon by the examination of a copy, as well as of the original." *Dyer* v. *Lowell,* 33 Me., 260, 262. Only such errors or defects as appear on its face as brought up

can be considered; *Ross* v. *Ellsworth, et al.*, 49 Me., 417; and "when the writ issues the Court can act only on the record as produced. No evidence aliunde is receivable." *Lord, et als.* v. *County Commissioners for Cumberland County*, 105 Me., 556, 561, 75 A., 126, 128, and cases cited.

On the petitioner is the burden to establish irregularities and errors in the record. He must lay the foundation for such proof by proper and sufficient allegation in his petition. This requires that it contain, either by inclusion or annexation, a copy of the record sought to be quashed; or, if the petitioner can not include or annex it, he should allege his reasons for his inability so to do, as, for instance, demand upon the tribunal for access to the record and refusal. The fact that the respondent in *certiorari* must certify the record does not relieve the petitioner when possible from setting it forth in or annexing it to his petition. This Court has heretofore stated that in ". . . petitions for the writ of *certiorari*, a copy of the record sought to be quashed should be annexed. . . ." *Hewett* v. *County Commissioners*, 85 Me., 308, 27 A., 179.

The seventh cause also has merit, that the petitioner did not aver that his "alleged causes of error" were "errors which appear on the records of the Board of Police." In *Emery, et al.* v. *Brann, et als.*, 67 Me., 39, on page 44, it is said:

> "But it is not alleged in the petition that the irregularities and errors specified appear by the record of the Justices, which they seek to have quashed. The petition should contain such an allegation."

The necessity therefor is apparent. In *certiorari* the issue involves the legal sufficiency of the record. Consequently, failure of allegation in the petition that the alleged irregularities and errors appear in the record is fatal. In *Emery, et al.* v. *Brann, et als.*, supra, although there were no such allegation, the Court considered the case for the reason that "the respondent appeared and answered, and presented a copy of the record of the proceedings of the Justices, duly certified," which was made a part of the case. In the instant cases, consideration now has only to do with the situation presented by demurrers prior to the presentation of any record by the respondents. As to the necessity of such an allegation,

Emery v. *Brann*, supra, is affirmed in *Stevens* v. *County Commissioners*, supra.

Passing, then, to the next cause or causes that have merit, we group the ninth, tenth, eleventh and twelfth, it being therein objected that the petitioners failed "to set forth that the matter of suspension was not incidental to the exercise of the power of removal of the petitioner."

The effect of *certiorari* being to quash the proceedings of a tribunal or officers acting in a judicial or quasi-judicial capacity, it is essential that the inducing petition should clearly, definitely and completely assign and set forth the claims of irregularity and error that appear in the record. The allegations in the petition must be sufficient to show that the record is necessarily erroneous. So here it was necessary for the petitioners to deny by proper allegation the right of this tribunal to suspend incident to its power of removal. As indicating such necessity may be cited *Inhabitants of Sumner* v. *County Commissioners of Oxford*, 37 Me., 112. It was held that a petition for *certiorari*, in which the alleged error was for want of notice to a party, should state not only that the party did not receive the notice prescribed by law but that he had no sufficient notice and that he suffered inconvenience for want of it. The tribunal's avenues for escape from error should be blocked by proper and sufficient allegation in the petition.

Next we consider together causes fourteenth and sixteenth, the former being that an allegation in the petition that "said charges were in fact frivolous and without merit" and the latter "that the petitioner did not in fact receive a fair and impartial hearing" were insufficient without statement of the facts revealing the asserted frivolity, lack of merit and impartiality of hearing. We think this point is well taken. An early case is precedent for so holding. *Inhabitants of Minot* v. *Cumberland County Commissioners*, 28 Me., 121. In that it was alleged that the County Commissioners in making their report "were actuated by motives of gross partiality for the petitioner" but the Court, inasmuch as the particulars constituting the "gross partiality" were not annexed, held that it was not required to pass upon that issue. The general allegation was too uncertain and indefinite to require consideration.

While the sustaining of certain causes in a special demurrer is

equivalent to overruling all others assigned therein (*Cosmopolitan Trust Company* v. *Cohen*, 244 Mass., 128, 130, 131, 138 N. E., 711), we may say that careful consideration discloses no merit in the causes we have not discussed in this opinion. The entry must be,

Exceptions in both cases sustained.

STATE OF MAINE *vs.* GEORGE W. MARTIN.

Kennebec. Opinion, October 13, 1936.

CRIMINAL LAW. PLEADING & PRACTICE. CONSTITUTIONAL LAW. EXCEPTIONS. VERDICTS.

The rule of the failure of proof is not one of mere technicality, but goes to the upholding of constitutional law and procedure. The fundamental rule, that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, is embodied, as a part of the declaration of rights, in both State and Federal Constitutions.

If an indictment apprises the respondent in such manner that he may avail himself of the plea of former jeopardy, slight variations between it and the proof do not rate as departures from substance, nor constitute a failure of proof.

But, a variance between allegation and proof, or a failure of proof, as to the constituent elements, is fatal.

In criminal, as well as in civil proceedings, allegation must be specific and accurate, that defendant may prepare to meet it. And proof must follow allegation.

Paltry variance, however, mere refinement of pleading, lack of technical form, when the person and the case may be rightly understood is not truly important.

In the United States the powers of government are, by the prevailing dual system distributed between the categories of government of two sovereigns, one the State and the other the Nation. The people live under two distinct governments, each independent within its own sphere of action.

While the State can have no existence, politically, outside the Constitution of

the United States, and although cooperation between the State and the Union of the States is highly desirable, nevertheless the States are not in any true and complete sense inferior to, or dependent upon, the United States.

The States exercise, as to all control not delegated to the United States, or prohibited to the States, that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the ends of its institution. Subject to these restrictions, the State of Maine, so long as it does not conflict with the Federal Constitution, is, with regard to regulating its own internal affairs, preeminent.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.

The rule governing the direction of verdicts in trials for crime is that when the evidence is so defective or weak that a verdict based upon it could not be allowed to stand, the trial court, on being moved thereto should direct a verdict for the accused.

A refusal, at the close of the evidence on both sides, to so direct, is ground of exception.

In the case at bar, there was no evidence whatever tending to prove the existence of an Emergency Relief Administration of the State of Maine.

The Legislature of Maine neither accepted nor rejected the provisions of the congressional legislation relating to emergency relief.

Money, however, was "granted" to the State, on application by the Governor. Such money appears to have been used for relief.

The "granted" money never became the subject of local legislative action.

The State,—no official, no employee of the State, as such,—had title to, nor control of the funds apportioned by the United States, nor of food, clothing, or other supplies purchased therewith.

There was cooperation concerning the administration of relief, in that the State Controller and the State Treasurer, and their assistants, lent administrative help, but administration was always Federal; funds were so earmarked; all reports of expenditures were made to the United States, and unexpended balances accounted for, accordingly.

Emergency relief administration in Maine was by the United States, and not by the State.

The indictment in the case at bar was for one crime; the proof, if it establishes crime, did not establish the commission of that which accusation laid.

Exceptions to the refusal to direct must be sustained.

On exceptions by respondent. Respondent indicted and tried for common-law bribery, was found guilty. To the overruling of his motion for a directed verdict of not guilty, and to a portion of the charge of the presiding Justice to the jury, respondent seasonably excepted. As to the denial of directed verdict: exception sustained. The case fully appears in the opinion.

Francis H. Bate, County Attorney, for State of Maine.

Joseph E. F. Connolly,

Arthur F. Tiffin, for respondent.

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

DUNN, C. J. The counts in the indictment, six in all, are for the common-law crime of bribery.

Each count, so far as need be recited here, alleges that:

"George W. Martin of Augusta in said County of Kennebec, on the twenty-third day of August in the year of our Lord one thousand nine hundred thirty-four at Augusta in said County of Kennebec being then and there entrusted with a public duty, to wit, being then and there in charge of the clothing warehouse of the Emergency Relief Administration of the State of Maine at said Augusta, engaged in the distribution of clothing for the relief of distress within the State of Maine and in the purchase of said clothing for distribution for the relief of distress within the State of Maine under the supervision of and subject to the approval of one John A. McDonough, Administrator of the Emergency Relief Administration of the State of Maine, unmindful of and not regarding the trust so reposed in him, the said George W. Martin, but perverting the trust so reposed in him, the said George W. Martin, and contriving and intending the citizens of the State of Maine for the private gain of him, the said George W. Martin, to oppress and impoverish and to impede and obstruct the general welfare of the said State of Maine and to impede and obstruct the relief of the distress of the citizens of the said State of Maine, under the color of the trust so reposed in him, the said George W.

Martin, a certain sum of money, to wit, the sum of . . . hundred dollars from one John H. Vickery of Brewer in the County of Penobscot in the State of Maine, then and there the agent of W. S. Emerson Company of Bangor, Maine, to influence him, the said George W. Martin, so that the said John H. Vickery, agent as aforesaid of said W. S. Emerson Company, might obtain orders for clothing from said Emergency Relief Administration of the State of Maine for said W. S. Emerson Company, then and there unlawfully, unjustly and extorsively did accept, receive and have . . . ."

After unsuccessfully pleading that offense, if any, did not directly affect the State of Maine or its population, but was distinctively against the United States, respondent entered his plea of not guilty, and was put on trial by jury. The judge, in charging, instructed the jury to return, as to the first count, verdict of not guilty, assigning the applicable evidence insufficient to warrant conviction. As to every other count, the verdict was guilty.

The case is forward on exceptions: (1) To the overruling of the plea setting up absence of jurisdiction of the court; (2) to a portion of the charge; (3) to the denial of motion, by respondent, after the conclusion of all the evidence, and before the charge was given, for the direction of a verdict in his favor.

The main question arising on the record, and which only it seems necessary to consider, is whether the motion already mentioned, the ground of which was a failure of the prosecutor to offer proof, either positive or inferential, to establish guilt against the prisoner, on issues presented by his plea, should have been granted. In other words, respondent contended, at the trial, that no evidence to prove facts, proof of which would be indispensable, had been introduced; that there was an entire failure of proof; indeed, that the facts in evidence tended to negative material allegations in the indictment.

The rule of the failure of proof is not one of mere technicality, but goes to the upholding of constitutional law and procedure. The fundamental rule, that in all criminal prosecutions, the accused shall have the right to demand the nature and cause of the accusation, is embodied, as a part of the declaration of rights, in both State and Federal Constitutions. Constitution of Maine, Article 1,

Section 6; Amendment VI to Constitution of the United States.

The general principles of civil and criminal liability are the same. It is a precept in actions of law, that to entitle a plaintiff to recover, he must allege in his declaration all facts necessary to be proved, and what is proved, or that of which proof is offered, must correspond essentially with the allegation in his pleading. *Perkins* v. *Cushman*, 44 Me., 484; *Swanton* v. *Lynch*, 58 Me., 294.

If an indictment apprises the respondent in such manner that he may avail himself of the plea of former jeopardy, slight variations between it and the proof do not rate as departures from substance, nor constitute a failure of proof. *State* v. *Littlefield*, 122 Me., 162, 119 A., 113.

But a variance between allegation and proof, or a failure of proof, as to constituent elements, is fatal. *Swanton* v. *Lynch*, supra.

To illustrate, in respect first to civil, next to criminal, proceedings:

In an action for negligence, it is not proper for the plaintiff to allege one thing as the proximate cause of his injury, and upon the trial prove another. *Shaw* v. *Boston & Worcester Railroad Corporation*, 8 Gray, 45. A declaration under one statute was not supported by proof under some other statute. *Eveleth* v. *Gill*, 97 Me., 315, 54 A., 756. An allegation of sale was not supported by proof of a mortgage. *State* v. *Seguin*, 98 Me., 285, 56 A., 840.

Allegation must be specific and accurate, that defendant may prepare to meet it. And proof must follow allegation. *State* v. *Seguin*, supra.

Paltry variance, however, mere refinement of pleading, lack of technical form, when the person and the case may be rightly understood, are not truly important. *State* v. *Littlefield*, supra.

What is the offense set forth in the indictment?

On a fair reading, accusation was framed, and the trial was conducted, for and against contention of the prosecution, that respondent, in perversion of trust confided in him by the State of Maine, in connection with its emergency relief administration, accepted bribes.

The respondent was entitled to be tried only for crime the commission of which was laid against him. He might have been convicted, under the indictment, on proof, among other things, beyond a

reasonable doubt, of the existence of an emergency relief administration, as a public department, or activity, of the jurisdiction. The indictment clearly avers such an administration; the allegation could not be omitted without affecting crimination.

There was no evidence whatever tending to prove the existence of an Emergency Relief Administration of the State of Maine.

It might be answered that in 1933, during a period of economic depression and widespread unemployment, the Congress of the United States passed a law, which is still in force, called, for short, the Federal Emergency Relief Act of 1933, (15 USCA, Secs. 721, 728) which, on applications by the governors of the several States, made funds available for the alleviation of persons in distress; and that, from the evidence presented, the jury could have found that respondent, while engaged in Maine, under the Federal Act, betrayed for money, public trust.

The powers of government are, by the prevailing dual system, distributed between the categories of government of two sovereigns, one the State and the other the Nation. The people live under two distinct governments, each independent within its own sphere of action. *McCulloch* v. *Maryland*, 4 Wheat., 316, 4 Law ed., 579.

While a State can have no existence, politically, outside the Constitution of the United States, and although cooperation between the State and the Union of the States is highly desirable, nevertheless the States are not in any true and complete sense inferior to, or dependent upon, the United States.

The States exercise, as to all control not delegated to the United States, or prohibited to the States, that public authority which commands in civil society, and orders and directs what each citizen is to perform, to obtain the ends of its institution. *Note to Bannock County* v. *Bell*, 101 A. S. R., 158; *New Hampshire* v. *Louisiana*, 108 U. S., 76, 27 Law ed., 656. Subject to these restrictions, the State of Maine, so long as it does not conflict with the Federal Constitution, is, with regard to regulating its own internal affairs, preeminent.

"The task of the Constitutional Convention," Mr. Norton has said, "was not to construct a government from the foundation up. There had already been firmly set by experience thirteen basestones in the form of State republican governments. Upon these, and for

the benefit of their population as a whole, the National structure was placed. This super-government was to deal with foreign nations, and also to administer at home all matters of National (as distinguished from State or local) character. The National government was to be supreme in its domain, and the State governments were to be sovereign in all affairs not National or foreign." Norton, The Constitution, p. xii.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.

To return to the Act, cited above, of 1933.

Congress legislates for the general national welfare. The enactment of the law, providing for the assistance of needy persons, was national in scope and purpose.

The Act created the office of Federal Emergency Relief Administrator. That official could, and can, to carry the law to objective, appoint officers and employees; and, to aid in furnishing relief and employment, and in relieving hardship and suffering, allocate, what the Act denominates "grants" of funds, to State units.

The Legislature of Maine neither accepted nor rejected the provisions of the congressional legislation.

Money, however, was "granted" to the State, on application by the Governor. Such money appears to have been used for relief.

The "granted" money never became the subject of local legislative action.

The State,—no official, no employee of the State, as such,—had title to, nor control of the funds apportioned by the United States, nor of food, clothing, or other supplies purchased therewith.

What the state of the law would be if the funds and supplies had become the property of the State, it is unnecessary to decide; the instant case does not involve the point.

The Federal Act empowered every incumbent of State gubernatorial office to make application for bounty. Competency could have been invested differently, but, Congress having placed it in the Governor, that Maine official acted under Federal authority; solely in facilitation of, and to effectuate, Federal plan and program.

The drafts, or checks, which the Governor received, in response to applications, were endorsed and delivered over, that the money so represented might be disbursed conformably to Federal super-

vision, within a portion of the territory of the United States, namely, that part comprising in standing, at home and abroad, the State of Maine in the United States.

Thereupon the Governor had, under the Act, nothing more to do, until, occasion arising, he should apply again.

There was cooperation concerning the administration of relief, in that the State Controller and the State Treasurer, and their assistants, lent administrative help, but administration was always Federal; funds were so earmarked; all reports of expenditures were made to the United States, and unexpended balances accounted for, accordingly.

Emergency relief administration in Maine was by the United States, and not by the State.

A case in Arkansas accords with the view here taken. *Wiseman, State Commissioner* v. *Dyess, Administrator of Emergency Relief*, 72 S. W. (2d), 517. The same case was again before the court, on insistence that the agreed statement of facts, on which the first case had been decided, was erroneous, but original decision remains unchanged. *Dyess, Administrator* v. *Wiseman, Commissioner*, 76 S.W. (2d), 979. See, also, *Langer* v. *United States*, 76 Fed. (2d) 817; *Madden* v. *United States*, 80 Fed. (2d) 672.

The rule governing the direction of verdicts in trials for crime is that when the evidence is so defective or weak that a verdict based upon it could not be allowed to stand, the trial court, on being moved thereto, should direct a verdict for the accused. *State* v. *Cady*, 82 Me., 426, 19 A., 908; *State* v. *Simpson*, 113 Me., 27, 92 A., 898; *State* v. *Grondin*, 113 Me., 479, 94 A., 947; *State* v. *Benson*, 115 Me., 549, 98 A., 561; *State* v. *Davis*, 116 Me., 260, 101 A., 208; *State* v. *Gustin*, 123 Me., 307, 122 A., 856.

A refusal, at the close of the evidence on both sides, to so direct, is ground of exception. *State* v. *Simpson*, supra; *State* v. *Grondin*, supra; *State* v. *Shortwell*, 126 Me., 484, 139 A., 677.

The indictment is for one crime; the proof, if it establishes crime, does not establish the commission of that which accusation lays.

Exception to the refusal to direct must be sustained.

This conclusion obviates investigating the other exceptions.

As to the denial of directed verdict:

Exception sustained.

GEORGE E. MACGOWAN, JR., ADMR. *vs.* LOUIS H. SCHLOSBERG.

Cumberland. Opinion, October 20, 1936.

EXECUTORS AND ADMINISTRATORS. ACTIONS.

It may be said that generally, in his representative capacity, an administrator is a party to an action which he brings far more than "nominal only." It is the duty of an administrator to collect money due the estate by suit if not otherwise collectible, and to distribute the same according to law.

Only when it appears that his testator or he, as executor, had no true interest in the claim, but the interest is in another, or others, in whose name the action might have been brought or might be defended, is the executor a "nominal party."

In such case evidence of bad faith must be clear, to the effect that such money as was paid, and further sums promised, were the property of and due to another than to the decedent, in order to place a plaintiff executor or administrator in a position of a nominal party.

In the case at bar, the Court holds that the document over defendant's signature, imported consideration. The record showed partial payments and a valid claim.

On exceptions by defendant. An action in assumpsit, brought as on a promissory note, given by defendant and payable to plaintiff's intestate. Exceptions overruled. The case fully appears in the opinion.

Richard S. Chapman,
Nathan W. Thompson, for plaintiff.
Robinson & Richardson, for defendant.

SITTING: DUNN, C. J., STURGIS, BARNES, HUDSON, MANSER, JJ.

BARNES, J. Plaintiff, as administrator of the estate of George E. Macgowan, deceased, brought suit in assumpsit.

The document declared on reads as follows:

"Portland, Maine
Dec. 1, 1926

To Whom It May Concern —

I owe Geo. E. Macgowan two thousand three hundred eight dollars and thirty cents, which I am to divide and pay in ten parts. Each part should be two hundred thirty dollars and eighty-three cents, which should be paid him before the first of January each year commencing January first, Nineteen hundred twenty-seven, until the total of two thousand three hundred eight dollars and thirty cents has been paid.

No payment was made on January first, Nineteen hundred twenty-seven, but was agreed between us to be paid sometime during the year Nineteen twenty-seven.

(Signed) L. H. Schlosberg

March 1—1927	Cr by Cash	$267.50
	(Alice) check	92.50
	cash	175.00
		267.50
	Jan. 23/30	350.00
		617.50
		75.00
	LHS 692.50	692.50

Friend George This I think will answer our purposes—if you prefer another way, let me know on my return—
Schlosberg"

At the trial it was offered in evidence and was admitted over the objection of the defendant, giving rise to the first exception.

Defendant, conceding the signature to be genuine and the document admissible under the second count in the writ, waives this exception, as also the fourth and last, which was taken to the Court overruling a motion to transfer the case from law to equity.

Defendant offered in evidence a statement in eight paragraphs

of what the majority stockholder of the corporation owning the building, in which defendant was a tenant at the time the action accrued would state, if called as a witness, and the statement was admitted. Counsel then presented the defendant as a witness, claiming it to be his right to be heard because plaintiff was what is termed a party "nominal only" in R. S., Chap. 96, Sec. 119, Par. III. It may be said that generally, in his representative capacity, an administrator is a party to an action which he brings far more than "nominal only." It is the duty of an administrator to collect money due the estate, by suit if not otherwise collectible, and to distribute the same according to law.

"An executor, who sues as such, on a debt claimed to be due to the estate, cannot be a *nominal* party unless it appears that his testator or he, as executor, had or have no interest in the claim, but the interest is in another, or others, in whose name the action might have been brought or might be defended." *Drew* v. *Roberts*, 48 Me., 35.

Argument of defendant is upon the theory that, in the transaction which gave rise to defendant's promise to pay plaintiff's decedent, the defendant was acting as the representative or agent of the corporation named in the statement admitted, "seeking in connection therewith for personal advantage for himself."

Evidence of such bad faith must be clear, to the effect that such money as was paid, and further sums promised, were the property of and due to another than to the decedent, in order to place this plaintiff in the position of a nominal party.

We find no such evidence in the record, and hence rule that the plaintiff is more than a nominal party, and overrule this exception.

Finally, it is argued that on the record the burden of proving consideration was not sustained. With this contention we can not agree. The document, over defendant's signature, reads: "I owe George E. Macgowan (money) which I am to divide and pay in ten parts . . . which should be paid . . . until the total of it has been paid."

This language imports consideration. The record shows partial payments.

Exceptions overruled.
Judgment affirmed with costs.

ERNESTINE RIOUX

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

AND

HARRIS M. ISAACSON, ADMINISTRATOR OF THE ESTATE OF FRANK E. LANGLEY.

Androscoggin. Opinion, November 4, 1936.

EQUITY. FINDINGS OF FACT. INSURANCE. EVIDENCE.

R. S., CHAP. 60, SECS. 177–180.

Findings of a sitting Justice on questions of fact have the weight of a jury verdict.

Unless a plaintiff, upon whom is the burden of proof, satisfies the Court by evidence clear and convincing that the findings of the sitting Justice were not based on credible evidence they will be sustained.

On the contents of a writing, testimony of a witness who denies recollection of the same and asserts that others in the office do the typewriting is not admissible, if objected to.

In the case at bar, if there were occasion to interpret the employment contract, and the sales contract under which the salesman who drove the injured plaintiff worked, the treatment of other employees of the company would not aid in such interpretation, and the plaintiff was not aggrieved by the ruling of the Justice excluding such testimony as he had already found that one-half of the salesmen of the insured were employed under the salesmen plan, so called.

Nor was evidence as to the use of the dealer's plates on the salesman car with the knowledge of the sales manager, as tending to show that the assured had not made a sale of the car to the salesman, admissible.

The written contract was not to be defeated by such evidence.

Likewise evidence whether records of the assured showed monthly payments to the finance company for the benefit of the salesman, was not admissible.

On appeal and exceptions by plaintiff. An equitable action to reach and apply the proceeds of an insurance policy under the provisions of Secs. 177 to 180, of Chap. 60, R. S. The sitting Justice dismissed the bill. Plaintiff seasonably appealed, and likewise filed exceptions to the rulings of the Justice excluding certain testimony offered by plaintiff. Appeal dismissed. Exceptions overruled. Decree below affirmed. The case fully appears in the opinion.

Benjamin L. Berman,
David V. Berman, for plaintiff.
William B. Mahoney, for defendant.

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

BARNES, J. A bill in equity to reach and apply the obligations of insurer in satisfaction of a judgment debt of an insured in favor of plaintiff, brought under authority of Secs. 177 to 180 of Chap. 60, R. S. 1930.

Defendant is a foreign corporation authorized to do insurance business in this state: plaintiff, on the 19th day of August, 1933, while riding as an invited guest in an automobile owned and operated by one William Rioux, in Cumberland County, this State, was injured, in collision with a Ford car, then operated by Frank E. Langley, since deceased, but then a salesman, in the employ of Cook-Ripley, Inc., a corporation selling automobiles and then insured by the defendant corporation, under a policy dated March 22, 1933, having as part thereof two endorsements, dated May 27, 1933.

In due time, after the collision, plaintiff brought her action at law against the estate of Frank E. Langley, deceased, recovered judgment for her damages, and prosecuted her right under the statute cited above.

The cause was heard on bill, answers, replications and proof, defendant corporation denying that at the time of the collision it was an insurer of Mr. Langley.

The bill was dismissed, with costs, and plaintiff appealed. She also prosecuted a bill of exceptions.

The argument, on appeal, presents a single question: Whether or not Mr. Langley and the automobile driven by him into collision with the Rioux car were, at the time of collision, included in the coverage of the policy issued to Cook-Ripley, Inc.

The coverage provisions in the insurance policy, so far as applicable here are incorporated in the endorsements dated the 27th of May, 1933, attached to the policy, and forming a part thereof, which provide as follows:

> "IT IS HEREBY UNDERSTOOD AND AGREED that the policy to which this endorsement is attached is extended to cover the legal liability, as defined therein, of the owners, partners, officers and employees of the Named Assured whose salary is included in the payroll upon which the premium for this policy is based, for the operation of any automobile owned by or in charge of the Named Assured, other than an automobile owned by such individuals or by a member of their family, for the purposes described in the policy and for private and pleasure purposes.
>
> IT IS FURTHER UNDERSTOOD AND AGREED as respects automobiles owned by the Named Assured that the Company extends the insurance provided by this policy so as to be available, in the same manner and under the same conditions as it is available to the Named Assured, to any person or persons while riding in or legally operating any of the automobiles owned by the Named Assured, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured. In no event shall the extension of insurance provided herein be construed to cover a purchaser of any automobile, whether or not such automobile is being purchased on the installment plan."

The Justice hearing the bill found: "In March or April, 1933, Cook-Ripley, Inc., dealers in automobiles, employed said Frank E. Langley, since deceased, as one of its automobile salesmen, on a commission basis, his name was carried on its payroll, and he continued in its employ up to and at the time of said accident on

August 19, 1933. Whether or not, at the time of the accident, he was engaged in the performance of the duties of his employment, does not appear.

"During the time of his employment, said Cook-Ripley, Inc., had a 'salesmen plan,' so-called, by which, through the Universal Credit Company, a finance company, a salesman who wished to own his own demonstrator, could purchase an automobile of said Cook-Ripley, Inc., on the installment plan, under a conditional sale contract, and drive it on its dealer's license plates.

"But, under this plan, if a salesman desired to sell the automobile so purchased by him, it became necessary for him to obtain the consent of Cook-Ripley, Inc., if he wished to continue longer in its employ; and, in that case, he was required to pay over to it the profits of such sale if he desired to obtain from it another demonstrator under that plan. But no such restrictions or conditions were incorporated in the conditional sale contract.

"About one-half of the salesmen of Cook-Ripley, Inc., were paying for their own demonstrators under this plan.

"The reason why Cook-Ripley, Inc., desired to control the sale of demonstrators by its salesmen while in its employ, to the extent aforesaid, was so that the salesmen could not sell their demonstrators to their own advantage and with no profit to Cook-Ripley, Inc.

"At first Langley was on a straight commission, and used the automobile of Cook-Ripley, Inc.; but, on August 11, 1933, he took advantage of the 'salesmen plan' and purchased of it, on the installment plan, by conditional sale contract, with a provision to the effect that title was not to pass to the purchaser until the amount is fully paid in cash, the certain Ford automobile which was afterwards involved in said collision, and which he was driving at the time of the accident. Said automobile was delivered to him on said August 11, 1933.

"By the terms of his conditional sale contract, said Langley was required to pay two hundred and two dollars and sixty-cents, on or before delivery, and in addition thereto, a deferred balance of four hundred and ninety-five dollars, payable at the offices of the Universal Credit Company, in three payments of twenty-five dollars each, and one payment of four hundred and twenty dollars. That two hundred and two dollars and sixty-two cents, at least the whole

of that sum—was never actually paid by him, although the Ford automobile was delivered to him; but the Universal Credit Company requested that it be put through in that way. The automobile was really sold to him at wholesale, and the reduction in price at which it was sold to him was figured there.

"Upon said Langley purchasing said automobile on the installment plan, and signing the conditional sale contract, said Cook-Ripley, Inc., sold, assigned and transferred to said Universal Credit Company, the finance company, the right, title and interest of said Cook-Ripley, Inc., in and to said contract, and the property thereby covered, and authorized said Universal Credit Company to do every act and thing necessary to collect and discharge the same, for which said Cook-Ripley, Inc., received pay from said Universal Credit Company on August 14, 1933. Said Langley had possession of, and operated, said automobile, from the time it was delivered to him, on August 11, 1933, up to and at the time of the accident on August 19, 1933, on the dealer's license plates of Cook-Ripley, Inc., made no report to the secretary of state of a sale to said Langley; and, as a matter of fact, made no report of sales of any other automobiles to the secretary of state.

"In said assignment of said conditional sale contract to the Universal Credit Company by said Cook-Ripley, Inc., as aforesaid, among other things, it is stipulated, in 'consideration of your purchase of the within contract, the undersigned' (Cook-Ripley, Inc.) 'guarantees payment of the full amount remaining unpaid hereon, and covenants if default be made in payment of any installment herein to pay the full amount then unpaid to Universal Credit Company upon demand, except as otherwise provided by the terms of the present Universal Credit Company Retail Plan.'

"At the time said Langley obtained this automobile, as aforesaid, there was insurance against collision to protect the finance company and Cook-Ripley, Inc.; and after the accident the latter caused the wreck of the automobile to be sold, and credited the proceeds to Langley's account.

"On October 11, 1933, said Cook-Ripley, Inc. sent its check to the Universal Credit Company to clear off the unpaid balance, and said conditional sale contract was thereafterwards returned to said Cook-Ripley, Inc.

"It is admitted that the defendant, Employers Liability Assurance Corporation, Ltd., before the recovery of said judgment in said actions at law against the estate of said Frank E. Langley, deceased, had notice of said accident, injury and damages. It did not defend any of said actions at law, however, and took no part in the defense of any of them."

The Justice further found: "That said Langley was obligated to make each and all of the deferred payments for said Ford automobile required of him in, and in accordance with, the terms of his conditional sale contract; and that there was no agreement or understanding, express or implied, excusing him from making each and all of said deferred payments according to the terms of his said contract.

"That at the time of said accident on August 19, 1933, the said Ford automobile was not 'owned by or in charge of the Named Assured,' Cook-Ripley, Inc.

"That at the time of said accident, said Langley was not 'riding in or legally operating' an automobile 'owned by the Named Assured,' Cook-Ripley, Inc., with its permission.

"That in said conditional sale contract (Plaintiff's Exhibit No. 4), and also in Defendant's Exhibit No. A, which is the conditional sale contract and the Dealer's Representations, Assignment and Guaranty, the conditional vendee is designated as 'purchaser'; and said conditional sale contract recites, among other things, that 'the undersigned Purchaser hereby purchases, subject to the terms and conditions hereinafter set forth, . . .' and underneath the signature of said Frank E. Langley appear the words, 'Purchaser's Signature.'

"That said endorsement, which is made a part of said policy, contains a provision which reads as follows, to wit: 'In no event shall the extension of insurance provided herein be construed to cover a purchaser of any automobile, whether or not such automobile is being purchased on the installment plan.'

"That at the time of said accident, said Frank E. Langley was within that class of persons designated in that clause in said provision last quoted, which reads as follows, to wit: 'a purchaser of any automobile, whether or not such automobile is being purchased on the installment plan.'

"That at the time of said accident, neither said Frank E. Langley, nor said Ford automobile he was then driving, were covered by the so-called coverage provisions in said policy and its endorsements.

"That said policy, with its attached endorsements made a part thereof, do not cover liability for the damages for the injuries sustained by the plaintiffs in said actions at law against the Estate of said Frank E. Langley, deceased, in which said judgments were recovered as aforesaid, or any of them," and issued the decree appealed from.

The findings of the Justice on questions of fact have the weight of a jury verdict, and painstaking search of the record fails to reveal that in any particular his findings were not based on credible evidence.

They therefore stand, unless plaintiff, upon whom is the burden of proof, satisfies this Court, by evidence clear and convincing that the transactions of Cook-Ripley, Inc., with the Credit Company were not what their language imports.

During the course of the trial several exceptions were reserved, as follows — plaintiff's counsel asked the following question:

"Was this arrangement which you had with Mr. Langley, as you have testified, with relation to the purchase by him of this demonstrator,—was that the same plan or arrangement in force by your company with other salesmen who were paying for demonstrators used by them?"

Upon objection the question was excluded and to this ruling Exception No. 1 was taken, counsel saying, "I want to get into the record a determination as to whether this arrangement with Mr. Langley was peculiar to Mr. Langley, outside of the regular course this company pursued with all of its employees, as bearing upon the interpretation of the word and term 'employee' as used in the policy contract."

If there were occasion to interpret employment contract and sales contract under which Mr. Langley worked, the treatment of other employees by the company would not aid in such interpretation; and plaintiff was not aggrieved by this ruling because the Justice found as herein quoted that about one-half of the salesmen of the insured were employed under the salesmen plan.

The second and third exceptions may be passed upon together. The second was as to knowledge of the sales manager of the assured on what cars use of dealer's plates was permitted; the third, as to the sales manager's knowledge that purchasers of autos could not operate their vehicles on such plates, upon the theory that if such was the knowledge of the sales manager the assured had not made a sale of the car to Mr. Langley.

The written contract was not, in the opinion of the Justice, to be defeated by such evidence, and we hold the exclusion of the evidence of this sort correct.

Exceptions 4, 5, 6 and 8 were waived.

The seventh exception was taken to admission of the assignment of the original sales contract.

The document objected to was the proven original, containing assignment to the Universal Credit Company. The undisputed testimony is that the insured paid the manufacturer for the car and that on August 14, 1933, received its pay for the same from the Credit Company.

The witness was the office manager of the insured, in charge of the bookkeeping. She had testified to sale in accordance with the sales contract; assignment to the Credit Company and receipt of payment from the Credit Company. She testified that in transactions of the sort under examination, "the original goes to the finance company," that a copy of the contract, but not a copy of the assignment remains in her office, and that when she searched the files for original papers she found therein the exhibit objected to.

She testified that the document offered was sent to the Finance Company.

She did not claim recollection of mailing or delivering the document of assignment to the company.

The Justice concluded that such delivery was satisfactorily proven, and we approve of his decision.

The ninth exception arose on this wise: The office manager was being cross-examined by plaintiff's counsel as to "arrangements" between the Credit Company and insured. She had testified that she could not remember whether or not she had filled out the Langley "purchaser's statement." When asked if she remembered preparing such statement, she replied, "I could not remember." She

was then asked: "On this purchaser's statement did you set forth, or was it set forth, that Mr. Langley was a salesman for Cook-Ripley, Inc., at that time?"

On the contents of a writing, testimony of a witness who denies recollection of the same and asserts that others in the office do the typewriting is not admissible, if objected to.

So this exception falls.

The last question by counsel for plaintiff met objection and was ruled out. The office manager was being examined as to details of bookkeeping, as follows:

> "Q. Have you got a record in your office—a separate account with the Universal Finance Company?
>
> "A. Yes, we have.
>
> "Q. And would those records show payments made by Cook-Ripley, Inc., to the Universal Finance Company for 1933 from April through the month of August, 1933? . . .
>
> "A. Yes, sir.
>
> "Q. Payments would be posted to individual account of the Universal Finance Company?
>
> "A. An individual account? We have an account with the Universal Credit Company.
>
> "Q. If and assuming that Cook-Ripley, Inc., made the monthly payments to Universal Credit Company upon cars used by salesmen as demonstrators under the same plan, would this record show those payments to the account of Universal Credit Company?"

Objected to. Excluded and exception reserved.

This ruling is sustained.

Mr. Langley purchased his automobile, August 11; no monthly payment on this car had been made, on the 19th day of the same month, when the collision occurred which caused his death.

Exceptions overruled.
Appeal dismissed.
Decree below affirmed.

EDNA A. NORTON *vs.* INHABITANTS OF FAYETTE AND TRUSTEE.

Androscoggin. Opinion, November 16, 1936.

ATTORNEY AND CLIENT. JUDGES. PLEADING & PRACTICE.

R. S., CHAP. 97, SEC. 33.

The great underlying principle relating to a disinterested tribunal is that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. This principle should not have a narrow or technical construction, but should be applied to all cases where a judicial officer is called upon to decide controversies between the people. Such a rule is in the general interest of justice, to preserve the purity and impartiality of the courts and the respect and confidence of the people for their decisions.

One who has undertaken a cause in behalf of one party as his advocate and counselor can not sit in judgment to determine the rights of both parties to the same cause.

Under a narrow and strict interpretation of R. S., Chap. 97, Sec. 33, relating to qualifications of justices of municipal and police courts, it might be urged that it did not in terms include an action, matter or thing in which the judge has previously acted as attorney. Our Court, however, has already spoken in no uncertain language and given to this statute a broad construction consistent with its manifest purpose and intent.

The statute is broad enough to create a prohibition. It disqualifies the judge under the circumstances which existed in the case at bar. It was not intended that the prohibition should be circumvented or the statute devitalized by failure of the defendant to comply with the technical rules of pleading or procedure. It could not thus be weakened to a mild impotent request.

In the case at bar, the Judge of the Municipal Court for the Town of Livermore Falls, having previously acted as counsel for the plaintiff, was disqualified. There was no valid judgment of the Municipal Court, and consequently there could be no valid affirmation by the Superior Court.

On exceptions by defendant. An action against the principal defendant for board and care of alleged paupers of the Town of Fayette. From a decision against it in the Municipal Court of the

Town of Livermore Falls defendant appealed to the Superior Court for the County of Androscoggin. To the ruling of the presiding Justice dismissing the appeal and affirming the decision of the Municipal Court, defendant seasonably excepted. The issue involved the question whether or not the lower court as constituted was a disinterested tribunal. Exceptions sustained. The case fully appears in the opinion.

Herbert E. Foster, for plaintiff.

Edmund C. Darey, for defendant.

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

MANSER, J. A practicing attorney at Livermore Falls, in the County of Androscoggin, at one time represented the plaintiff in connection with her claim now in suit against the defendant. He was at the same time Judge of the Municipal Court at Livermore Falls.

The statute, R. S., Chap. 97, Sec. 33, provides that, "No judge of any municipal or police court shall act as counsel or attorney in any case, cause, matter or thing, which depends upon or relates to any cause exclusively cognizable by the court over which he presides, or which is actually brought in said court, although concurrently cognizable by some other court."

The plaintiff, however, was a resident of Fayette, in the County of Kennebec, and the defendant town is also located in that county. Ordinarily the Livermore Falls Municipal Court is without jurisdiction outside of its county, and therefore its judge could with propriety act as attorney for the plaintiff and was not then subject to the prohibition of the statute.

Acting as such attorney, he wrote to the first selectman of Fayette, setting forth the claim of the plaintiff in a statement which shows that it is identical with that in suit, and requested immediate payment, asserting among other things, "It is an honest bill." Later a second letter discloses that he had discussed the matter with the selectmen, been informed of the version of the defendant, advanced its denial by the plaintiff, and again insisted upon payment. The defendant did not comply with the request.

About five months later the plaintiff through another attorney

brought this action against the defendants, returnable to the Livermore Falls Municipal Court. Although the claim amounts to but $37 and the defendant is a town, the plaintiff named the Livermore Falls Trust Co. as trustee, alleging that the defendant did not have in its hands and possession goods and estate of the value of the *ad damnum* of $75. As the trustee was located at Livermore Falls, this use of the trustee process gave jurisdiction to the Livermore Falls Municipal Court. It appears from the record that the trustee never filed a disclosure. The plaintiff took no action to require one, and the trustee has never been charged, discharged or defaulted by the Judge.

Several terms after the case was entered the defendant filed a written motion that the action be abated or removed to a disinterested tribunal upon the ground that the Judge was disqualified. The letters written by the Judge were incorporated in the motion. The motion was denied. The docket of the Municipal Court then shows that judgment was rendered for the plaintiff for the full amount, with interest. The defendant appealed to the Superior Court for Androscoggin County. In that Court the plaintiff filed a motion to dismiss the appeal for the reason that the defendant did not plead the general issue in the Municipal Court. The sole question presented to the presiding Justice was upon the right of appeal when no plea of general issue had been made in the lower court. The plaintiff was upheld on this contention, and exceptions bring the case forward.

Argument of counsel has been directed to the point raised in the Superior Court, and, further, that the motion to dismiss was in the nature of a plea in abatement and was insufficient because not filed in season and not supported by affidavit.

The real question, however, is not a matter of technical defects according to the course of common-law pleadings. The writ is in proper form. The Court, on the face of the writ, had jurisdiction; but as constituted, was it a disinterested tribunal? The great underlying principle is that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. This principle should not have a narrow or technical construction, but should be applied to all cases where a judicial officer is called upon to decide controversies between the people. Such a rule is in the gen-

eral interest of justice, to preserve the purity and impartiality of the courts and the respect and confidence of the people for their decisions.

In 15 R. C. L., Judges, Sec. 16, we find the principle stated thus: "Courts should scrupulously maintain the right of every litigant to an impartial and disinterested tribunal for the determination of his rights, and courts cannot too carefully guard against any attempt of an interested judge to force himself on litigating parties."

The reason expressed by Bronson, J., in *People* v. *Suffolk*, Com. Plea, 18 Wend., 550, shows its universal application: "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the Judge." *Conant's Appeal*, 102 Me., 477, 67 A., 564; *Lyon* v. *Hamor*, 73 Me., 56.

By the weight of authority, a judge is disqualified to be a witness in a case on trial before him, and many reasons are assigned, one being that the safer course, the better way is to remove trial judges from all temptation, and relieve them from all suspicion or criticism, by adopting and enforcing an unyielding rule that he who has been, or is to be, a material witness in a cause, can not preside at the trial thereof. *Burlington Ins. Co.* v. *McLeod*, 40 Kan., 54, Ann. Cas., 1913 C.

This might well be paraphrased with even greater force by saying that he who has undertaken a cause in behalf of one party as his advocate and counselor can not sit in judgment to determine the rights of both parties to the same cause.

It is true, as stated in *Bond* v. *Bond*, 127 Me., 117, 141 A., 833, 835, that "at common law, the only ground for recusation of a judge was pecuniary interest or relationship. Bias or prejudice was not sufficient." But as further noted in the opinion, "The modern trend has been to add by legislation other grounds of recusation to those recognized at common law . . . and in a few cases the courts have held other grounds than those recognized at common law sufficient to disqualify."

In *Tampa St. Ry. Co.* v. *Tampa Suburban R. Co.*, 30 Fla., 595, 17 L. R. A., 681, the Court held that the previous relations of attorney and client disqualify a judge, notwithstanding there is no statute in the state making it a disqualification.

In the case at bar the statute of our State, R. S., Chap. 97, Sec. 33, cited *supra*, was invoked. Under a narrow and strict interpretation it might be urged that the statute does not in terms include an action, matter or thing in which the judge has previously acted as attorney. Our Court, however, has already spoken in no uncertain language with reference to a municipal court charter provision of exactly the same import, and has given to it a broad construction consistent with its manifest purpose and intent. In *National Publicity Society* v. *Raye*, 115 Me., 147, 98 A., 300, the Court held that the charter prohibition applied to a judge who brought suit in another court upon a cause which was within the concurrent jurisdiction of his own court. In that case the judge acted only as an attorney and undertook to prosecute the action before a disinterested tribunal. In this case he gave judgment to his former client in the very matter in which he had acted for her as attorney.

It is contended, however, that the defendant did not comply with the rules of pleading; that by the municipal court charter all the provisions of law relating to proceedings and practice in the Supreme Judicial Court were made applicable, and that under Rule 5 of the Supreme Judicial and Superior Courts not only must pleas or motions in abatement be filed within two days after the entry of the action, but also, if alleging matter of fact not apparent on the face of the record, must be verified by affidavit.

The statute is broad enough to create a prohibition. It disqualifies the judge under the circumstances which exist in the present case. It was not intended that the prohibition should be circumvented or the statute devitalized by failure of the defendant to comply with the technical rules of pleading or procedure. It could not thus be weakened to a mild and impotent request. This is the reasoning in *National Publicity Society* v. *Raye*, supra, and the Court further says: "In the case at bar there are no independent provisions for the enforcement of the prohibition. The prohibition itself must carry by its own momentum if it is to be effective."

Consideration has also been directed as to whether the exceptions raise the particular point, but it is to be noted the exceptions are to the ruling of the presiding Justice in the Superior Court that the defendant's appeal be dismissed and the judgment of the Muni-

cipal Court affirmed. There was no valid judgment of the Municipal Court, and consequently there could be no valid affirmation.

Exceptions sustained.

THE J. R. WATKINS COMPANY

vs.

LEO BROWN AND JOHN T. MCPHERSON.

Penobscot. Opinion, November 18, 1936.

PLEADING & PRACTICE. EVIDENCE.

Evidence, even though legally inadmissible, received without objection, is regarded as in the case by consent, and, if relevant, must be considered by the trier of the facts.

In the case at bar, the evidence was so received, and unquestionably established a liability of the defendants to the plaintiff. Under such circumstances the finding for the defendants was erroneous.

On exceptions by plaintiff. An action for breach of alleged contract of guaranty. Trial was had before a sitting Justice without jury, right of exceptions as to matters of law reserved. To his rendition of judgment for the defendants, plaintiff seasonably excepted. Exceptions sustained. The case sufficiently appears in the opinion.

David W. Fuller,
Albert C. Blanchard, for plaintiff.
Fellows & Fellows, for defendants.

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

THAXTER, J. The plaintiff, a corporation having its place of business at Winona in the State of Minnesota, brought suit against

the defendants for breach of a written contract under the terms of which it is alleged the defendants agreed to pay the plaintiff the sum of $414.44 on an account owed the plaintiff by one William A. Wilson of Brownville, Maine, and also to pay such sum of money as might thereafter become due for goods sold and delivered by the plaintiff to said Wilson, the total liability not to exceed $700. The defendants pleaded the general issue and the case, with right of exceptions reserved, was heard by the presiding Justice who found for the defendants. To this ruling the plaintiff filed exceptions which are now before us.

It is unnecessary to recite the facts in detail. The evidence for the plaintiff consists of depositions, taken before a notary public in Minnesota, of the assistant treasurer, assistant general sales manager, and auditor of the plaintiff corporation in which they refer to orders for goods received from Wilson. The defendants claim that this testimony is inadmissible on the ground that the witnesses had no personal knowledge of the facts and that their evidence is hearsay.

The record does not show that any objections were made to the interrogatories either when they were filed or at the time the depositions were offered at the trial. Evidence, even though legally inadmissible, received without objection, is regarded as in the case by consent, and, if relevant, must be considered by the trier of the facts. *Moore* v. *Protection Insurance Co.*, 29 Me., 97; *Brown* v. *Moran*, 42 Me., 44; *Tomlinson* v. *Clement Bros. Inc.*, 130 Me., 189, 154 A., 355. The evidence so received in this instance unquestionably established a liability of the defendants to the plaintiff. Under such circumstances the finding for the defendants was erroneous.

Exceptions sustained.

MARY E. SWEENEY *vs.* JOHN W. SHAW.

Aroostook. Opinion, November 19, 1936.

EQUITY. PLEADING & PRACTICE. MORTGAGES. RES ADJUDICATA.

In a bill in equity seeking redemption of real estate from a mortgage, wherein defendant entered a plea alleging that a previous bill of similar import had been filed by the plaintiff which, after hearing, had been dismissed, and, wherein the presiding Justice sustained this plea and entered a decree dismissing the bill:

HELD

The first bill was brought under the provisions of R. S. 1930, *Chap.* 104, *Sec.* 16, *which provides for redemption when the amount due on a mortgage has been actually tendered.*

The dismissal of that appeal does not preclude the plaintiff from proceeding under the provisions of Sec. 15 *for an accounting and a redemption. The bill now before the court sets forth an issue quite different from that raised by the first. The plea of* res adjudicata *can not be upheld.*

On appeal. A bill in equity seeking redemption from a mortgage held by the defendant. From the ruling of the presiding Justice sustaining a plea of *res adjudicata* and dismissing the bill, plaintiff appealed. Appeal sustained. The case sufficiently appears in the opinion.

Brown and Brown, for plaintiff.

Herschel Shaw, for defendant.

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

THAXTER, J. The plaintiff, the owner of the equity of redemption in certain real estate, has brought a bill in equity in accordance with the provisions of R. S. 1930, Chap. 104, Sec. 15, seeking redemption from a mortgage held by the defendant. The bill contains the usual allegations setting forth the title of the respective parties, and a foreclosure by the defendant. It alleges that on January 3, 1936, the plaintiff demanded an account of the amount due on the

mortgage and offered to pay the same, and that the defendant refused to render such account. It prays for a determination of the balance due and that the defendant be ordered to convey the property to the plaintiff on the payment of the same. The defendant entered a plea alleging that a previous bill of similar import had been filed by the plaintiff in August, 1934, against the defendant; that after a hearing a decree was entered dismissing such bill; that the appeal therefrom to the Law Court was not perfected; and that therefore the present bill should be dismissed. The presiding Justice sustained this plea, ruling in effect that the cause was *res adjudicata*. A decree was entered dismissing the bill and the plaintiff has appealed.

The first bill is made a part of this record. A glance at it shows that it was not brought under the provisions of R. S. 1930, Chap. 104, Sec. 15. It contains no allegation that the plaintiff had asked the defendant for an accounting of the amount due on the mortgage and that the defendant had refused to render the same. It sets forth that the plaintiff offered to pay the defendant the sum of $1,375.98, the amount due, and that the defendant refused to accept it. The plaintiff, if she raised by her first bill any issue cognizable in equity, seems to have proceeded under R. S. 1930, Chap. 104, Sec. 16, which provides for redemption when the amount due on a mortgage has been actually tendered.

The original bill was properly dismissed if the plaintiff failed to show that she had actually tendered to the defendant the correct amount due. Its dismissal does not preclude her from proceeding under the provisions of Section 15 for an accounting and redemption. The second bill now before the Court sets forth an issue quite different from that raised by the first. The plea of *res adjudicata* can not be upheld.

Appeal sustained.

ARMITT BROWN

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED.

Hancock. Opinion, November 23, 1936.

COMMON CARRIERS. WAREHOUSEMEN.

No rule requires a carrier to do what by the exercise of due effort it cannot do.

Despite inability to give notice, common carrier obligations do not terminate until reasonable opportunity has been afforded for the consignee to call, examine, and take his things from the premises of the carrier.

What is a reasonable time is sometimes a question of law, sometimes of fact, not infrequently of mixed law and fact.

No two cases are alike; circumstances vary. What is a reasonable time depends upon a variety of considerations. The term is an elastic one of uncertain value in a definition.

The state of affairs in the particular case, not the mere convenience of the consignee, will control in determining this reasonable time.

Warehousemen are not held to indemnify against loss by accidental fire.

The standard of care for warehousemen is such as an ordinarily prudent person would take of his own property, under the same or in a similar situation.

In the case at bar, the court holds that the consignee did not call at the office of the carrier for his goods within a reasonable time, and that when the goods were burned, defendant was no longer liable as a carrier. Liability had been transmuted to that of warehouseman. Lack of care not being shown, a finding in favor of defendant is compelled.

On report and agreed statement of facts. An action on the case to recover for the loss of two trunks, a suitcase, and ten paper boxes and the contents therein, transported by the defendant in its capacity as a common carrier. The issue involved the question whether or not the consignee called for the goods within a rea-

sonable time after their arrival in defendant's office in the city of Ellsworth so as to charge defendant as a common carrier insurer, or merely as a warehouseman. Judgment for the defendant. The case fully appears in the opinion.

H. L. Graham, for plaintiff.

Hale & Hamlin, for defendant.

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

DUNN, C. J. The parties agree upon the facts.

Consignee (who was also consignor,) sues the terminal carrier for nondelivery of two trunks, a suitcase, and ten boxes, containing wearing apparel, other effects, and property, of the declared and fair value of $1,000.00. Transit over, the articles had been placed, in good order, absent specific delivery address, in the carrier's office, where, five days later, they were completely destroyed by a great fire. This fire, of undetermined origin, consumed many business places, as well as much of the residential district, in the city of the location of the express office. The cause of the fire is in nowise attributable to defendant. Any sufficiency of the place of deposit is not at issue.

Events may be summarized as follows:

On April 29, 1933, plaintiff took the containers to the Southeastern Express Company, at Summerville, South Carolina, in which place, through the preceding winter, he had been a vacationist, and left them for carriage, charges to be collected at destination.

Each package was marked and addressed: "Armitt Brown, Ellsworth, Me."

The carrier accepted the shipment. Prepayment of carrying rates was not necessary; if the charges should not be paid, the carrier would have a lien therefor, upon the things in its possession and under its control. *Ames* v. *Palmer*, 42 Me., 197.

Plaintiff was to summer in Maine, fourteen miles from Ellsworth, at Somesville, in the town of Mount Desert, where, as he already knew, there is no express office, and deliveries of express are not made.

That plaintiff intended going to Somesville, does not appear to have been brought to attention of the initial carrier. The shipper said he was journeying by automobile to Ellsworth, to arrive about two weeks later than the consignment.

The receipt given him refers to terms and conditions in official tariffs and classifications, which plaintiff, though he could have, did not read.

The receipt, as the case is submitted, neither increases nor modifies the general duty of the carrier.

The agent, on being told that plaintiff would call at destination for his goods, did not say that carrier liability would attend until the consignee should come; nor did he say that it would not. Nothing shows any mention of the subject.

The packages reached Ellsworth by train, on May 2, 1933, either in the morning or late afternoon.

A postal card notice, bearing postmark May 3, 1933, to consignee, mailed in a street letter box, to the address on the trunks and other receptacles, stating that they were being held at his risk, was returned to sender by the postal authorities, after the fire. The card had been stamped: "Addressee unknown."

The fire broke out May 7, 1933, at ten o'clock, P.M.

A fortnight or so from April 29, 1933, (the shipping day,) plaintiff appeared in Ellsworth.

In the course of a week, he gave notice of loss, by letter, from Mount Desert. The claim was rejected on its merits.

The underlying question is whether, at the time of the fire, defendant's responsibility as a common carrier of goods, with consequent liability as an insurer, had ceased, and become, less rigorously, that of a warehouseman, or bailee, the yardstick for the measurement of whose duty, for the protection of the property, is reasonable diligence only. *Hutchinson* v. *United States Express Co.*, 63 W. Va., 128, 59 S. E., 949.

It has been stated in a syllabus, in Maine, that where there is no special contract, an express company's liability as a carrier obtains until delivery of the shipment to the consignee, personally or at his residence or place of business. See Headnote, *State* v. *Parshley*, 108 Me., 410, 81 A., 484.

A headnote to a reported decision, it is the general rule, is not

law except so far as it is warranted by the judgment of the court upon the facts of the case. 7 R. C. L., 1017.

The headnote to *State* v. *Parshley*, supra, is broader than the opinion, delivered by Mr. Justice Bird, justifies. Controversy there was whether certain intoxicating liquors, moving in interstate commerce, as regulated by congressional legislation, (26 U. S. Stat., 313, known as the Wilson Act,) had, in a constructive sense, been delivered, so as to be beyond Federal protection, and subject to local laws.

That case and the present one are quite distinguishable.

> "Ordinarily," says Bigelow, C. J., in *Conway Bank* v. *American Express Company*, 8 Allen, 512, "the duty of common carriers is to deliver articles at the place of destination to those persons for whom they are intended, and their responsibility as carriers does not cease until such delivery has been accomplished. But the contract of carriage may, in this respect, be essentially modified by express agreement; or by a usage or course of trade, by a particular mode of dealing between parties, by the well known and established practice of the carrier, and any other circumstances from which an intention of the parties can be clearly gathered to change the usual incidents of the contract, so as to put an end to the responsibility of the carrier as soon as the articles are transported by him to a particular terminus, and to substitute in its place the less stringent obligation of a depository or custodian of property intrusted to him for safe keeping."

In *Chapman* v. *Great Western Railway Co.*, 5 Q. B. Div., 278, quoted in *Burr* v. *Adams Express Co.*, 71 N. J. L., 263, 58 A., 609, shipment was addressed to the plaintiff at a railway station, "To be left till called for." The court said that, notwithstanding the special direction, carrier liability continued for a reasonable time after arrival of the goods. It was decided that when plaintiff came for them, he having suffered more than a reasonable time to elapse, defendant's liability as a carrier was already ended.

In the case at bar, carrier function was not completed by putting the effects in the office at the terminus of the route.

Attempt to give notice of readiness to deliver was fruitless.

The consignee did not reside in Ellsworth; he had no agent there.

No rule requires the carrier to do what by the exercise of due effort it cannot do. *Laporte* v. *Wells, etc., Co.*, 48 N. Y. S., 292; *Payne* v. *Roe*, 143 Md., 282, 122 A., 322; *Hutchinson* v. *United States, etc., Co.*, supra; *St. Louis, etc., Co.* v. *Townes*, 93 Ark., 430, 124 S. W., 1036.

Despite inability to give notice, common-carrier obligation did not terminate until reasonable opportunity had been afforded for the consignee to call, examine, and take his things from the premises of the carrier. Angell on Carriers, (5th ed.,) Sec. 303; *Burr* v. *Adams Express Co.*, supra.

What is a reasonable time is sometimes a question of law, sometimes of fact, not infrequently of mixed law and fact.

No two cases are alike; attendant circumstances vary.

What is reasonable depends upon a variety of considerations. The term is an elastic one of uncertain value in a definition. *Sussex Land, etc., Co.* v. *Midwest Refining Co.*, 294 F., 597.

The courts, aside from those jurisdictions which have adopted what is known as the Massachusetts doctrine, (*Thomas* v. *Boston, etc., Corp.*, 10 Met., 472; *Norway Plains Co.* v. *Boston, etc., Railroad*, 1 Gray, 263,) viz: that where the transit is ended, and the shipment is in the warehouse, liability as carrier is over, have refused definitely to fix by hours or days the limit of a reasonable time.

And it seems, to quote from a note to *United Fruit Co.* v. *New York, etc., Line*, as reported in 8 L. R. A., (N. S.) 240, that the state of affairs in the particular case, not the mere convenience of the consignee, will control in determining this reasonable time.

In the following cases, the time stated was held to have been more than reasonable, upon or regardless of other facts appearing; wherefore the carrier's liability, as such, had ceased:

From Saturday afternoon to Monday evening, for a box containing watches and other jewelry. *Laporte* v. *Wells, etc., Co.*, supra.

One full day and part of another, where consignee was absent and had no agent to whom delivery could be made or notice given. *Northrup* v. *Syracuse, etc., Co.*, 3 Abb. Dec., 386, 5 Abb. Prac., (N. S.) 425.

Three days, without notice, where consignee had recently moved from another city to a place four miles from the depot, and was neither known to nor found by the carrier's agent. *Pelton* v. *Rensselaer, etc., Co.*, 54 N. Y., 214.

Four days, where notice was mailed to consignee, but, being out of the city, he did not get it until two days after the fire had destroyed the goods. *Denver, etc., Co.* v. *Peterson*, 30 Colo., 77, 69 P., 578.

Five days, where the consignee did not live in the vicinity, had no agent there, and his residence was unknown to the carrier. *Derosia* v. *Winona, etc., Co.*, 18 Minn., 133.

Six days, *Welch* v. *Concord Railroad*, 68 N. H., 206.

Conclusion in the case in hand is that, when the goods were burned, defendant was no longer liable as carrier. Liability had been transmuted to that of warehouseman.

Warehousemen are not held to indemnify against loss from accidental fire. *Norway, etc., Co.* v. *Boston, etc., Co.*, supra; *Aldrich* v. *Boston, etc., Co.*, 100 Mass., 31; *Rice* v. *Hart*, 118 Mass., 201; *McCarty* v. *New York, etc., Co.*, 30 Pa. St., 247; *United Fruit Co.* v. *New York, etc., Co.*, (supra), 104 Md., 567, 65 A., 415.

The standard of care for warehousemen is such as an ordinarily prudent person would take of his own property, under the same or in a similar situation.

Since a lack of care is not shown, a finding in favor of defendant is compelled.

The case is remanded for the entry of:

Judgment for defendant.

PELEGIO METRINKO, ADMX. *vs.* HARRY WITHERELL.

DORRANCE T. COLEMAN *vs.* HARRY WITHERELL.

ANGIE JOHNSTON *vs.* HARRY WITHERELL.

STANLEY J. JONES *vs.* HARRY WITHERELL.

Franklin. Opinion, November 24, 1936.

MOTOR VEHICLES. NEGLIGENCE. EVIDENCE. RES IPSA LOQUITUR.

R. S., CHAP. 101, SECS. 9-10, CHAP. 96, SEC. 50.

The statutory Death-Liability cause of action begins where the common law left off. The test of the right to maintain the action is measured solely by the statute: whether the deceased person, if living, could recover damages.

Due care on the part of decedent is presumed. The presumption, however, is a disputable one. Upon the issue of contributory negligence, the burden of proof is on defendant.

A motion for a new trial, on predicate of violation of the evidence, is in no sense a trial de novo. *In this, as in all other cases where questions of reasonable care, contributory negligence, or the like are in controversy the facts being in dispute, or, though undisputed, affording space for different conclusions, rationally drawn, the question is for the jury.*

Findings of facts, when supported by a fair preponderance of reasonable and substantial evidence, will not be disturbed.

Res ipsa loquitur *is a rule of evidence which, where applicable, permits the inference of negligence from circumstantial facts.*

In dealing with inferences, the jury is at liberty to find the ultimate fact one way or the other, as it may be impressed by the evidence and legitimate deductions.

In the case at bar, the evidence, when closed, was, upon the issues tried, somewhat conflicting. It does not, however, appear that any finding lacked evidential basis, or was against evidence, or the weight of evidence; nor that the jury was actuated by improper motives. The motions must, therefore, be overruled.

On general motion for new trial by plaintiffs. Four cases involving death of one person and personal injuries of three others arising out of an automobile accident. Trial was had at the May Term, 1936, of the Superior Court, for the County of Franklin. The jury found for the defendant in each case. General motions for new trial were thereupon filed by each plaintiff. Motions overruled. The cases fully appear in the opinion.

Harry E. Nixon,
Edward L. Fenton, for plaintiffs.
Francis W. Sullivan,
Currier C. Holman, for defendant.

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

DUNN, C. J. On July 12, 1935, near midnight, Angie Johnston, Stanley Jones and Harry Witherell were seated in the front seat, Olga Metrinko and Cecil Farrar in the rumble, and Dorrance T. Coleman was on the running board of a Ford roadster, riding along a public road in Scarborough.

The car belonged to Farrar.

He had assembled the group, through the evening, the last of its members at a dance hall. From there, where stay had been brief, start was for the hotel, four miles away, where all except Farrar were employees.

Witherell, here defendant, was driving.

The vehicle left the highway, struck the stump of a tree, and "jackknifed."

Olga Metrinko died from a fractured neck without regaining consciousness.

Invoking the Death-Liability Act, (now Revised Statutes, Chapter 101, Sections 9, 10, as amended,) the personal representative of decedent sues, civilly, for the benefit of the parents of deceased, as her heirs; the term is inclusive of next of kin. The suit is not for conscious suffering up to the time of death, but for negligently causing death, averment being that demise was immediate. *Perkins, Admr.* v. *Oxford Paper Co.*, 104 Me., 109, 71 A., 476.

The statutory cause of action begins where the common law left

off. *Anderson* v. *Wetter*, 103 Me., 257, 69 A., 105. The test of the right to maintain the action is measured solely by the statute: whether the deceased person, if living, could recover damages. *Danforth, Admr.* v. *Emmons*, 124 Me., 156, 126 A., 821.

Due care on the part of decedent is presumed. R. S., Chap. 96, Sec. 50. The presumption is a disputable one. R. S., *supra*. Upon the issue of contributory negligence, the burden of proof is on defendant. *Cullinan, Admr.* v. *Tetrault*, 123 Me., 302, 122 A., 770; *Danforth, Admr.* v. *Emmons*, supra.

Of the party members surviving, three, Mrs. Johnston, Coleman, and Jones, individually, bring tort actions, sounding in negligence, for personal injuries. Each plaintiff must, at the common law, establish, as one element of his case, his own freedom from any want of ordinary care, which, concurring with actionable negligence, was part of the proximate cause of injury.

The four cases were tried together.

To the charge, no exception was taken.

Verdicts being adverse to plaintiffs, they move for new trials, arguing only the ground that the verdicts are against the evidence.

A motion for a new trial, on predicate of violation of the evidence, is in no sense a trial *de novo*.

In this, as in all other cases where questions of reasonable care, contributory negligence, or the like are in controversy, the facts being in dispute, or, though undisputed, affording space for different conclusions, rationally drawn, the question is for the jury.

Findings of fact, when supported by a fair preponderance of reasonable and substantial evidence, will not be disturbed.

This is so familiar as to require no citation of authorities.

The surviving plaintiffs, to recur to the record, testified on the witness stand.

Persons who had been close to the scene of the accident, on being called and sworn, witnessed as to physical conditions and other details. Deputy sheriffs who arrived there shortly, gave testimony. There was also medical evidence.

Some, at least, of the party, inclusive of the driver, had drunk intoxicating liquor. The driver's drinking, if shown to have been known to the guests, and the jury could, from the evidence, so find, might have been found to bear on the question of contributory neg-

ligence. *Richards, Admr.* v. *Neault,* 126 Me., 17, 135 A., 524.

Plaintiffs insisted the doctrine of *res ipsa loquitur.* This doctrine is not without limit.

As is said, in sum, in *Stevens* v. *Railway,* 66 Me., 74; *Edwards* v. *Power Co.,* 128 Me., 207, 146 A., 700; *Chaisson* v. *Williams,* 130 Me., 341, 156 A., 154; *Winslow* v. *Tibbetts,* 131 Me., 318, 162 A., 785, and *Shea* v. *Hern,* 132 Me., 361, 171 A., 248; *res ipsa loquitur* is a rule of evidence which, where applicable, permits the inference of negligence from circumstantial facts.

In dealing with inferences, the jury is at liberty to find the ultimate fact one way or the other, as it may be impressed by the evidence and legitimate deductions. *Stumpf* v. *Montgomery,* 101 Okla., 257, 226 P., 65.

Defendant introduced testimony.

Defense witnesses, so the jury could find, delineated a country highway, darkness, not much traffic, the road narrowing, abruptly, from thirty-two feet to sixteen feet; Farrar, the owner of the roadster, asleep; two of the car occupants singing; the driver, despite the glare of approaching headlights, duly careful, and, on discerning, unexpectedly, directly ahead, outlines of persons walking, his swerving; then the accident.

The tree stump, it was in evidence, stood by the roadside; the tree, recently felled, was on the ground; grass, like uncut hay, as a witness puts it, was growing there; some of the grass was trampled.

The evidence, when closed, was, upon the issues tried, somewhat conflicting. It does not, however, appear that any finding lacks evidential basis, or is against evidence, or the weight of the evidence; nor that the jury was actuated by improper motives.

The motions must be overruled.

Motions overruled.

FIRST NATIONAL BANK, TRUSTEE

vs.

GRACE I. DEWOLFE ET ALS.

Androscoggin. Opinion, November 24, 1936.

EQUITY. WILLS. RULE AGAINST PERPETUITIES. REMAINDERS. CONDITIONS SUBSEQUENT. EXECUTORY DEVISES.

The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates, which, by possibility, may not become vested within a life or lives in being, and twenty-one years, together with the period of gestation, when inclusion of the latter is necessary to cover cases of posthumous birth.

The thought and intention of the testator, examined in the light of the attendant facts which may be supposed to have been in his mind, if not counter to some positive rule of law or public policy, must govern. Rules of construction are valuable only when intention cannot be so gathered. Then, such legal canons as have been established to meet the circumstances of the case, regulate.

An estate, merely subject to a condition subsequent, has, none the less, the attributes of being inheritable, devisable, and assignable, but the condition remains annexed.

The time of vesting, and not the period of duration, the beginning and not the ending, concerns the rule against perpetuities. The rule is without relation to vested interests.

An executory devise differs from a remainder in needing no particular estate to support it, and that thereby, a fee simple, or less estate, may be limited after a fee simple. The original purpose of executory devises was to carry out the will of the testator and give effect to provisions which, at common law, cannot operate as contingent remainders.

In the case at bar, when the will was written, testator's son had two children. On the remainder becoming effective, these children had, each for himself, one-half of one-half of the whole, in present equitable right, on condition subsequent. The son's third child was born June 1, 1933. This child shares, with the others, in the group of which she is, *pro rata.*

This situation differed from that in the daughter's family, in that her third child was born during the period of the tenancy for life.

Testator defined a trust to accumulate until his grandchildren "severally attain the age of twenty-five years." That, in this will, was no infringement of the rule against perpetuities.

The bequest includes, with respect to each group, all grandchildren born before one attained the age of twenty-five years, although born after the death of the testator. The bequest would not include a grandchild born after one grandchild attained that age.

On appeal. A bill in equity brought by the plaintiff acting as trustee under the will of William Alson Nichols, asking for interpretation and construction of certain provisions of said will and for instructions in carrying out provisions of the trust set up in said will. From the final decree of the presiding justice hearing the case, defendants Grace I. DeWolfe and Ernest Osgood Nichols, appealed. Appeal dismissed with costs. Reasonable expenses and counsel fees, where allowable against the fund, to be settled below. The case fully appears in the opinion.

Skelton & Mahon, for petitioner.

Carl F. Getchell, for Cleon Y. DeWolfe, Clyde A. Nichols, William Lester DeWolfe and Dorothy Osgood Nichols.

Ellis L. Aldrich, for Ernest Osgood Nichols and Grace I. DeWolfe.

Elwyn H. Gamage, pro se.

Frank W. Linnell, pro se.

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

DUNN, C. J. This appeal depends upon the construction of the third clause of the last will of William Alson Nichols, who died September 9, 1923. The will, which was duly admitted to probate, bears date November 20, 1920. Testator, by the second clause in his will, gave all his estate, real as well as personal, except a kit of tools, to his wife, (who survived him,) for life, with eminently discretionary power. She could, in her sole judgment, use and expend all the property for her support and maintenance.

The will does not, strictly, having reference to the second paragraph, provide a remainder, but, through the medium of a trust, to secure against incapacity, disposes of the remainder, should there be any.

Mrs. Nichols, whose death occurred October 14, 1926, did not, as to the corpus of the estate held by her as life tenant, or quasi trustee, exercise empowered authority.

The devise over took effect upon the termination of the life tenancy. *Smith* v. *Snow*, 123 Mass., 323; *Nelson* v. *Meade*, 129 Me., 61, 149 A., 626. The trust is not transgressive.

The third clause of said will is as follows:

"Third — All the rest, residue and remainder over of my said estate I give, devise and bequeath unto the National Shoe and Leather Bank of Auburn, Maine, in trust however, for the following purposes (1) to deliver to my son Ernest Osgood Nichols, of Providence, R. I. my Odd Fellows chart and the portrait of his maternal grandmother and grandfather and a portrait of 'a girl' and to my daughter, Grace I. DeWolfe of said Mechanic Falls a picture in gilt frame entitled 'General Putnam's duel with an English Officer.' (2) to convert the balance of said rest, residue and remainder over into cash and safely invest the same in four equal parts, and when each of my grandchildren, namely, Dorothy Osgood Nichols, Clyde Alson Nichols, children of my said son and Cleon Y. DeWolfe and William Lester DeWolfe children of my said daughter shall severally attain the age of twenty-five years to pay the same together with the accumulations to said grandchild so entitled to the same; provided, however that if hereafter a child or children shall be born to my said son and his wife the respective shares of their said son and daughter shall be reduced proportionately and the same paid as aforesaid to such after born child or children to the end that all their said children shall share equally. And provided further that if a child or children shall be hereafter born to my said daughter and her husband the respective shares of their sons shall be reduced proportionately and the same paid to such after born child or children, as aforesaid to the end that all their children shall share equally; and I direct my said trustee to pay accordingly."

Plaintiff is trustee in succession to the one the will nominates. Since testator's death another child (the third) has been born to

his son (this child being first issue of the son's second marriage); and a child (third to her) born to testator's daughter.

The six grandchildren, three on the son's side, as many on the daughter's, are all living.

The testamentary trustee filed its bill in the equity court for directions and instructions.

Contention by testator's son and daughter, that the will offends the rule against perpetuities, or remoteness, was not sustained below.

The rule is usually stated as prohibiting the creation of future interests or estates, which, by possibility, may not become vested within a life or lives in being, and twenty-one years, together with the period of gestation, when the inclusion of the latter is necessary to cover cases of posthumous birth. *Pulitzer* v. *Livingston*, 89 Me., 359, 364, 36 A., 635; *True Real Estate Co.* v. *True*, 115 Me., 533, 99 A., 627; *Bancroft* v. *Sanatorium Association*, 119 Me., 56, 109 A., 585.

What was the thought and intention of the testator with regard to a remainder?

The answer must be collected from his will, examined in the light of the attendant facts which may be supposed to have been in his mind; thought and intention so ascertained, if not counter to some positive rule of law or public policy, must govern. *Perry* v. *Leslie*, 124 Me., 93, 126 A., 340. Rules of construction are valuable only when intention cannot be so gathered. *Perry* v. *Leslie*, supra. Then, such legal canons as have been established to meet the circumstances of the case, regulate. *Perry* v. *Leslie*, supra.

Obviously, testator meant, in the event of a remainder, to benefit his grandchildren, who, in his will, he designates by name, and identifies further by mention of their descent. These four grandchildren, the testator places in two groups, those of the son, and those of the daughter; all were alive when the will was made.

Testator, when he willed, was thinking, not solely of living grandchildren, but had in mind the possibility of others.

All living grandchildren, as he defines, are to share equally, modified, however, in their respective groupings, as to potential births.

At the termination of the life tenancy, another, or third child

had, previously, namely: on July 28, 1926, been born to testator's daughter. Each of these three grandchildren, once there was a remainder, took one-third part of one-half of the whole trust estate, in vested equitable interest, the time of payment, or actual enjoyment, postponed. *Morse* v. *Ballou*, 109 Me., 264, 83 A., 799; *Bryant* v. *Plummer*, 111 Me., 511, 90 A., 171; *Carver* v. *Wright*, 119 Me., 185, 109 A., 896; *Belding* v. *Coward*, 125 Me., 305, 133 A., 689. A condition subsequent was, however, attached to the gift. *Buck* v. *Paine*, 75 Me., 582.

The will introduced the condition by language quite commonly employed in such connection. It says, in effect,—provided, however, that if other children shall be born into the family of my son, or into that of my daughter, they shall partake in equality with those of their immediate blood.

An estate, merely subject to a condition subsequent, has, none the less, the attributes of being inheritable, devisable, and assignable, but the condition remains annexed. *Buck* v. *Paine*, supra.

There was, as testator willed, no suspension of ownership.

The time of vesting, and not the period of duration, the beginning and not the ending, concerns the rule against perpetuities. *Andrews* v. *Lincoln*, 95 Me., 541, 50 A., 898; *Strout* v. *Strout*, 117 Me., 357, 104 A., 577; *Bancroft* v. *Sanatorium*, supra. The rule is without relation to vested interests. *Singhi* v. *Dean*, 119 Me., 287, 110 A., 865.

The vested interests were subject to be divested, proportionately, in the case of the birth, in the same allocation, of a grandchild or grandchildren. Any divested part, the will gives over, as an executory devise. *Buck* v. *Paine*, supra. See, too, *Morse* v. *Ballou*, 112 Me., 124, 90 A., 1091; *Union Safe Deposit Company* v. *Wooster*, 125 Me., 22, 25, 130 A., 433; *Davis* v. *McKown*, 131 Me., 203, 208, 160 A., 458.

An executory devise differs from a remainder in needing no particular estate to support it, and that thereby, a fee simple, or less estate, may be limited after a fee simple. *Sayward* v. *Sayward*, 7 Greenl., 210. The original purpose of executory devises was to carry out the will of the testator and give effect to provisions which, at the common law, cannot operate as contingent remainders. *Brattle Square Church* v. *Grant*, 3 Gray, 142.

When the will was written, testator's son had two children. On the remainder becoming effective, these children had, each for himself, one-half of one-half of the whole, in present equitable right, on condition subsequent. *Buck* v. *Paine*, supra. The son's third child, already of mention, was born June 1, 1933. This child shares, with the others, in the group of which she is, *pro rata.*

Situation here differs from that in the daughter's family, in that, as noted before, her third child was born during the period of the tenancy for life.

Testator defined a trust to accumulate until his grandchildren "severally attain the age of twenty-five years."

That, in this will, is no infringement of the rule against perpetuities. *In re Johnston's Estate*, 185 Pa., 179; *Bancroft* v. *Sanatorium*, supra.

Testator's words, the surrounding circumstances, and applicable rule of construction indicate, controllingly, that children of his own children, as he grouped his grandchildren, inclusive of them thereafter born into either group, shall share and share alike. Limit is not indefinite.

The bequest includes, with respect to each group, all grandchildren born before one attained the age of twenty-five years, although born after the death of the testator. *Hubbard* v. *Lloyd*, 6 Cush., 522. The bequest would not include a grandchild born after one grandchild attained that age. *Hubbard* v. *Lloyd*, supra. No grandchild was.

In the son group, Dorothy Osgood Nichols, (now Fitzhugh,) born December 20, 1910, almost ten years old when the will was made, attained the age of twenty-five years December 19, 1935.

In the other group, the grandchild Cleon Y. DeWolfe, first to reach the age of twenty-five years, was born January 25, 1912. He was, at the time of the making of the will, eleven years old; he becomes twenty-five January 24, 1927.

Mandate will be:

Appeal dismissed, with costs. Reasonable expenses and counsel fees, where allowable against the fund, to be settled below.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

FRANK HARTY NORRIS, A MINOR,

BY

GERTRUDE V. HOLESWORTH, GUARDIAN,

vs.

CLYDE C. CHILDS AND TOWN OF MOUNT VERNON.

Kennebec County. Decided December 10, 1935. The record in this case indicates that there are persons materially interested in the subject matter of the suit who are not joined as parties, and no reason for their non-joinder appears. Also the right of the guardian of the non-resident plaintiff to prosecute the suit for her ward is not established. Under the circumstances, the entry must be: Report discharged. *Berman & Berman* of Lewiston, for plaintiff. *Ralph W. Crockett*, for defendants.

PERCY BRYANT *vs.* W. K. CARVILLE AND HENRY CARVILLE.

PERCY BRYANT *vs.* W. K. CARVILLE AND HENRY CARVILLE.

GLADYS BRYANT *vs.* W. K. CARVILLE AND HENRY CARVILLE.

Androscoggin County. Decided January 3, 1936. Actions of tort for personal injuries and consequential damages arising from

alleged assault and battery. The cases come forward on motions. The plaintiffs are husband and wife.

An examination of the record shows conflicting versions as to what took place, either of which is credible. From the testimony of a physician it is clear that the plaintiffs sustained actual physical injuries, which in the case of the wife were quite serious.

The issue was one peculiarly within the province of the jury. There is nothing to show that the jury was improperly influenced, either upon the question of liability or damages, and the cases present no meritorious reasons for disturbance of the verdicts: Motion overruled. *Berman* & *Berman* of Lewiston, for plaintiffs. *John G. Marshall*, for defendants.

STATE OF MAINE *vs.* FRANK F. COLBURN.

Sagadahoc County. Decided January 6, 1936. The respondent was indicted by the Grand Jury for Sagadahoc County for a violation of R. S. 1930, Ch. 136, Sec. 18. This is the statute making unlawful lotteries and schemes or devices of chance. The case is before us on report on an agreed statement, and the issue concerns the validity of a so-called "bank night" as conducted by the respondent in his moving-picture house in the City of Bath.

A recital of the facts as set forth in the agreed statement is unnecessary, as in the opinion of this Court they are insufficient to allow an intelligent decision of the problem presented to us. The entry must accordingly be: Report discharged. *Ralph O. Dale*, County Attorney for State. *Ensign Otis*, *W. R. Pattangall*, for respondent.

EVERETT C. STETSON *vs.* FRED PARKS.

Androscoggin County. Decided January 21, 1936. This case comes from the Superior Court on an agreed statement of facts, with a petition for review of proceedings terminated by decision of the Law Court under date of July 19, 1935, 133 Me., 463, 180, A., 366. That opinion is so recent that it need not now be repeated.

By such decision this Court held that a new promise to pay, "whether made after the discharge (of defendant, in bankruptcy), or between the adjudication and the discharge, is within the Statute of Frauds."

"In this state, there is no provision by statute or rule for a rehearing by the Law Court after a decision rendered."

Booth Bros. et al v. *Smith Admr.*, 115 Me., 89. *Summit Thread Co.* v. *Cortrell* 132 Me., 336, 341, 171 A., 254.

Further, there is here no occasion for adverting to a possible exception to the rule; our opinion in the case tried being a correct interpretation of the statute limiting the remedy of a creditor only. Motion denied. Petition dismissed. *Franklin Fisher*, for plaintiff. *John G. Marshall*, for defendant.

ANTONIO ARICO *vs.* HARRY T. GUSHEE ET ALS.

Knox County. Decided January 27, 1936. The court below, by its decree here appealed from, sustained a general demurrer to the plaintiff's bill in equity but made no final decree.

In this State, an appeal may be taken from an interlocutory decree in a cause in equity, but such appeal does not suspend any proceedings in the cause "and shall not be taken to the Law Court until after final decree." R. S. (1930), Chap. 91, Sec. 55.

The decree in equity in the case at bar, sustaining a demurrer and doing nothing more, is interlocutory and prematurely presented on this appeal. *Masters* v. *Van Wart*, 125 Me., 402; *Worcester Board of Health* v. *Tupper*, 210 Mass., 380. Appeal dismissed from

this court. *Charles A. Perry*, for plaintiff. *Montgomery & Gillmor*, for defendants.

ALBERT S. HUTCHINS *vs.* LINWOOD J. EMERY.

York County. Decided March 6, 1936. The motion in this case is overruled on the authority of the decision in the case of *Ethel M. Hutchins* v. *Linwood J. Emery*, just announced. Motion overruled.

VINCENT CELUCCI

vs.

CUMBERLAND COUNTY POWER AND LIGHT COMPANY.

Cumberland County. Decided March 17, 1936. This action is for damages incurred when plaintiff, in the evening of February 3, 1935, slipped from a step of defendant's trolley car, due, as claimed, to ice surfacing the step.

The only dispute is as to the facts, and there is sufficient evidence to justify the jury's verdict of $490.

The motion, therefore, is: Overruled. *Clifford E. McGlauflin*, for plaintiff. *Verrill, Hale, Booth & Ives*, for defendant.

CARROLL S. CHAPLIN, JUDGE OF PROBATE

vs.

NATIONAL SURETY CORPORATION.

Cumberland County. Decided June 1, 1936. This action, brought to recover of the surety the penalties of two probate bonds, is before us on report on an agreed statement of facts. There are

six counts in the declaration, three of which apply to a bond dated November 28, 1921 in the penal sum of $2,000, and the other three to an additional bond in a like amount dated January 30, 1933. No permission to sue on the second bond has been obtained from the Judge of Probate, as required by R. S. 1930, Chap. 86, Sec. 17; and there is accordingly no jurisdiction to enter any judgment with respect to it. We are therefore concerned solely with the first bond.

Horace H. Towle, in November 1921, was appointed by the Probate Court for the County of Cumberland guardian of Herbert Chester Webber. He qualified by giving the usual statutory bond in the sum of $2000, with the National Surety Company, a New York Corporation, as surety. July 3, 1934, on the petition of Frank T. Hines, Administrator, Veteran's Administration, alleging that the guardian had failed to file his annual accounting, Towle was removed by decree of the Probate Court. On April 23, 1934, he had filed his seventh account, which was allowed July 3, 1934. Schedule C of this account showed a balance in a savings account in the Fidelity Trust Company of $51.65, a balance in a checking account in the same bank of $87.99, and cash on hand of $2,279.37. On August 24, 1934, George W. Grover, successor guardian of Towle, made demand on him for the balance shown in this seventh account. Payment was refused, but an adjusted service certificate, referred to in the account, was turned over.

On April 2, 1933, the National Surety Company was placed in the hands of the Superintendent of Insurance of the State of New York for rehabilitation under the laws of New York. As a part of the plan of rehabilitation, a new corporation was organized known as the National Surety Corporation; and an agreement was entered into between the old company through the rehabilitator and the new one, the purpose of which in part was to permit the new company to carry on the business of the old with respect to judicial bonds.

The new corporation is the defendant in this action, the foundation of the claim against it being a so-called "Assumption of Liability Certificate," which was left in the office of the Register of Probate with the apparent intention that it should be attached to the original bond of the National Surety Company. This certificate reads in part as follows:

"THIS CERTIFIES that, for a valuable consideration, National Surety Corporation has assumed liability for losses arising from or caused by acts committed on and after May 1st, 1933, under the above designated bond of National Surety Company, provided, however, that the liability hereby assumed by National Surety Corporation under the bond of National Surety Company shall be deemed and held to be decreased by the aggregate amount of losses arising from or caused by acts committed prior to May 1st, 1933."

The agreed statement sets forth that between February 2, 1933 and May 1, 1933, Towle used $2,313.16 of the cash of his ward to pay his own personal obligations, and that from May 1, 1933 to the time of his removal as guardian he "did not possess at any time funds or property in his own lawful right in excess of $750" with which to make repayment.

The decree of the Judge of Probate, dated July 3, 1934, found that the account was just and true and ordered that it be recorded and allowed. This was an adjudication by the Judge of Probate that at the end of the accounting period, viz., April 21, 1934, the guardian had in his possession the money as set forth in Schedule C of the account.

The present case was argued on the theory that the guardian had misappropriated this money and did not at any time have it in his possession. Such assumption is contrary to the finding of the Judge of Probate; and the agreed statement filed in the present case does not unequivocally support the contention of defendant's counsel that the guardian did not then have this money.

It is well settled that decrees of probate courts, when not appealed from, in matters of probate, within the authority conferred upon them by law, are conclusive upon all persons and are not subject to collateral attack. *Snow* v. *Russell*, 93 Me., 362; *Harlow* v. *Harlow*, 65 Me., 448.

In determining the issue as to the defendant's liability, it is essential that we know whether the guardian did have in his possession the money as set forth in Schedule C of his account. In view of the effect which must be given under the circumstances to the decree

of the Judge of Probate finding such money on hand, this Court feels that it has not the necessary information before it in this proceeding to determine the issue as to the liability of this defendant.

Though we regret the delay occasioned by the ruling, the entry must be: Report discharged. *John S. S. Fessenden*, for plaintiff. *Frank H. Haskell*, for defendant.

DOROTHY WILLWERTH, PRO AMI, *vs.* VELMA M. FREEMAN.

WENDALL L. WILLWERTH *vs.* SAME.

Cumberland County. Decided July 16, 1936. These cases arose as the result of an automobile collision. One suit is in behalf of a child of fourteen years, who was a guest passenger in the automobile of the defendant and who sustained serious physical injuries. The verdict was for $3000. The other suit is by the father of the minor for the expenses incurred in her behalf. It was stipulated that such expenses amounted at the time of the trial to $478.85. The award in this case was $500.

The cases come forward on motion for a new trial on the ground that the verdicts were against evidence, and that the damages awarded the minor plaintiff were excessive.

No element of negligence of the minor plaintiff is involved.

It was conceded that the defendant, in driving her car from Pine Street in South Portland into Broadway, a much traveled thoroughfare, turned diagonally to her left across the path of any traffic which might be approaching. This was in violation of R. S., Chap. 29, Sec. 74, which provides in effect that the driver of any vehicle in turning to the left at an intersection shall pass beyond the center thereof. The center is defined in the statute as the meeting point of the medial lines of the ways intersecting one another.

The testimony would justify the jury in finding that the car which collided with the defendant's automobile was traveling on Broadway on its right-hand side and was in close proximity to the

intersection when the defendant entered, although the defendant failed to observe it. The point of collision was in dispute, but credible evidence placed it within a few feet of the entrance to the intersection.

The failure to observe approaching vehicles on the thoroughfare and contravention of the statutory rule by driving diagonally towards such traffic with the resultant collision occurring, warranted the conclusion of the jury that negligence of the defendant was a proximate cause of the accident.

While the defense maintained that the accident was caused solely by the negligence of the driver of the other car involved in the collision, this was a question of fact, and the finding of the jury is amply sustained by the record.

The nature and severity of the injuries to the minor plaintiff justified a substantial verdict, and there is nothing to show that the jury was improperly influenced in arriving at the amount awarded. Motions overruled. *Chaplin, Burkett & Knudsen,* for plaintiffs. *Charles E. Gurney, Lauren M. Sanborn,* for defendant.

ALFRED STODDARD *vs.* JOHN C. LANE.

Cumberland County. Decided July 30, 1936. On December 12, the plaintiff's and defendant's automobiles, each operated by its owner, collided at the intersection of Rochester and Seavey Streets in the City of Westbrook. The plaintiff sued in tort to recover property damages and obtained a verdict of $165.00. The defendant comes up on general motion based on the usual grounds.

Only questions of facts are involved. The plaintiff's version, if believed, justified the verdict. His testimony was corroborated by that of the only disinterested witness who observed the accident. The damages are not excessive. Manifest error by the jury has not been shown. Motion overruled. *Harry E. Nixon,* for plaintiff. *Max L. Pinansky,* for defendant.

WILLIAM T. MACPHERSON *vs.* HENRY WARREN.

WILLIAM T. MACPHERSON *vs.* HERSEY F. WARREN.

Androscoggin County. Decided August 4, 1936. At the trial of these actions of negligence, the defendants, at the close of the evidence, moved for directed verdicts which were denied and exceptions reserved. Verdicts for the plaintiff were returned and the defendants also filed general motions for new trials.

The printed case discloses evidence which tends to prove that on the 2nd day of May, 1935, as the plaintiff, William T. MacPherson, attempted to cross Court Street at its intersection with Main Street in the City of Auburn, he was struck down by a motor truck owned by the defendant, Hersey F. Warren, and driven by his employee, the defendant, Henry Warren. The plaintiff was crossing the street in that part, seasonally designated at least, as a crosswalk and had reached a point at or near a strip between the street railway tracks running along the middle of the way when a traffic signal located near by flashed green for the advance of traffic on Court Street. He stopped, and the testimony of witnesses justified the finding that on the change of the signal light the defendant, Henry Warren, started his truck from across Main Street, passed a trolley car proceeding in the same direction and, turning to the left, drove straight ahead with one set of wheels on the car track. The plaintiff testifies that he saw the truck veer to the left and come directly towards him. In an attempt to escape injury, as he says, he jumped ahead and across the street in front of the truck, but was struck down and seriously injured.

The accident happened in broad daylight. Although the defendant driving the truck had a clear view of the street in front of him, he admits that he did not see the plaintiff until the moment of impact. On the facts in evidence, this can be attributed only to thoughtless inattention. The master and his servant are both chargeable with negligence.

The jury were not clearly wrong in reaching the conclusion, indicated by their verdicts, that the plaintiff suddenly found him-

self in a position of peril created by the veering of the defendant's truck and its continued advance towards him, and in this emergency was not chargeable with negligence in stepping or even, as it is claimed, jumping forward to avoid being run down.

The verdicts are not manifestly against the weight of the evidence. There is no ground for suspicion that prejudice, passion or improper motive influenced the conclusions of the panel. Despite possible errors and inconsistencies in some details of the testimony of witnesses, the evidence at large appears to be sufficiently consistent with the circumstances and probabilities of the cases to raise a fair presumption of its truth. The damages awarded are not clearly excessive. The verdicts of the jury must stand.

The Exceptions and the Motions for new trials raise the same issues. The entry in each case must be: Motion and Exception overruled. *Peter A. Isaacson, Alton A. Lessard*, for plaintiff. *Frank T. Powers, Wm. B. Mahoney*, for defendants.

JAMES A. DYER *vs.* WILLIAM AYOOB.

Aroostook County. Decided November 5, 1936. Action on the case for negligence. Verdict for the plaintiff with reasonable assessment of compensatory damages. General motion for a new trial on the usual grounds.

There is evidence in the case tending to show that the plaintiff, somewhat advanced in years, on June 7, 1934, in attempting to cross the main highway running through the Town of Blaine, was struck by the defendant's Peerless sedan and seriously injured. The driver of the automoblie, with full opportunity to observe the plaintiff crossing the street in front of him, continued on with excessive speed until his belated application of the brakes and a swerve to the right did not and could not prevent an accident. A finding that the driver of the car, who was the defendant's employee, was negligent and the owner chargeable therefor is not manifestly wrong.

Nor can it be held upon this record as a matter of law that the

plaintiff was guilty of contributory negligence. He testifies without contradiction that, as he came out from behind the car from which he had alighted and before he started to cross, he looked up and down the road and saw no automobiles coming towards him. A consideration of the distance to the point where an approaching car would come into view and the apparent speed of the defendant's automobile supports his assertion. The jury was warranted in finding that under the circumstances of this case an ordinarily careful and prudent person would have deemed it safe to have attempted to make the crossing. This is the measure of care required of a pedestrian crossing a public street. *Wetzler* v. *Gould*, 119 Me., 276; *Sturtevant* v. *Ouellette*, 126 Me., 558. Motion overruled. *J. Frederick Burns*, for plaintiff. *M. P. Roberts*, *Herchel Shaw*, for defendant.

FRANK L. BARNES *vs.* HERBERT W. BAILEY.

Hancock County. Decided November 5, 1936. In this action of negligence, the jury returned a verdict for the plaintiff and the defendant filed a general motion for a new trial.

The evidence, when carefully examined, shows that on November 13, 1934, the automobile in which the plaintiff was riding, then owned and operated by his wife, collided with a truck owned and driven by the defendant in Augusta at or near the intersection of Route 201 leading from Augusta to Waterville, and Route 3 leading from Augusta to Belfast. The defendant admits that he saw the Barnes car coming up the Belfast road increasing its speed as it approached the intersection and apparently coming into the main highway directly in front of him unless it slowed down or changed its course. He saw, however, another car coming from Waterville on the opposite side of the road over which he was driving, fixed his attention on it and neglected to see the Barnes car enter the intersection until it was too late to avoid running into it. The evidence does not indicate that the car coming from Waterville

threatened the defendant's safety or furnished a sufficient reason for his inattention to the approach of the Barnes car. The defendant was clearly negligent and his conduct is not excused by the equally unjustified entry into the intersection by the car driven by the plaintiff's wife. Her negligence, however, is not imputable to her husband. He was for the time being, in the eyes of the law, her guest.

The motion for a new trial can not be sustained on the ground that the damages awarded were excessive. The plaintiff suffered numerous lacerations, abrasions and minor sprains and also, according to the diagnosis of his physician, a lumbar and sacro-iliac strain. There is evidence, contradicted but not entirely disproved, that he was suffering from chronic arthritis at the time of the accident, long dormant but lighted up by the strain caused by this accident. He was a retail shoe dealer and practicing podiatrist and chiropodist and submitted evidence of a loss of earnings averaging forty dollars a week from the time of the accident to the date of the trial. The compensation awarded for this loss, for pain and suffering and for future loss of earnings, was generous but not so clearly excessive as to warrant setting the verdict aside. Motion overruled. *Blaisdell & Blaisdell*, for plaintiff. *Merrill & Merrill, John J. O'Connor*, for defendant.

FITZROY F. PILLSBURY *vs.* KESSLEN SHOE COMPANY ET AL.

York County. Decided November 27, 1936. On motion and exceptions by defendant.

MOTION

In his action of tort the plaintiff by jury trial recovered a verdict against the defendant Shoe Company, in a sum not claimed to be excessive, for personal injuries received by him in a near-collision with the defendant's loaded one and a half ton Dodge truck on the three lane cement road, State Highway No. 1, a short distance westerly of Kennebunk Village. Hall Street enters Route 1 from the

south. One Miller, defendant's agent and the then driver of the truck, lived in the second house westerly of Hall Street and on the south side of Route 1. Both the plaintiff's automobile, a Packard sedan, then being driven by the plaintiff, and the truck ahead were proceeding westerly and on the most northerly lane at a speed of from thirty-five to forty miles per hour. When they had arrived at the entrance of Hall Street, oncoming traffic from the west having ceased, the plaintiff, with horn warning, entered the middle lane to pass the truck. When about to pass, Miller, without warning according to the plaintiff's testimony, turned the truck southerly for the purpose of entering his driveway. The plaintiff attempted to avoid an actual collision with the truck and did; but in doing so collided with a telephone pole on the southerly side of the road. The plaintiff's contention was that his injuries were received proximately from the sole negligence of the defendant. The jury so found.

A careful reading of the record convinces us that the jury was entirely justified in reaching its conclusion and we see no reason for disturbing its verdict. Purely questions of fact were involved and the case was preeminently one for such a tribunal. The law pertaining to such a situation has lately been clearly enunciated in *Verrill* v. *Harrington*, 131 Me., 390, and need not now be restated.

EXCEPTIONS

Two in number, the first exception is to the refusal of the presiding Justice to direct a verdict for the defendant; already in effect covered by consideration of the motion for a new trial.

The second exception relates to the admission of certain rebuttal testimony by the plaintiff. In dispute was the fact whether the truck remained on the cement road or actually entered Miller's driveway after the collision with the telephone pole. Two witnesses for the defense testified that it so remained.

In rebuttal the plaintiff over objection was permitted by the presiding Justice to introduce evidence of witnesses, cumulative to that he had introduced as a part of his original case, that immediately after the accident they had seen the truck in the driveway. Cumula-

tive evidence is not admissable in rebuttal unless by leave of Court. To admit it then is within judicial discretion, and to such admission there is no right of exception in the absence of abuse of discretion. *Sweeney* v. *Cumberland County Power & Light Co.*, 114 Me., 367; *Hill* v. *Finnemore*, 132 Me., 459. Here the Court gave its leave and there was no abuse of discretion. Motion and exceptions overruled. *Louis B. Lausier*, *Willard & Willard*, for plaintiff. *Edward S. Titcomb*, *Leon V. Walker*, for defendant.

QUESTIONS AND ANSWERS

Question Submitted by the Governor of Maine to the Justices of the Supreme Judicial Court of Maine November 26, 1935, With the Answer of the Justices Thereon.

STATE OF MAINE

Executive Department.

Augusta, November 26, 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, being advised and believing that the question of law is important, I, Louis J. Brann, Governor of Maine, respectfully submit the following statement of facts and question and ask the opinion of the Justices of the Supreme Judicial Court thereon.

Statement

The 87th Legislature passed an Act entitled, "AN ACT to Incorporate the Brunswick School District," the same being Chapter 70 of the Private and Special Laws of 1935. This Act, in accordance with the provisions of Section 8 thereof, was accepted and approved by a majority vote of all the legal listed voters of the ter-

ritory embraced within the limits of said district voting at an election specially called and held for the purpose, and for the purpose of electing trustees as provided in Section 3.

The trustees elected at said Special election, acting under the provisions of Section 4 thereof, are endeavoring to procure funds by an issue of its bonds, necessary to the carrying out of the purposes of said Act, and in connection therewith a question has arisen as to the constitutionality of said Act, should the indebtedness thus incurred, together with the present debt of the town, exceed the town's legal debt limit, the limits of said district being co-terminous with the town.

Question.

Is this Act valid and constitutional within the meaning of Article XXXIV of the Constitution of Maine?

Respectfully submitted,

LOUIS J. BRANN,
Governor of Maine.

TO HONORABLE LOUIS J. BRANN, GOVERNOR:

Whether Chapter 70, Private and Special Laws of 1935, entitled: "An Act to Incorporate the Brunswick School District," authorizes hiring money on the security of town property, in attempt to evade the debt limit provision of the Constitution of Maine, is, in all deference, and with due respect, no longer a question for determination by Your Excellency.

The Act has been approved, and signed, by the Executive. It follows that no "solemn occasion," wherein the Governor may require the Justices of the Supreme Judicial Court to give their opinion, that is, express their individual views, without a hearing, or the benefit of argument, as to the constitutionality of the particular enactment, exists.

Should parties in interest institute a proceeding for the purpose,

the Court, as such, might, after hearing, and mature consideration, determine if the legislation be valid and constitutional.

CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON
HARRY MANSER

Justices, Supreme Judicial Court.

Augusta, December 4, 1935.

QUESTIONS AND ANSWERS

Questions Submitted by the Executive Council of the State of Maine to the Justices of the Supreme Judicial Court of Maine November 9, 1936, With the Statement of the Justices Thereon

STATE OF MAINE

Executive Department

Augusta, November 9, 1936.

To the Honorable Justices of the Supreme Judicial Court:

Under and by virtue of the authority conferred upon the Executive Council by the Constitution of Maine, Article VI, Section 3, and being advised and believing that the questions of law are important, and that it is upon a solemn occasion, the majority of the Executive Council of the State of Maine respectfully submits the following statement of facts and questions and asks the opinion of the Justices of the Supreme Judicial Court thereon:

Statement

On July 1, 1936, a vacancy happened in the Executive Council by reason of the death of Dr. Allen M. Small of the Fifth Councillor District.

On July 7, 1936, the Governor nominated Honorable Ralph L. Cooper to fill the vacancy.

On July 15, 1936, at a session of the Council, the Governor presented the nomination of Mr. Cooper to the Council and the same was placed upon the table by the Council.

On October 20, 1936, the Governor nominated Mrs. Edith M. Small to fill the said vacancy, prior thereto having withdrawn, if legally authorized to do so, the nomination of Mr. Cooper.

On November 6, 1936, at a session of the Council the Governor presented the nomination of Mrs. Small to the Council

The nomination of the name of Mrs. Small was temporarily laid on the table. In order that the Council might avoid and waive, if possible, the legal objection, if any, to the nomination of Mrs. Small by reason of the pendency of a prior nomination before the Council, the nomination of Mr. Cooper was taken from the table and a vote was passed authorizing the Governor to withdraw Mr. Cooper's nomination. Thereafter the nomination of Mrs. Small was taken from the table and re-tabled pending determination of the legal situation set forth in this inquiry.

Questions

The following questions are, therefore, respectfully asked:

1. A nomination having been made by the Governor and the same having been presented for advice and consent to the Council and laid on the table by the Council, has the Governor authority to make another nomination for the same office while the first nomination is pending either by the withdrawal of the first nomination by the Governor or without such withdrawal?

2. If the answer to the first question is in the negative, may the Council, subsequent to the second nomination, by authorization of the Governor to withdraw the first nomination waive the pendency of the first nomination at the time of the second nomination and consent to the appointment of the second nominee?

3. Has the Governor authority to nominate and, upon presentation to it, the Council authority to consent to the appointment to

fill a vacancy in the Council, such nomination having been made more than thirty days after the happening of the vacancy?

4. A nomination having been made, has the Council authority to consent, more than thirty days after the happening of a vacancy in the Council, to an appointment to fill such vacancy?

At the request of the Governor the following further question is asked:

5. In the event the court decides such nomination and consent to appointment are not authorized and, the Governor having acted to nominate to fill a vacancy more than thirty days after the happening of said vacancy, the Council should act to consent to the same and the appointee undertake to qualify, would such appointee be a councillor de facto?

Respectfully submitted,

GEORGE C. LORD
RAYMOND S. OAKES
F. L. LEAVITT
CLYDE H. SMITH
ORMAN B. FERNANDEZ
ERNEST A. WOODMAN

Members of Executive Council.

STATE OF MAINE

SUPREME JUDICIAL COURT

Augusta, November 17, 1936.

To the Honorable, the Council of Maine:

The Council may, on occasion, require the Justices of the Supreme Judicial Court to give their opinion upon important questions of law, but not as to what may hereafter become such, or which may arise from the doing of some act. The matters with regard to which advisory opinions are proper are those of instant, not past nor future, concern; things of live gravity.

The inquiries submitted presenting no matter of grave importance, the undersigned feel, with all respect to the Council, that they ought not answer the questions.

Charles J. Dunn
Guy H. Sturgis
Charles P. Barnes
Sidney St. F. Thaxter
James H. Hudson
Harry Manser

Justices, Supreme Judicial Court.

INDEX

ACTIONS.

The transfer of an action of forcible entry and detainer from a court of original jurisdiction to the Superior Court is governed by Revised Statutes, Chapter 108, Section 6.

Under this statute, when the defendant in an action of forcible entry and detainer pleads not guilty and files a brief statement of title in himself or in another person under whom he claims the premises, he is required to recognize in a reasonable sum to the claimant with sufficient sureties conditioned to pay all intervening damages and costs and a reasonable rent for the premises. The claimant is also required in like manner to recognize to the defendant conditioned to enter the suit at the next term of the Superior Court and to pay all costs adjudged against him.

The statute also provides that, if either party neglects so to recognize, judgment shall be rendered against him as on nonsuit or default.

Haskell and Corthell v. *Young*, 221.

It is settled law in this State that one who creates a nuisance upon another's land is under legal obligation to remove it. Successive actions may be maintained until he is compelled to do so.

Goodwin and Stewart v. *The Texas Co.*, 266.

If one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his co-promisor for one half of the amount so paid.

The cause of action is founded, not upon the note itself, but upon an implied contract of contribution. Such action must be commenced within six years after the cause accrues.

Paradis, Appellant from Decree of Judge of Probate, 333.

R. S. 1930, Chap. 14, Sec. 64, provides that "the Mayor and Treasurer of any city, the Selectmen of any town, and assessors of any plantation to which a tax is due may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable." Compliance with such statutory provision is a condition precedent to the maintenance of such action.

City of Eastport v. *Jonah*, 428.

It may be said that generally, in his representative capacity, an administrator is a party to an action which he brings far more than "nominal only." It is the duty of an administrator to collect money due the estate by suit if not otherwise collectible, and to distribute the same according to law.

Only when it appears that his testator or he, as executor, had no true interest in the claim, but the interest is in another, or others, in whose name the action might have been brought or might be defended, is the executor a "nominal party."

MacGowan v. *Schlosberg*, 456.

ADOPTION.

Adoption is unknown to the common law; it exists solely by virtue of statute. Various legislative acts determine the right of the parties affected by the decree of adoption.

By the act of 1917 now embodied in R. S. 1930, Chap. 80, Sec. 38, the legislature expressly provided in case of intestacy for the descent of such property as the adopted child might own at his death. Such property as he acquired himself or from his adopting parents or their kindred is to be distributed in accordance with the general statute governing the descent of property as if the child had been born to them in lawful wedlock.

A decree of adoption entered in accordance with power conferred by statute fixes the status of the child; it divests the natural parents of control and establishes the right and obligations of the foster parents. It does not settle for all time the child's right to inherit property. That remains, as in the case of all persons, subject to legislative regulation, until it becomes vested by the death of him whose estate may be subject to administration. The same principle applies to rights of those who may inherit from the child.

Gatchell and Jeffrey v. *Curtis and Given*, 302.

ANIMALS.

Injuries to animals while lawfully on the highway are governed by the same rule. Common law principles of negligence control.

Adams v. *Richardson*, 109.

ASSESSORS.

Every property owner must bear his just share of the public expense. A remedy does not lie in the courts merely because that burden is too heavy. It is only when the owner bears a disproportionate share of the load that he has a just claim for judicial redress. If, however, he shows that his property is assessed substantially in excess of its true value, a presumption arises of inequality and he has made out a prima facie case for relief.

The Constitution of Maine provides, Art. IX, Sec. 8, that "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." The phrase "just value" is the equivalent of "value" or "market value."

In appraisal for tax purposes due consideration must be given to all the uses to which such property may be put by an owner. Its value is measured by the highest price that a normal purchaser, not under peculiar compulsion, will pay for it. It is what it will bring at a fair public sale, when one party wishes to sell and another to buy.

If, during a time of crisis, it is impossible to determine the true worth of real estate by reference to the price which it will bring in the market, resort may be had to other factors such as original cost less depreciation, to reproduction cost with an allowance for depreciation, to the purchase price, if not sold under stress or under unusual conditions, and to its capacity to earn money for its owner. No one of these elements is controlling, but each has its place in estimating value for purposes of taxation.

The burden is on the petitioner to show that the valuation is unjust, and not on the assessors to establish that their figures are correct. The presumption is that the assessment is valid.

It is not sufficient to show merely that the assessors have made an error, even though such mistake may result in a lack of uniformity. It is solely where there is evident a systematic purpose on the part of a taxing board to cast a disproportionate share of the public burden on one taxpayer, or on one class of taxpayers, that the Court will intervene.

Sweet v. *City of Auburn*, 28.

A lawful tax list requires the signatures of at least a majority of the Board of Assessors.

The tax list so signed may be the one retained by the assessors under Section 84, Chapter 13, R. S. 1930, or another committed by them to the collector under Section 81 of the same chapter.

If the list retained by the assessors is insufficient to constitute a lawful tax list because signed by only one assessor, yet if the list committed to the collector is lawful, so far as the tax list is concerned, recovery may be had of a judgment in personam for the tax.

In the absence of any sufficient description in any valid tax list, either the one retained by the assessors or the one committed to the collector, there can be no enforcement of the tax lien.

A failure of the majority of the assessors to sign the tax list is fatal neglect to comply with the express provision of the statute and such a tax list can not be cured by amendment under Sec. 10 of Chap. 5, R. S. 1930.

Cassidy v. *Aroostook Hotels, Inc.*, 341.

ASSIGNMENT.

A contract which is too personal for assignment may on its breach give rise to an assignable action for damages. Damages for breach of a contract to support have been held assignable.

Liberty v. *Pooler*, 115.

ATTORNEY AND CLIENT.

The endorsement of the attorney for a judgment creditor on the back of an execution that the officer should collect or commit is not part of the process, and uncertainty therein, if there be such, can not affect its validity.

Trafton v. *Hoxie*, 1.

One who has undertaken a cause in behalf of one party as his advocate and counselor can not sit in judgment to determine the rights of both parties to the same cause.

Under a narrow and strict interpretation of R. S., Chap. 97, Sec. 33, relating to qualifications of justices of municipal and police courts, it might be urged that it did not in terms include an action, matter or thing in which the judge has previously acted as attorney. Our Court, however, has already spoken in no uncertain language and given to this statute a broad construction consistent with its manifest purpose and intent.

The statute is broad enough to create a prohibition. It disqualifies the judge under the circumstances which existed in the case at bar. It was not intended that the prohibition should be circumvented or the statute devitalized by failure of the defendant to comply with the technical rules of pleading or procedure. It could not thus be weakened to a mild impotent request.

Norton v. *Inhabitants of Fayette*, 468.

AUTOMOBILES.

See Motor Vehicles.

BANKS AND BANKING.

Ordinary certificates of deposit in their essential elements resemble negotiable promissory notes, and in general have that legal effect.

The word deposit, in its broad and comprehensive sense, includes deposits for which certificates, whether interest-bearing or not, are issued payable on demand or on certain notice at a fixed future time.

The nature of a deposit, however, is fixed by the contract of the depositor and the bank. The relation of banker and depositor is voluntarily assumed as matter of contract. The contract need not be in any particular form, being governed like all other contracts by the mutual intention and understanding of the parties.

Although the right to issue certificates of deposits is not expressly granted nor are controlling regulations found in the statutes, it is well-settled law that banking corporations authorized to receive deposits and exercise the usual powers incidental to the business of banking, unless there is a constitutional or statutory restriction, may issue certificates of deposit payable either on demand or time.

There are no constitutional or statutory restrictions in this State upon the power of trust companies to issue certificates of deposit for either savings or commercial deposits.

A certificate of deposit is not the usual evidence of a deposit in the savings department of a bank, and when it recites a receipt of a deposit only, without defining its character, it must be presumed that the deposit which it represents was made and accepted as a commercial deposit.

R. S., Chap. 57, Secs. 89-90, regulating the segregation of assets by a trust company, enumerates the kinds of savings deposits for which assets must be segregated in terms seemingly broad enough to include all savings deposits in such institutions, but it can not be construed as a statutory declaration or determination of what are savings deposits and thereby abrogate the common law rule that the character of the deposit is determined by reference to the agreement of the bank and its depositor.

Cooper v. *Fidelity Trust Company*, 40.

The obligation of a stockholder in a national bank, although arising from voluntary agreement, evidenced by becoming a stockholder, is statutory.

The liability does not altogether cease on the death of the owner, but, as limited and defined by the U. S. Code, attaches to his estate. The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living.

A cause of action for an assessment does not arise until the assessment.

As against a national bank stockholder's estate, liability terminates on valid assignment of the shares in final distribution of the estate if not by an earlier transfer.

There can be no liability on the part of a decedent's estate, where assessment is after entire administration of the estate, and distribution of all the property.

In the case at bar, when assessment was imposed, administration had come to an end; there was no estate to charge.

Wakem v. *Duff*, 137.

As a general principle an enumeration of specific powers excludes all others except such as are reasonable and necessary to carry into effect those expressly given. Such is the rule with respect to corporations generally, but, in the case of a bank, which is in a sense a public institution, which holds itself out as qualified to care for the money of others, it is more than ever important that its charter should be strictly construed, and that those members of the public who entrust their property to its care should have assurance that it will act only within those limits which the legislature has defined.

Because of the direct interest in a bank of all those who may become depositors in it and the vital concern of the general public in its proper management, the state has interposed its authority in order to define its power, to supervise its management, and in case of trouble to take over and distribute its assets.

The bank commissioner of the state is required by statute to examine every bank to determine whether it is able at all times to meet its obligations, and he must publish a statement of its condition. Every bank is required to keep a cash reserve of at least fifteen per cent of its demand deposits. The amount which it may loan is restricted to a certain percentage of its capital, unimpaired surplus, and net undivided profits. The capital stock of a bank must be kept unimpaired, and assessments provided for, when it appears insufficient in amount to secure adequately claims of depositors.

Except to protect an investment of its own, or as an incident to the transfer of commercial paper, or to effectuate a merger with another institution, a bank has no implied power to become a guarantor, and any contract by which it seeks to do so is void.

Nor can an ultra vires contract be held valid because of the supposed indirect benefits which may accrue from its performance.

Gardiner Trust Co. v. *Augusta Trust Co.*, 191.

BILLS AND NOTES.

Ordinary certificates of deposit in their essential elements resemble negotiable promissory notes, and in general have that legal effect.

Cooper v. *Fidelity Trust Co.*, 40.

BONDS.

It is universally recognized that, in the absence of express or implied prohibition or restrictions in its charter or other statute, a corporation has the implied power to issue bonds for any purpose for which it may lawfully borrow money or contract a debt, and special authority to that effect is unnecessary.

BURDEN OF PROOF.

CARRIERS.

CERTIFICATES OF DEPOSIT.

See Banks and Banking.

CERTIORARI.

CHARITABLE TRUSTS.

CHATTEL MORTGAGES.

CHILDREN.

A child is required to exercise only that degree of care and judgment which children of the same age and intelligence ordinarily exercise under the same circumstances.

Searles v. *Ross*, 77.

CONDITIONAL SALES.

In both a conditional sale and chattel mortgage, the legal title is held only as security, subject to redemption, and the conditional sale vendor's right is practically the same as that of the chattel mortgagee.

The right of possession in absence of agreement otherwise is in the conditional sale vendor.

When by agreement the conditional sale vendee has possession, upon default by him the vendor may repossess the property.

Title does not pass until performance of the condition by the conditional sale vendee.

By statute (R. S. 1930, Chap. 123, Sec. 8), the conditional sale vendor may foreclose and the vendee redeem as in mortgages of personal property.

A conditional sale vendee, without tender of his overdue indebtedness, and without demand, may not maintain trover against his vendor, who, having lawfully repossessed the property after default, has without foreclosure sold it to a third party.

Such a sale does not of itself effect a conversion of the right to redeem, for, without impairment of the right of redemption, at least in some degree, no wrong is done to the conditional sale vendee.

Such a sale by the conditional sale vendor does not necessarily give the vendee the immediate right of possession nor work a conversion without either of which trover may not be maintained.

Following such a sale, the conditional sale vendee must tender his overdue indebtedness and demand restoration of the property in order to obtain the right of immediate possession necessary for maintenance of trover.

Harvey v. *Anacone*, 245.

CONDITIONS SUBSEQUENT.

See Wills — *First National Bank* v. *De Wolfe et als.*, 487.

CONFLICT OF LAWS.

Although the transactions attending an alleged gift originate and are perfected in another state, the law in such state, in the absence of proof to the contrary, is presumed to be that of the forum.

Reid v. *Cromwell*, 186.

CONSTITUTIONAL LAW.

All municipal indebtedness or liability incurred beyond the constitutional limit is void and unenforcible, and the fact that the municipality has had the benefit of the contract by which the indebtedness was incurred does not render it liable upon an implied contract to pay the value thereof.

One who contracts with a city or town, by which an indebtedness or liability is created, must, at his peril, take notice of its financial standing and condition and satisfy himself as to whether its debt limit is or will thereby be exceeded.

Tractor Co., Inc. v. *Anson,* 329.

A statute can not be invalidated because it seems to the Court to inaugurate an inexpedient policy. All questions as to the expediency of a statute are for the legislature.

The constitutional debt-limit provision confines the indebtedness of cities and towns within prescribed bounds. Loose construction should not be allowed to weaken the force or broaden the extent of that provision.

The courts may not, however, absent express constitutional limitations, entirely deny the power of the legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations.

The Constitution of Maine contains no specific provision that wherever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebtedness of all the separate units should be taken, in ascertaining the debt limit of one of them.

The Maine Legislature, with regard to incorporating corporations purely public, is of virtually unlimited power.

A legislative act should not be declared unconstitutional unless it is clearly so.

Kelley v. *School District et als.,* 414.

The rule of the failure of proof is not one of mere technicality, but goes to the upholding of constitutional law and procedure. The fundamental rule, that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, is embodied, as a part of the declaration of rights, in both State and Federal Constitutions.

In the United States the powers of government are, by the prevailing dual system distributed between the categories of government of two sovereigns, one the State and the other the Nation. The people live under two distinct governments, each independent within its own sphere of action.

While the State can have no existence, politically, outside the Constitution of the United States, and although cooperation between the State and the Union

of the States is highly desirable, nevertheless the States are not in any true and complete sense inferior to, or dependent upon, the United States.

The States exercise, as to all control not delegated to the United States, or prohibited to the States, that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the ends of its institution. Subject to these restrictions, the State of Maine, so long as it does not conflict with the Federal Constitution, is, with regard to regulating its own internal affairs, preeminent.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission..

State v. *Martin,* 448.

CONTRACTS.

A health and accident insurance policy like any other contract is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be construed together.

An accident and health monthly-payment insurance policy which provides that "this policy will continue in force, subject to its provisions, as long as the premiums shall be paid as agreed therein, unless it is sooner terminated in accordance with its terms" constitutes one continuing contract subject to the condition that the assured pay the monthly premium, and not a series of successive monthly contracts.

Connellan v. *Casualty Company,* 104.

A contract which is too personal for assignment may on its breach give rise to an assignable action for damages. Damages for breach of a contract to support have been held assignable.

Liberty v. *Pooler,* 115.

See *The United Company* v. *Grinnell Canning Company,* 118.

In determining the legal meaning of a written contract, its stipulations, limitations, or restrictions should be read together, and construed as a whole.

Pendexter v. *Simonds,* 142.

All municipal indebtedness or liability incurred beyond the constitutional limit is void and unenforcible, and the fact that the municipality has had the benefit of the contract by which the indebtedness was incurred does not render it liable upon an implied contract to pay the value thereof.

CONTRIBUTORY NEGLIGENCE.

CORPORATIONS.

COURTS.

A petitioner to obtain review of a judgment, claiming right under Sec. 1, Paragraph VII, Chapter 103, R. S. 1930, must satisfy the court at *nisi prius* (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable.

Such a petition is addressed to the discretion of the court and its decision thereon can be revised upon exceptions only for erroneous rulings in matter of law.

Thompson v. *Chemical Company,* 61.

A writ of *certiorari* is not one of right, but grantable at the sound discretion of the Court when it appears that some injustice will be done.

On the hearing on the petition, the only question for the Court to determine is whether in its discretion it will issue the writ, and the grant of leave for the writ to issue is not a judgment that the record below be quashed.

No stipulation can sweep away the established rules of procedure and confer power on the Court to render final judgment on a mere petition for *certiorari.*

Rogers v. *Brown,* 88.

The great underlying principle relating to a disinterested tribunal is that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. This principle should not have a narrow or technical construction, but should be applied to all cases where a judicial officer is called upon to decide controversies between the people. Such a rule is in the general interest of justice, to preserve the purity and impartiality of the courts and the respect and confidence of the people for their decisions.

One who has undertaken a cause in behalf of one party as his advocate and counselor can not sit in judgment to determine the rights of both parties to the same cause.

Under a narrow and strict interpretation of R. S., Chap. 97, Sec. 33, relating to qualifications of justices of municipal and police courts, it might be urged that it did not in terms include an action, matter or thing in which the judge has previously acted as attorney. Our Court, however, has already spoken in no uncertain language and given to this statute a broad construction consistent with its manifest purpose and intent.

The statute is broad enough to creat a prohibition. It disqualifies the judge under the circumstances which existed in the case at bar. It was not intended that the prohibition should be circumvented or the statute devitalized by failure of the defendant to comply with the technical rules of pleading or procedure. It could not thus be weakened to a mild impotent request.

Norton **v.** ***Inhabitants of Fayette,*** 468.

CRIMINAL LAW.

The remedy of one convicted of a felony to present to the Law Court the correctness of the ruling of the *nisi prius* Judge in denying his motion for new trial is by appeal and not exception.

Where an admittedly true transcript of evidence given by the complainant in the Municipal Court is by agreement read to the jury, the State's attorney not having agreed that the transcript itself should be admitted as an exhibit, and the statutory requirements of a deposition in a criminal case not having been complied with, its exclusion as an exhibit by the Trial Court is not exceptionable error.

An exception taken but not alluded to in argument before the Law Court may by the Court be deemed waived by the exceptant.

State v. *Sutkus*, 100.

When the validity of a conviction depends upon circumstantial evidence, it is not for that reason any less conclusive. Crimes of violence are not usually committed in sight of man, and most murderers will go unpunished if resort can not be had to collateral facts from which the inference of guilt arises.

When many circumstances having their origin in unrelated sources and established by the testimony of impartial witnesses, all point in one direction, their force is often compelling, the inference to be drawn from them irresistible.

In the case at bar, neither all, nor any substantial part of the circumstances established by proof could concur and leave any reasonable doubt in the minds of an impartial jury of the respondent's guilt.

State of Maine v. *Cloutier*, 269.

The rule of the failure of proof is not one of mere technicality, but goes to the upholding of constitutional law and procedure. The fundamental rule, that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, is embodied, as a part of the declaration of rights, in both State and Federal Constitutions.

If an indictment apprises the respondent in such manner that he may avail himself of the plea of former jeopardy, slight variations between it and the proof do not rate as departures from substance, nor constitute a failure of proof.

But, a variance between allegation and proof, or a failure of proof, as to the constituent elements, is fatal.

In criminal, as well as in civil proceedings, allegation must be specific and accurate, that defendant may prepare to meet it. And proof must follow allegation.

Paltry variance, however, mere refinement of pleading, lack of technical form, when the person and the case may be rightly understood is not truly important.

CY PRES.

DAMAGES.

DEATH.

The statutory Death-Liability cause of action begins where the common law left off. The test of the right to maintain the action is measured solely by the statute: whether the deceased person, if living, could recover damages.

Due care on the part of decedent is presumed. The presumption, however, is a disputable one. Upon the issue of contributory negligence, the burden of proof is on defendant.

Metrinko et als. v. *Witherell*, 483.

DEEDS.

The character of the transaction, whether it be a sale or a mortgage, is determined at its inception, and though the deed be absolute in form, the conveyance may in equity be shown to have been intended as security for a pre-existing debt or a contemporaneous loan.

Fulton v. *McBurnie*, 6.

One giving a deed with covenants of warranty can not thereafter deny the recitals in the deed, and set up an after-acquired title in derogation of that conveyed by such instrument.

Lapitre v. *Breton alias Butler*, 300.

A daughter, heir at law of her mother, is estopped to claim title to land owned by her mother at the time when the mother signed a mortgage of it given by her husband, the mortgage containing full covenants and a testimonium clause containing in part the following language: "I the grantor and . . . wife of the said grantor hereby agreeing to the terms of this mortgage, and in token of her relinquishment of all right of dower and all other rights in the premises, . . ."

The daughter not taking by purchase has only such title as her mother had at the time of her death.

Constructive knowledge by reason of the recording of the deed to the mother does not necessarily control.

The mere fact that the truth can be ascertained by an examination of the records does not prevent the operation of the estoppel where there is a duty to speak, as where inquiries are made, or instead of merely remaining silent some positive affirmative act is performed which would actually have the effect of misleading and deceiving the grantee.

An owner of land knowingly standing by and suffering another to purchase it and expend his money thereon under an erroneous impression that the legal title is acquired thereby and without making his own title known is estopped later to exercise his legal right against such purchaser.

Stearns v. *Thompson et als.*, 352

DEMURRER.

See *Federal Trust Company* v. *Wolman,* 86.

An allegation in the petition that "said charges were in fact frivolous and without merit" and "that the petitioner did not in fact receive a fair impartial hearing" without statement of the facts revealing the asserted frivolity, lack of merit and impartiality of hearing, is insufficient upon special demurrer because of uncertainty and indefiniteness.

The sustaining of certain causes in a special demurrer is equivalent to overruling all others assigned therein.

Jellerson v. *Police of Biddeford,* 443.

DESCENT.

By the act of 1917 now embodied in R. S. 1930, Chap. 80, Sec. 38, the legislature expressly provided in case of intestacy for the descent of such property as the adopted child might own at his death. Such property as he acquired himself or from his adopting parents or their kindred is to be distributed in accordance with the general statute governing the descent of property as if the child had been born to them in lawful wedlock.

A decree of adoption entered in accordance with power conferred by statute fixes the status of the child; it divests the natural parents of control and establishes the right and obligations of the foster parents. It does not settle for all time the child's right to inherit property. That remains, as in the case of all persons, subject to legislative regulation, until it becomes vested by the death of him whose estate may be subject to administration. The same principle applies to rights of those who may inherit from the child.

Gatchell and Jeffrey v. *Curtis and Given,* 302.

Under the common law rule as adopted in this State, title to real estate of a deceased person passes immediately upon the death to the heirs or devisees; the rents accruing after the death are incident to the reversion and go to such heirs or devisees; the administrator or executor as such has no right to enter upon the lands or take the rents, and the taxes accruing upon the real estate after the death of the deceased are payable by the heirs or devisees and are not chargeable by the administrator in his probate account.

An administrator may in some instances receive the income of real estate by request of the heirs or devisees, or with their acquiescence, and if so, should be allowed for the taxes paid.

Unless authorized by will, and except as above stated, executors and administrators c.t.a. have no legal right to take possession of real estate and collect rents until it becomes necessary to sell the real estate for payment of debts.

Paradis, Appellant from Decree of Judge of Probate, 333.

DISCLOSURE.

See *Trafton* v. *Hoxie,* 1.

DRAINS AND SEWERS.

By statute it is provided that "when a person at his own expense, lays a common drain or sewer, all who join or enter it shall pay him their proportion of such expense; and the expense of opening and repairing shall be paid by all benefited, to be determined in each case by the municipal officers, subject to appeal to the country commissioners."

When a statute provides entire regulation for relief it supersedes the common law, and furnishes the exclusive method of procedure.

Jameson v. *Cunningham,* 134.

EMANCIPATION.

Emancipation may take place in one of several ways, during the minority of the child.

Marriage of a minor son, with the consent, and not contrary to the direction of his parents, works complete emancipation.

Emancipation is never presumed, but must always be proved. It may be implied from circumstances, or inferred from the conduct of the parties.

Trenton v. *Brewer,* 295.

EQUITY

The character of the transaction, whether it be a sale or a mortgage, is determined at its inception, and though the deed be absolute in form, the conveyance may in equity be shown to have been intended as security for a pre-existing debt or a contemporaneous loan.

Evidence in such case is not confined to a mere inspection of the written papers alone; but extraneous evidence is admissible to inform the Court of every material fact known to the parties when the deed and memorandum were executed. To insist on what was really a mortgage, as a sale, is in equity a fraud, which can not be successfully practised under the shelter of any written papers, however precise they may appear to be.

Fulton v. *McBurnie,* 6.

been filed by the plaintiff which, after hearing, had been dismissed, and, wherein the presiding Justice sustained this plea and entered a decree dismissing the bill:

HELD

The first bill was brought under the provisions of R. S. 1930, Chap. 104, Sec. 16, which provides for redemption when the amount due on a mortgage has been actually tendered.

The dismissal of that appeal does not preclude the plaintiff from proceeding under the provisions of Sec. 15 for an accounting and a redemption. The bill now before the court sets forth an issue quite different from that raised by the first. The plea of *res adjudicata* can not be upheld.

Sweeney v. *Shaw*, 475.

ESTOPPEL.

At common law estoppel in pais need not be pleaded.

Evidence of facts by the plaintiff tending to show estoppel or waiver is admissible, although there is no allegation of estoppel or waiver in the replication.

Where the facts show an estoppel to deny or waiver of proof of operation by permission, as far as permission is concerned there is sufficient proof of coverage.

That which operates as a waiver or estoppel in favor of the assured also operates in favor of the injured person.

Colby, Pro Ami v. *Insurance Company*, 18.

No estoppel arises to deny the validity of an ultra vires and unlawful contract because it has been executed, but the remedy of the aggrieved party is to disaffirm it and recover on a *quantum meruit* the value of what the defendant has actually received the benefit of.

No rights arise on the ultra vires contract, even though the contract has been performed; and this conclusion can not be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised.

Gardiner Trust Co. v. *Augusta Trust Co.*, 191.

When a party is to be deprived of his right to allege the truth by an estoppel, the equity must be strong and the proof clear. The estoppel must be certain to every intent and not taken by argument or inference.

Augusta Trust Co. v. *Railroad Co.*, 314.

EVIDENCE.

EXECUTORY DEVISES.

See Wills — *First National Bank* v. *DeWolfe et als.*, 487.

EXCEPTIONS.

The Law Court has no power to permit an amendment of a bill of exceptions.

Mann v. *Homestead Realty Company*, 37.

The remedy of one convicted of a felony to present to the Law Court the correctness of the ruling of the *nisi prius* Judge in denying his motion for new trial is by appeal and not exception.

Where an admittedly true transcript of evidence given by the complainant in the Municipal Court is by agreement read to the jury, the State's attorney not having agreed that the transcript itself should be admitted as an exhibit, and the statutory requirements of a deposition in a criminal case not having been complied with, its exclusion as an exhibit by the Trial Court is not exceptionable error.

An exception taken but not alluded to in argument before the Law Court may by the Court be deemed waived by the exceptant.

State v. *Sutkus*, 100.

For a party to be aggrieved, one of his rights must have been injuriously affected.

Exceptions will not be sustained unless he who excepts shows affirmatively that he is aggrieved. And he can not be aggrieved unless his legal right has been invaded by the act of which he complains.

In re Maine Central Railroad Company, 217.

An excepting party is bound to see that his bill of exceptions includes all that is necessary to enable the Court to decide whether the rulings, of which he complains, were or were not erroneous.

Findings of fact by a Referee are not exceptionable if there is any evidence of probative value to support them.

Richardson v. *Lalumiere*, 224.

In considering exceptions the rule is now well established in this State that mere technical error will not justify a new trial. There must be substantial prejudice. A just verdict will not be lightly set aside.

State of Maine v. *Cloutier*, 269.

It is well settled in this jurisdiction that a motion by the defendant for a directed verdict is equivalent to a demurrer to the evidence. Exceptions raise the question, not whether there is sufficient evidence to take the case to the jury, but whether upon all the evidence as it appears in the record a verdict for the plaintiff could be permitted to stand.

Ward v. *Power & Light Co.*, 430.

The rule governing the direction of verdicts in trials for crime is that when the evidence is so defective or weak that a verdict based upon it could not be allowed to stand, the Trial Court, on being moved thereto should direct a verdict for the accused.

A refusal, at the close of the evidence on both sides, to so direct, is ground of exception.

State v. *Martin*, 448.

EXECUTORS AND ADMINISTRATORS.

A cause of action for an assessment does not arise until the assessment.

As against a national bank stockholder's estate, liability terminates on valid assignment of the shares in final distribution of the estate if not by an earlier transfer.

There can be no liability on the part of a decedent's estate, where assessment is after entire administration of the estate, and distribution of all the property.

In the case at bar, when assessment was imposed, administration had come to an end; there was no estate to charge.

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Under the common law rule as adopted in this State, title to real estate of a deceased person passes immediately upon the death to the heirs or devisees; the rents accruing after the death are incident to the reversion and go to such heirs or devisees; the administrator or executor as such has no right to enter upon the lands or take the rents, and the taxes accruing upon the real estate after the death of the deceased are payable by the heirs or devisees and are not chargeable by the administrator in his probate account.

An administrator may in some instances receive the income of real estate by request of the heirs or devisees, or with their acquiescence, and if so, should be allowed for the taxes paid.

Unless authorized by will, and except as above stated, executors and administrators c.t.a. have no legal right to take possession of real estate and collect rents until it becomes necessary to sell the real estate for payment of debts.

Paradis, Appellant from Decree of Judge of Probate, 333.

FALSE IMPRISONMENT.

FALSE REPRESENTATION.

FINDINGS OF FACT.

FIRE.

FIXTURES.

FORCIBLE ENTRY AND DETAINER.

GIFTS INTER VIVOS.

Although the transactions attending an alleged gift originate and are perfected in another state, the law in such state, in the absence of proof to the contrary, is presumed to be that of the forum.

To constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given. *Reid* v. *Cromwell,* 186.

HIGHWAYS.

Our statutes make it the duty of public authority to keep highways safe and convenient for travelers, and when blocked and encumbered with snow to render them passable.

Notwithstanding this obligation, towns are exempted by statute from liability for damages to pedestrians on account of snow and ice on any sidewalk. The statutes further authorize towns to make by-laws or ordinances providing for the removal by abutters of snow and ice from sidewalks and to enforce such by-laws by suitable penalties. *Ouelette* v. *Miller,* 162.

INDICTMENT.

See Criminal Law.

INDUSTRIAL ACCIDENT COMMISSION.

In order for an employee to recover compensation under the Workmen's Compensation Act (R. S. 1930, Chap. 55), it must appear that the employer assented to the Act as well as that the injury arose out of and in the course of the employment. Without assent, the Commission has no jurisdiction.

It is incumbent upon the employee to prove that the injury received was within the scope of the employer's acceptance.

The assent of the employer is not to be extended beyond what in the usual course of a specified business is necessary, incident or appurtenant thereto.

The Commission's decision upon all questions of fact, in the absence of fraud, is final and may not be disturbed if there is any competent substantive evidence or reasonable inferences therefrom to warrant it.

Eddy v. *Furniture Co.,* 168.

In cases under the Workmen's Compensation Act it is not the province of the Law Court to ascertain and determine facts; neither does the Court have the right or duty to pass upon the application of a legal principle when it appears that the ruling was predicated upon an erroneous assumption as to facts, or

that the Commissioner failed to decide facts which it found in favor of the claimant, would obviate the necessity of considering the legal issue raised.

The Law Court has authority to recommit the case to the Industrial Accident Commission for the purpose indicated, and the Commission may receive and consider additional evidence thereon.

Under Section 36 of the Act, the Commissioner must decide the merits of the controversy. Then under Section 40 proceedings to procure a review require a decree *pro forma* by a Justice of the Superior Court as though rendered in a suit in equity duly heard and determined by the Court. Both requirements clearly provide that cases under this Act must not be sent up piecemeal.

Guthrie v. *Mowry et al.*, 256.

INSURANCE.

In a bill in equity under the provisions of R. S. 1930, Chap. 60, Secs. 177-178, to enforce against an insurance company a judgment recovered by the plaintiff against the alleged insured, and wherein the sole question was whether the owner of the truck was in fact insured; and this in turn depended on whether there was a binding oral agreement to transfer the insurance coverage from a truck which had been sold, to a new truck purchased at the same time:

HELD

The plaintiff's contention that the truck owner called the office of the agent of the defendant company on September 19, 1931, and requested that the insurance be changed to cover the new truck is refuted by evidence which is decisive.

First: A letter of the truck owner dated October 3, 1931, requested the change, and there is no reference in this letter to any prior oral contract or to the fact that the insurance policy was to be made out as of a prior date.

Second: The truck owner without any compulsion signed a statement on January 25, 1932, shortly after the insurance company had first learned of the accident, in which he stated that he did not have insurance coverage changed to cover the new truck because he didn't suppose it was necessary.

These statements of the truck owner support the claim of the insurance company that no request to change the insurance was made until after the date of the accident.

Bowley v. *Aetna Life Insurance Company*, 13.

In actions brought under Sec. 178 of Chap. 60, R. S. 1930, to reach and apply insurance money in satisfaction of judgments obtained, where the plaintiff alleged permission to operate the automobile and the defendant denied the same, the plaintiff under equity practice in this State need file only a formal replication and need not set up therein facts claimed to show estoppel or waiver upon the part of the defendant.

Where the facts show an estoppel to deny or waiver of proof of operation by permission, so far as permission is concerned there is sufficient proof of coverage.

That which operates as a waiver or estoppel in favor of the assured also operates in favor of the injured person.

An insurance company by assuming and conducting the defense in the original actions, both for the owner of the car, the assured, and the driver, with knowledge of all the facts and without reservation, can not defend against liability to pay the judgments obtained in the actions so defended.

Colby, Pro Ami v. *Insurance Company,* 18.

False and untrue representations of facts in an application for a life insurance policy, which are material to the risk, void the policy.

In the case at bar, the applicant for the life policy denied that he had raised or spat blood, consulted a physician or practitioner for or suffered from any ailment or disease of the heart, had within the past five years consulted with or been treated by a physician. In truth within a period of one year theretofore he had raised and spat blood, consulted and been treated by a physician for coronary occlusion, which heart trouble caused his death within fourteen months after the date of the application. He stated false and untrue facts material to the risk and by so doing made recovery by the beneficiary impossible as a matter of law.

Sakallaris v. *Insurance Company,* 91.

A health and accident insurance policy like any other contract is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be construed together.

An accident and health monthly-payment insurance policy which provides that "this policy will continue in force, subject to its provisions, as long as the premiums shall be paid as agreed therein, unless it is sooner terminated in accordance with its terms" constitutes one continuing contract subject to the condition that the assured pay the monthly premium, and not a series of successive monthly contracts.

Under the provisions of R. S., Chap. 96, Sec. 40, "if the defendant relies upon the breach of any condition of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea at its election, and all other conditions the breach of which is known to the defendant and not so pleaded shall be deemed to have been complied with by the plaintiff."

In cases arising under the above statute the burden of proof is still upon the plaintiff, but only as to such matters as are put in issue under the pleadings.

In the case at bar, it was the contention of the defendant that at the time of the alleged injuries to the plaintiff there was no insurance contract in force as the payment due the first of the month had not been made. The breach of this

condition, however, was not specifically pleaded. The brief statement setting up that there was no existing insurance contract in force, was not a compliance with the statute requirement. It added nothing to the general issue to inform the plaintiff as to the ground of defense, and did not, therefore, in view of the terms of the particular policy on which this action was brought, avail the defendant.

Connellan v. *Casualty Company*, 104.

See *McFarland* v. *Rogers*, 228.

Unless in a policy of insurance there be reserved the right to change the beneficiary named in an old line, as distinguished from a fraternal, policy has upon its issue a vested interest therein.

Where the right to change is reserved, the named beneficiary has simply a mere expectancy.

Such a mere expectancy is extinguished by the lawful substitution of another beneficiary.

It requires no more mental capacity to change a beneficiary in a life insurance policy than it does to make a will.

Acts of undue influence sufficient to invalidate a will will invalidate a change in beneficiary.

Such a change must be accomplished understandingly by the insured's own act.

Influence, to be undue, must amount either to deception or else to force and coercion, in either case destroying free agency.

The mere existence of an illicit or unlawful relation between the insured and the substituted beneficiary is not enough *per se* to raise a presumption that the change was procured by undue influence; but such a relationship is a fact to be considered along with other facts on the question as to whether or not the change was procured by undue influence.

If the free agency of the insured is destroyed or affected so that the act is not done in accordance with a free will, the change of the beneficiary is invalid.

The burden of proof to establish undue influence is on the asserter of it.

The first-named beneficiary, even though there be a reservation of the right to change the beneficiary, may have an equitable interest in the policy as the result of a contract or by reason of acts or conduct of the insured subsequently to the issue of the policy.

Goodale v. *Wilson*, 358.

See *Rioux* v. *Assurance Co.*, 459.

JOINT TENANCY.

In a valid tenancy, the four elements of unities of time, interest and possession are essential.

JUDGMENTS.

JUDICIAL DISCRETION.

JUDICIAL NOTICE.

JURY AND JURORS.

LABOR UNIONS.

LANDLORD AND TENANT.

A building erected on land of another remains personalty, and a subject of chattel mortgage, only if there be an agreement.

In case of a tenancy for any fixed and definite term, no agreement to the contrary and no waiver appearing, a tenant must remove his building or other fixtures before the termination of his tenancy.

All fixtures, for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover can not be maintained for a refusal to give them up.

Simpson v. *Emery*, 213.

A covenant to pay rent for leased premises constitutes an executory contract. It is to pay sums of money as rent accruing at stated times in the future.

Future rent can not be the basis of a claim.

In the absence of an express covenant, contract or stipulation in a lease providing for damages in contingencies similar to a termination by a receivership, the common law doctrine applies that no claim for such anticipated damages arises on breach of the covenant for rent of real estate.

Cooper v. *Trust Co.*, 372.

No particular form of words is necessary to constitute an instrument a lease. The criterion is the intention of the parties, to be derived from the whole instrument. Reservation of the payment of rent is not essential to create the relation of landlord and tenant. Courts are liberal in sustaining intent if it can be shown consistently with the rules of law.

Buswell v. *Wentworth et al.*, 383.

LAST CLEAR CHANCE.

LAW COURT.

The Law Court has no power to permit an amendment of a bill of exceptions.

Mann v. *Homestead Realty Company*, 37.

MALPRACTICE.

MANDAMUS.

MARRIAGE.

MORTGAGES.

MOTOR VEHICLES.

Second: The truck owner without any compulsion signed a statement on January 25, 1932, shortly after the insurance company had first learned of the accident, in which he stated that he did not have insurance coverage changed to cover the new truck because he didn't suppose it was necessary.

These statements of the truck owner support the claim of the insurance company that no request to change the insurance was made until after the date of the accident.

Bowley v. *Aetna Life Insurance Company,* 13.

See *Hutchins* v. *Emery,* 205.

See *Ward* v. *Power & Light Co.,* 430.

The statutory Death-Liability cause of action begins where the common law left off. The test of the right to maintain the action is measured solely by the statute: whether the deceased person, if living, could recover damages.

Due care on the part of decedent is presumed. The presumption, however, is a disputable one. Upon the issue of contributory negligence, the burden of proof is on defendant.

Metrinko et als. v. *Witherell,* 483.

MUNICIPAL CORPORATIONS.

Towns act in two capacities, one corporate, for its own private benefit, and the other governmental.

At common law, a town acting in the latter capacity is not liable.

The words "person" and "corporation" as used in R. S. 1930, Chap. 101, Sec. 9, known as "The Lord Campbell's Act" do not include a town when the town charged with wrongful act, neglect or default in engaged in its governmental rather than corporate capacity.

Chase, Adm. v. *Town of Litchfield,* 122.

A town has no control over the assessment of taxes. The statute requires the town to appoint assessors of all taxes to be levied within its limits, but the town does this as the political agent of the state.

A town, as a tax district, has no private right in a railroad location. A town does not become a party to a location proceeding by calling witnesses, or by being heard in argument. Such proceedings concern the whole people, and not infrequently they involve vital questions.

In such case the Attorney General represents the whole body politic, or all the citizens and every member of the State. It is for him, in instances like these, to protect and defend the interests of the public.

In re Maine Central Railroad Company, 217.

All municipal indebtedness or liability incurred beyond the constitutional limit is void and unenforcible, and the fact that the municipality has had the benefit of the contract by which the indebtedness was incurred does not render it liable upon an implied contract to pay the value thereof.

One who contracts with a city or town, by which an indebtedness or liability is created, must, at his peril, take notice of its financial standing and condition and satisfy himself as to whether its debt limit is or will thereby be exceeded. *Tractor Co., Inc.* v. *Anson,* 329.

Consistent with the threefold division of governmental power, political divisions, other than cities and towns, may be erected by the legislature for public purposes.

Towns must provide funds for the support of public schools within their limits, but it does not follow that the legislature can do no more for the same general purpose.

Municipal corporations organized for different purposes may include the same territory, as a city and a county, or a school district. Two authorities can not exercise power in the same area, over the same subject, at the same time. But identity of territory, putting one municipal coroporation, full or quasi, where another is, is immaterial, if the units are for distinct and different purposes.

A school district is a public agency or trustee established to carry out the policy of the State to educate its youth. The legislature may change such agencies, and control and direct what shall be done with school property. The length of time this district may exist, is, because capable of being made certain, definite from the beginning. A municipal corporation owes its existence to the legislative will. The legislature may, in its discretion, abolish or dissolve such a corporation at any time. When the district is at an end, the town shall, in succession, take the property, impressed with the duty of carrying on the trust.

The property held by school districts for public use is subject to such disposition in the promotion of the objects for which it is held, as the supreme legislative power may see fit to make.

The constitutional debt-limit provision confines the indebtedness of cities and towns within prescribed bounds. Loose construction should not be allowed to weaken the force or broaden the extent of that provision.

The courts may not, however, absent express constitutional limitations, entirely deny the power of the legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations.

The Constitution of Maine contains no specific provision that wherever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebtedness of all the separate units should be taken, in ascertaining the debt limit of one of them.

The Maine Legislature, with regard to incorporating corporations purely public, is of virtually unlimited power.

Kelley v. *School District et als.*, 414.

R. S. 1930, Chap. 14, Sec. 64, provides that "the Mayor and Treasurer of any city, the Selectmen of any town, and assessors of any plantation to which a tax is due may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable." Compliance with such statutory provision is a condition precedent to the maintenance of such action.

In the case at bar, the City of Eastport had adopted a charter providing for city manager form of government. Under the terms of its charter the court holds that the city manager is but an administrative officer who acts under the direction and control of the city council. He did not succeed to the powers formerly exercised by the mayor. His direction to bring the action in question was not a compliance with the statute, and the action was therefore not properly commenced.

City of Eastport v. *Jonah*, 428.

MURDER.

When the validity of a conviction depends upon circumstantial evidence, it is not for that reason any less conclusive. Crimes of violence are not usually committed in sight of man, and most murderers will go unpunished if resort can not be had to collateral facts from which the inference of guilt arises.

When many circumstances having their origin in unrelated sources and established by the testimony of impartial witnesses, all point in one direction, their force is often compelling, the inference to be drawn from them irresistible.

In the case at bar, neither all, nor any substantial part of the circumstances established by proof could concur and leave any reasonable doubt in the minds of an impartial jury of the respondent's guilt.

No prejudice resulted to the respondent from the admission in evidence of two pieces of wood found under the body.

The admission in evidence of the front seats of the automobile and of the car itself was proper.

The admission in evidence of articles of clothing worn by the victim was proper, on the ground that the clothing not being torn tended to disprove the claim of the respondent that the girl met her death by falling from a moving automobile.

The question asked of Mederic Cloutier as to whether or not he had a license to drive an automobile was proper. It was not asked for the purpose of impeaching the witness. It was asked in an effort to show that he had actually driven his father's car.

The charge of the Court stated the law clearly, correctly and adequately.

There was no substantial error in the conduct of the trial. The rights of the respondent were safeguarded throughout. The verdict was warranted by the evidence. Justice would not have been satisfied by any other result.

State of Maine v. *Cloutier,* 269.

NEGLIGENCE.

In order to establish contributory negligence on the part of a passenger, the defendant driver having had liquor to drink, it is necessary not only that the driver of the car should, to the knowledge of the passenger have been under the influence of liquor, but that this condition should have been a contributing cause of the accident.

Bubar, Foss, Pro Ami v. *Fisher,* 10.

Ordinarily when evidence is in conflict as to the negligence of the defendant the question is for the jury. The question of contributory negligence of the plaintiff is likewise ordinarily for the jury.

Children, even those of tender years, are not absolved from the obligation to use some care, but the law has regard for the frailties of childhood and the thoughtlessness of youth.

A child is required to exercise only that degree of care and judgment which children of the same age and intelligence ordinarily exercise under the same circumstances.

Searles v. *Ross,* 77.

In the ordinary case no presumption of negligence arises from the mere happening of an accident. The burden rests on the plaintiff to fasten liability on the defendant.

Injuries to animals while lawfully on the highway are governed by the same rule. Common law principles of negligence control.

Adams v. *Richardson,* 109.

See *Chase, Adm.* v. *Town of Litchfield,* 122.

At common law private individuals are not liable for injuries to others occasioned by natural causes.

Our statutes make it the duty of public authority to keep highways safe and convenient for travelers, and when blocked and encumbered with snow to render them passable.

Notwithstanding this obligation, towns are exempted by statute from liability for damages to pedestrians on account of snow and ice on any sidewalk. The statutes further authorize towns to make by-laws or ordinances providing for the removal by abutters of snow and ice from sidewalks and to enforce such by-laws by suitable penalties.

A person, by virtue of the ordinance, may be charged with a public duty but non-performance gives no cause of action to a private individual.

A good declaration in an action for negligence ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others.

If the pleader merely alleges the duty in his declaration, he states a conclusion of law, whereas the elementary rule is that the facts from which the duty springs must be spread upon the record so that the Court can see that the duty is made out.

Ouelette v. *Miller,* 162.

It is not necessary that a defendant's negligence be the sole cause of injury; it is enough if such negligence is a contributing cause.

Each of two independent torts may be a substantial factor in the production of injury. There may be two judgments, but only one satisfaction.

A wrongdoer is liable for all natural and probable consequences of his act.

It is a question of fact and not of law, as to what was the proximate cause of an accident.

Hutchins v. *Emery,* 205.

Under R. S., Chap. 96, Sec. 50, a defendant pleading contributory negligence has the burden of establishing it. The statute does not, however, change the substantive law of negligence. Under it, the tribunal hearing the case must still be satisfied on all the evidence that the deceased was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury. The statutory presumption in favor of the deceased does not compel the submission of this class of cases to the jury.

Ward v. *Power & Light Co.,* 430.

The standard of care for warehousemen is such as an ordinarily prudent person would take of his own property, under the same or in a similar situation.

Brown v. *Railway Express Agency,* 477.

The statutory Death-Liability cause of action begins where the common law left off. The test of the right to maintain the action is measured solely by the statute: whether the deceased person, if living, could recover damages.

Due care on the part of decedent is presumed. The presumption, however, is a disputable one. Upon the issue of contributory negligence, the burden of proof is on defendant.

Metrinko et als. v. *Witherell,* 483.

NEW TRIAL.

In considering motions by the defendant for new trials the evidence must be viewed in the light most favorable to the plaintiffs. On the defendants is the burden of proving that the jury's verdict is manifestly wrong.

Searles v. *Ross*, 77.

It is well settled that in considering motions for new trials the Court must view the evidence in the light most favorable to the plaintiff. On the defendant is the burden of proving that the jury's verdict is manifestly wrong.

Goodwin v. *Boston & Maine Railroad*, 282.

A motion for a new trial, on predicate of violation of the evidence, is in no sense a trial *de novo*. In this, as in all other cases where questions of reasonable care, contributory negligence, or the like are in controversy the facts being in dispute, or, though undisputed, affording space for different conclusions, rationally drawn, the question is for the jury.

Metrinko et als. v. *Witherell*, 483.

NOTICE.

A defect in a notice may be waived by the town upon which notice is served. Waiver may be implied. An answer denying liability upon other grounds waives the defect.

Bath v. *Bowdoin*, 180.

By reason of record of an instrument in the Registry of Deeds a party affected thereby is chargeable with notice of its existence and contents.

Buswell v. *Wentworth et al.*, 383.

NUISANCE.

It is settled law in this State that one who creates a nuisance upon another's land is under legal obligation to remove it. Successive actions may be maintained until he is compelled to do so.

Goodwin and Stewart v. *The Texas Co.*, 266.

OVERSEERS OF THE POOR.

Overseers of the poor are the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns with reference to claims, including those for pauper supplies. Their

authority extends to the adjustment of all claims of this sort and to all preliminary proceedings. *Bath* v. *Bowdoin,* 180.

PAUPERS AND PAUPER SETTLEMENT.

Under the statutes of this State, children, when emancipated, take the pauper settlement their father has at the time of emancipation and this settlement continues until they gain a new one for themselves.

If the emancipation is during minority, the gaining of a new settlement by the minor can begin only as of the date of his majority. It is a person of age who can acquire a pauper settlement in his own right.

When a child attains his majority, unless he is *non compos mentis,* he is emancipated within the meaning of the pauper law.

The words in the provision of the statutes that "he and those who derive their settlement from him lose their settlement in such town" includes only those who are deriving their settlement from the father at the time he loses his settlement. The statute has no retroactive force to bring a loss of settlement to those who at one time derived their settlement from the father but do so no longer.

The legislature, having repeated these words with full knowledge of a judicial construction placed upon them is presumed to have intended that the meaning which had attached to them should remain unchanged.

Winslow v. *Old Town,* 73.

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Overseers of the poor are the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns with reference to claims, including those for pauper supplies. Their authority extends to the adjustment of all claims of this sort and to all preliminary proceedings.

In the case at bar, while the notices given to the town of Bowdoin were unquestionably defective, the overseers of the poor of Bowdoin by their answer effectively waived the defect in the notices. *Bath* v. *Bowdoin,* 180.

In construing pauper statutes it is the underlying principle that settlement of children should follow that of the parent who was responsible for their support.

The term "stepchildren" is ordinarily defined as the children by a former marriage of either the husband or wife. In a literal sense it might be considered to have application to children of a living father where the remarriage of the

mother had taken place after the divorce. It is the duty of the Court, however, to interpret the provisions of P. L. 1930, Chap. 203, in accordance with established principles relating to pauper settlements and consonant therewith, and which at the same time obviate anomalous and absurd situations.

To relieve ambiguity and dispel doubt a rational and reasonable interpretation of P. L. 1930, Chap. 203, conformable to well-established principles of pauper law, requires that the meaning and interpretation of the word "stepchildren" be restricted to the class who have lost their father by death, and whose place is filled by a "stepfather."

Guilford v. *Monson*, 261.

The pauper settlement of a legitimate child is, by statute, that of his father, if he has one within the State. If the pauper settlement of the father changes during the child's minority, that of the child likewise changes, by operation of law, and regardless of the consent or desire of the parties. Upon emancipation, the child takes his father's pauper settlement, and retains it until he himself acquires a new one.

Emancipation may take place in one of several ways, during the minority of the child.

Marriage of a minor son, with the consent, and not contrary to the direction of his parents, works complete emancipation.

Emancipation is never presumed, but must always be proved. It may be implied from circumstances, or inferred from the conduct of the parties.

Trenton v. *Brewer*, 295.

PICKETING.

See *Keith Theatre* v. *Vachon et als.*, 392.

PLEADING AND PRACTICE.

A return of final process, wherein an execution running against the body in the nature of a *capias ad satisfaciendum*, is not required in order to permit the officer to justify under the process. It was so held at common law. The provisions of R. S., Chap. 96, Sec. 162, making executions returnable within three months, have not changed the rule.

Statutory provisions which require sheriffs and constables to return writs of execution are designed for the benefit of the plaintiffs therein and are not available for defendants aggrieved by any omission.

Trafton v. *Hoxie*, 1.

In actions brought under Sec. 178 of Chap. 60, R. S. 1930, to reach and apply insurance money in satisfaction of judgments obtained, where the plaintiff

Where an admittedly true transcript of evidence given by the complainant in the Municipal Court is by agreement read to the jury, the State's attorney not having agreed that the transcript itself should be admitted as an exhibit, and the statutory requirements of a deposition in a criminal case not having been complied with, its exclusion as an exhibit by the Trial Court is not exceptionable error.

An exception taken but not alluded to in argument before the Law Court may by the Court be deemed waived by the exceptant.

State v. *Sutkus,* 100.

Under the provisions of R. S., Chap. 96, Sec. 40, "if the defendant relies upon the breach of any condition of the policy by the plaintiff, as a defense, it shall set the same up by brief statement or special plea at its election, and all other conditions the breach of which is known to the defendant and not so pleaded shall be deemed to have been complied with by the plaintiff."

In cases arising under the above statute the burden of proof is still upon the plaintiff, but only as to such matters as are put in issue under the pleadings.

In the case at bar, it was the contention of the defendant that at the time of the alleged injuries to the plaintiff there was no insurance contract in force as the payment due the first of the month had not been made. The breach of this condition, however, was not specifically pleaded. The brief statement setting up that there was no existing insurance contract in force, was not a compliance with the statute requirement. It added nothing to the general issue to inform the plaintiff as to the ground of defense, and did not, therefore, in view of the terms of the particular policy on which this action was brought, avail the defendant.

Connellan v. *Casualty Company,* 104.

In reference of cases by rule of court under Rule 42 of the Supreme and Superior Courts, the decision of the Referee upon all questions of fact is final. A like finality attaches to his decision on questions of law unless the right to except thereto is specifically reserved and so entered on the docket.

Except as provided in the above rule and in Rule 21, the Court appointing a Referee, can not, on its own motion invest itself with a reviewing jurisdiction, nor can parties themselves, by mutual consent, confer jurisdiction. Judicial power must find its source in the law.

Parties, having submitted their cause without reservation to a tribunal of their own choosing, are bound by a decision of that tribunal and should not be permitted to afterwards return to the tribunal which they once abandoned and seek there a correction of the award on the ground that the Referee has made an erroneous decision.

Kliman v. *Dubuc,* 112.

Practice and authority has long sanctioned the account annexed as a simpler and more direct mode of declaring than the money counts for which it is substitute.

Mugerdichian v. *Goudalion,* 290.

In real actions, disclaimers must be filed at the first term and within two days after entry of the action.

In general, a judgment is conclusive only as to facts without proof of which the action could not have been maintained. In a real action on a plea of estoppel by a former judgment, it must appear that the issue of title was not merely submitted, but was determined.

The gist of the actions of trespass *de bonis* is an injury to the plaintiff's possession. To maintain the action, it is essential only that the plaintiff at the time of the alleged trespass should have had either actual or constructive possession or a right to immediate possession of the personalty.

Title to the land from which goods were taken is not necessarily in issue. A simple verdict of "not guilty" in such an action does not establish a finding upon the issue of soil and freehold nor determine the title to the locus.

Susi v. *Davis,* 308.

See *City of Eastport* v. *Jonah,* 428.

It is well settled in this jurisdiction that a motion by the defendant for a directed verdict is equivalent to a demurrer to the evidence. Exceptions raise the question, not whether there is sufficient evidence to take the case to the jury, but whether upon all the evidence as it appears in the record a verdict for the plaintiff could be permitted to stand.

Under R. S., Chap. 96, Sec. 50, a defendant pleading contributory negligence has the burden of establishing it. The statute does not, however, change the substantive law of negligence. Under it, the tribunal hearing the case must still be satisfied on all the evidence that the deceased was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury. The statutory presumption in favor of the deceased does not compel the submission of this class of cases to the jury.

Ward v. *Power & Light Co.,* 430.

As to *certiorari,* see *Jellerson* v. *Police of Biddeford,* 443.

See *State* v. *Martin,* 448.

Evidence, even though legally inadmissible, received without objection, is regarded as in the case by consent, and, if relevant, must be considered by the trier of the facts.

Watkins Co. v. *Brown and McPherson,* 473.

PROBATE COURTS.

PROXIMATE CAUSE.

See Negligence.

PUBLIC UTILITIES.

See *City of Rockland* v. *Water Company,* 95.

PUBLIC UTILITIES COMMISSION.

The Public Utilities Commission is an adminstrative body, of limited though extensive authority, having such powers as are expressly delegated to it by the legislature, and incidental powers necessary to the full exercise of those so invested.

Jurisdiction of the Commission, in the class of cases as in this at bar, is to determine judicially the fair value of the utility property devoted to public service, figure a just return thereon, and establish a rate which shall be reasonable, to apply with substantial equality to all receiving a similar service.

Such is the fair value concept, better called the rate base.

City of Rockland v. *Water Company*, 95.

In cases heard by the Public Utilities Commission involving the question of proper rates to be charged by the utility, purchase price of the utility may be considered if the property was not sold under stress or unusual conditions, otherwise not.

In hearings before the Public Utilities Commission the ordinary rules of evidence apply, but the mere erroneous admission or exclusion of evidence will not invalidate an order of the commission. Substantial prejudice must be affirmatively shown.

Findings of fact by the Public Utilities Commission will not be disturbed, if supported by any substantial evidence.

Water Co. v. *Itself, Re: Rates*, 349.

RAILROADS.

A town, as a tax district, has no private right in a railroad location. A town does not become a party to a location proceeding by calling witnesses, or by being heard in argument. Such proceedings concern the whole people, and not infrequently they involve vital questions.

In such case the Attorney General represents the whole body politic, or all the citizens and every member of the state. It is for him, in instances like these, to protect and defend the interests of the public.

In re Maine Central Railroad Company, 217.

In construing statutes relating to assessment of taxes it must be borne in mind that taxation is the rule and exemption the exception, and that the intention to exempt property from taxation must be expressed in clear and unambiguous language.

In the case at bar, the Court holds that, considering the history of railroad legislation in this state, it is apparent that in the mind of the legislature the

right of way of the railroad was at all times regarded as something distinct from its terminal facilities and from property acquired for incidental purposes. The methods prescribed for its taking and location were different from those designated for the taking of property for general purposes. When the legislature exempted from local taxation land within the located right of way, it seems clear that there was no intent to exempt such property as that involved in this case, and that the right to tax land employed for terminal facilities outside the four-rod strip was in the local communities. The Court therefore holds that the decision of the presiding Justice dismissing the appeal of the railroad from the assessment of this tax, was correct.

Terminal Co. v. *Assessors of Portland,* 434.

REAL ACTIONS.

See *Highland Trust Company* v. *Hamilton,* 64.

See *Lapitre* v. *Breton alias Butler,* 300.

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REFERENCE AND REFEREES.

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REMAINDERS.

RES ADJUDICATA.

RES IPSA LOQUITUR.

identity of territory, putting one municipal corporation, full or quasi, where another is, is immaterial, if the units are for distinct and different purposes.

A school district is a public agency or trustee established to carry out the policy of the State to educate its youth. The legislature may change such agencies, and control and direct what shall be done with school property. The length of time this district may exist, is, because capable of being made certain, definite from the beginning. A municipal corporation owes its existence to the legislative will. The legislature may, in its discretion, abolish or dissolve such a corporation at any time. When the district is at an end, the town shall, in succession, take the property, impressed with the duty of carrying on the trust.

The property held by school districts for public use is subject to such disposition in the promotion of the objects for which it is held, as the supreme legislative power may see fit to make.

Over property acquired and held exclusively by an agency of State government for purposes deemed public, the legislature may exercise control to the extent of requiring the agency, without receiving compensation, to transfer such property to some other governmental agency, to be used for similar purposes, or perhaps for other purposes strictly public in their character.

School property is public property, the property of the incorporated district and not of the taxpayers residing within it.

The courts may not, however, absent express constitutional limitations, entirely deny the power of the legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations.

The Constitution of Maine contains no specific provision that whenever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebtedness of all the separate units should be taken, in ascertaining the debt limit of one of them.

Kelley v. *School District et als.*, 414.

SHERIFFS AND DEPUTIES.

It is a well-settled rule of law that for reasons founded on public policy the law protects its officers in the performance of their duties if there is no defect rendering the process void or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look beyond his process. He is not to exercise his judgment touching the validity of it in point of law. He may justify though in fact the warrant may have been issued without authority or if there be irregularities rendering it voidable but not void. Irregularities merely that are amendable do not vitiate it. The officer stands upon defensible ground unless the process be absolutely void.

SHERIFF'S SALE.

SNOW AND ICE.

Notwithstanding this obligation, towns are exempted by statute from liability for damages to pedestrians on account of snow and ice on any sidewalk. The statutes further authorize towns to make by-laws or ordinances providing for the removal by abutters of snow and ice from sidewalks and to enforce such by-laws by suitable penalties.

A person, by virtue of the ordinance, may be charged with a public duty but non-performance gives no cause of action to a private individual.

Ouelette v. *Miller,* 162.

STATUTES, CONSTRUCTION OF.

Under the statutes of this State, children, when emancipated, take the pauper settlement their father has at the time of emancipation and this settlement continues until they gain a new one for themselves.

The words in the provision of the statutes that "he and those who derive their settlement from him lose their settlement in such town" includes only those who are deriving their settlement from the father at the time he loses his settlement. The statute has no retroactive force to bring a loss of settlement to those who at one time derived their settlement from the father but do so no longer.

The legislature, having repeated these words with full knowledge of a judicial construction placed upon them is presumed to have intended that the meaning which had attached to them should remain unchanged.

Winslow v. *Old Town,* 73.

In statutory construction, the common law is not to be changed by doubtful implication, be overturned except by clear and unambiguous language, and a statute in derrogation of the common law will not effect a change thereof beyond that clearly indicated, either by express terms or by necessary implication.

The words "person" and "corporation" as used in R. S. 1930, Chap. 101, Sec. 9, known as "The Lord Campbell's Act" do not include a town when the town charged with wrongful act, neglect or default is engaged in its governmental rather than corporate capacity.

Chase, Adm. v. *Town of Litchfield,* 122.

Statutes of Limitation may be made applicable to existing rights and causes of action provided a reasonable time is allowed for the prosecution of claims thereon before the right to do so is barred.

Barren of express commands or convincing implications, however, the limitation in such case can not be deemed to have been intended to be retroactive. It must be construed by the fundamental rule of statutory construction strictly

followed by the Maine court that all statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used.

Miller v. *Fallon*, 145.

As prerequisite to the maintenance of a petition for review under R. S., Chap. 75, Sec. 33, the petitioner is required to prove that, from accident, mistake, defect of notice or otherwise without fault on his part, he omitted to claim or prosecute his appeal. This is a distinct element, essential of proof.

Trust Co. v. *Baker*, 231.

The word "growth" as used in Chap. 12, Sec. 9, R. S., is in reason, and in any business view, limited to the enlargement and increase of trees valuable for timber and wood.

As provided in R. S., Chap. 1, Sec. 6, Par. I, "Words or phrases shall be construed according to the common meaning of the language. Technical words and phrases and such as have a peculiar meaning convey such technical or peculiar meaning."

Pejepscot Paper Co. v. *State of Maine*, 238.

In construing pauper statutes it is the underlying principle that settlement of children should follow that of the parent who was responsible for their support.

The term "stepchildren" is ordinarily defined as the children by a former marriage of either the husband or wife. In a literal sense it might be considered to have application to children of a living father where the remarriage of the mother had taken place after the divorce. It is the duty of the Court, however, to interpret the provisions of P. L. 1930, Chap. 203, in accordance with established principles relating to pauper settlements and consonant therewith, and which at the same time obviate anomalous and absurd situations.

A statute of doubtful import is to be expounded, not according to the letter, but according to the intention of the makers.

The fundamental rule in construction of statutes is that they are to be construed according to the intention of the legislature. All statutes on one subject are to be viewed as one. Such a construction must prevail as will form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration.

To relieve ambiguity and dispel doubt a rational and reasonable interpretation of P. L. 1933, Chap. 203, conformable to well-established principles of pauper law, requires that the meaning and interpretation of the word "stepchildren" be restricted to the class who have lost their father by death, and whose place is filled by a "stepfather."

Guilford v. *Monson*, 261.

The sale of land for taxes is the execution of a naked power.

All provisions of the statute, whether they relate to proceedings before, or subsequent to the sale, must be strictly complied with, or the sale will be invalid.

The statute exacts that, within thirty days, the collector "shall . . . make a return, with a particular statement of his doings in making such sale, to the clerk of his town, who shall record it in the town records; and said return, . . . shall be evidence of the facts therein set forth. . . ."

These commands are positive and direct; there is no limitation, no modification, attached to them.

Old Town v. *Robbins,* 285.

In construing statutes relating to assessment of taxes it must be borne in mind that taxation is the rule and exemption the exception, and that the intention to exempt property from taxation must be expressed in clear and unambiguous language.

Terminal Co. v. *Assessors of Portland,* 434.

Under a narrow and strict interpretation of R. S., Chap. 97, Sec. 33, relating to qualifications of justices of municipal and police courts, it might be urged that it did not in terms include an action, matter or thing in which the judge has previously acted as attorney. Our Court, however, has already spoken in no uncertain language and given to this statute a broad construction consistent with its manifest purpose and intent.

The statute is broad enough to create a prohibition. It disqualifies the judge under the circumstances which existed in the case at bar. It was not intended that the prohibition should be circumvented or the statute devitalized by failure of the defendant to comply with the technical rules of pleading or procedure. It could not thus be weakened to a mild impotent request.

Norton v. *Inhabitants of Fayette,* 468.

STATUTE OF LIMITATIONS.

The legislature has full power and authority to regulate and change the form of remedies in actions if no vested rights are impaired or personal liabilities created. There is no constitutional inhibition against the enactment of retroactive legislation which affects remedies only.

Statutes of Limitation are laws of process and, where they do not extinguish the right itself, are deemed to operate on the remedy only.

Statutes of Limitation may be made applicable to existing rights and causes of action provided a reasonable time is allowed for the prosecution of claims thereon before the right to do so is barred.

Barren of express commands or convincing implications, however, the limitation in such case can not be deemed to have been intended to be retroactive.

It must be construed by the fundamental rule of statutory construction strictly followed by the Maine Court that all statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used.

Miller v. *Fallon,* 145.

STOCKS AND STOCKHOLDERS.

The obligation of a stockholder in a national bank, although arising from voluntary agreement, evidenced by becoming a stockholder, is statutory.

The liability does not altogether cease on the death of the owner, but, as limited and defined by the U. S. Code, attaches to his estate. The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living.

A cause of action for an assessment does not arise until the assessment.

As against a national bank stockholder's estate, liability terminates on valid assignment of the shares in final distribution of the estate if not by an earlier transfer.

There can be no liability on the part of a decedent's estate, where assessment is after entire administration of the estate, and distribution of all the property.

In the case at bar, when assessment was imposed, administration had come to an end; there was no estate to charge.

Wakem v. *Duff,* 137.

Equity has jurisdiction both under R. S. 1930, Chap. 91, Sec. 36 § XI, and under its general equity powers, to compel a surrender to a guardian of a stock certificate owned by his ward but issued in the name of the ward, his stepdaughter and survivor, when detained and withheld from the owner so that it can not be replevied.

Stock certificates come within the meaning of "goods and chattels," as used in said statute.

Reid v. *Cromwell,* 186.

The well-settled rule is that, in the absence of clear and express statutory authority therefor, preferred stockholders as such are not creditors of the corporation and can not be made so to the prejudice of actual creditors. Agreements made to accomplish this result without legislative sanction are against public policy and therefore illegal and void.

It is within the power of the legislature, by character or statute, to prescribe that corporations may issue certificates in the form of certificates of preferred stock, so-called, making the holders creditors of the corporation as well as stockholders, and giving them a lien upon the property of the corporation with priority over other creditors.

STREETS.

STREET RAILWAYS.

STRIKES.

to him; and this right is as perfect and complete as the correlative right of all men to seek employment wherever they can find it."

A strike for both a legal and an illegal purpose is an illegal strike.

Employees have a lawful right to strike to obtain an increase in wages even though as increased they are on a level with the union schedule.

Were it held that employees have the right to strike to secure unionization for their own benefit (and herein it is not necessary so to hold), it does not follow that strangers may picket, though peaceably, to secure unionization.

The fact of ownership of property and responsibility therefor should give the owner all reasonable rights of control and management in order to preserve it, else in the end the right to have and to hold property will be seriously impaired.

"The right to conduct a lawful business is a property right, protected by the common law and guaranteed by the organic law of the state."

A laborer, whether union or not, in absence of contract to the contrary, has the right to work where and for whom he pleases, provided the work is lawful and agreement is reached upon terms of employment.

An employer's right to carry on its lawful business can not be interferred with without just cause or excuse.

Picketing is defined to be "posting members at all the approaches to the work struck against for the purpose of reporting the workmen going to or coming from the work; and to use such influence as may be in their power to prevent the workmen from accepting work there."

Rights of society do not justify peaceable picketing by strangers when the employees are not on strike, have no grievance against their employer, and are satisfied with their wages and the conditions under which they are working.

Representatives of unions have the right by free speech and persuasive argument to attempt the conversion of an employer to their belief that unionization should be effected.

Social welfare does not demand that non-related persons or organizations be given the right, even by peaceable picketing, to attempt to break down and destroy a satisfactory relationship between an employer and its employees in order to supplant it by another whose terms are satisfactory only to the dictators of it, there being no relationship between the picketers and the employer and its employees, nor labor dispute nor strike.

Keith Theatre v. *Vachon et als.*, 392.

SURETYSHIP AND GUARANTY.

Though there can not be imported into a bond an obligation not covered by its terms, yet the rule is that the liability of a bonding company, agreeing for a

consideration to act as surety, is not to be measured by the rule of *strictissimi juris*. Such agreement will be construed most strongly against the surety.

McFarland v. *Rogers*, 228.

TAXATION.

Every property owner must bear his just share of the public expense. A remedy does not lie in the courts merely because that burden is too heavy. It is only when the owner bears a disproportionate share of the load that he has a just claim for judicial redress. If, however, he shows that his property is assessed substantially in excess of its true value, a presumption arises of inequality and he has made out a prima facie case for relief.

The Constitution of Maine provides, Art. IX, Sec. 8, that "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." The phrase "just value" is the equivalent of "value" or "market value."

In appraisal for tax purposes due consideration must be given to all the uses to which such property may be put by an owner. Its value is measured by the highest price that a normal purchaser, not under peculiar compulsion, will pay for it. It is what it will bring at a fair public sale, when one party wishes to sell and another to buy.

If, during a time of crisis, it is impossible to determine the true worth of real estate by reference to the price which it will bring in the market, resort may be had to other factors such as original cost less depreciation, to reproduction cost with an allowance for depreciation, to the purchase price, if not sold under stress or under unusual conditions, and to its capacity to earn money for its owner. No one of these elements is controlling, but each has its place in estimating value for purposes of taxation.

The burden is on the petitioner to show that the valuation is unjust, and not on the assessors to establish that their figures are correct. The presumption is that the assessment is valid.

It is not sufficient to show merely that the assessors have made an error, even though such mistake may result in a lack of uniformity. It is solely where there is evident a systematic purpose on the part of a taxing board to cast a disproportionate share of the public burden on one taxpayer, or on one class of taxpayers, that the Court will intervene.

Sweet v. *City of Auburn*, 28.

Taxation is legislative. What money shall be raised by taxation, what property shall be taxed, what exempted, rests exclusively with the legislature to say, without any limitations except such as are imposed by express constitutional provisions.

A town has no control over the assessment of taxes. The statute requires the town to appoint assessors of all taxes to be levied within its limits, but the town does this as the political agent of the state.

A town, as a tax district, has no private right in a railroad location. A town does not become a party to a location proceeding by calling witnesses, or by being heard in argument. Such proceedings concern the whole people, and not infrequently they involve vital questions.

In such case the Attorney General represents the whole body politic, or all the citizens and every member of the state. It is for him, in instances like these, to protect and defend the interests of the public.

In re Maine Central Railroad Company, 217.

The burden of proof is on the petitioner for abatement of taxes to show that the findings of the state authorities work upon him an injustice.

It is the policy of the State that all property therein, except what is exempt from taxation by statute, shall bear its fair share of the tax burden, and it is beyond question that the "land," whatever its burden, on the surface or below, is properly taxed.

From its beginning as a state, Maine has taxed its unorganized area.

The word "land" or "lands" and words "real estate" include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein.

Under the statutes it is incumbent on the assessors not to tax on an assessment above a just and fair valuation. It is, however, not incumbent upon them to tax when not practicable, when for illustration the determination of the existence of property, such as a crop of wild fruit, and inspection thereof for purposes of valuation would entail expense incommensurate with the profit of the tax to the State.

Pejepscot Paper Co. v. *State of Maine,* 238.

The sale of land for taxes is the execution of a naked power.

All provisions of the statute, whether they relate to proceedings before, or subsequent to the sale, must be strictly complied with, or the sale will be invalid.

The statute exacts that, within thirty days, the collector "shall . . . make a return, with a particular statement of his doings in making such sale, to the clerk of his town, who shall record it in the town records; and said return, . . . shall be evidence of the facts therein set forth. . . ."

These commands are positive and direct; there is no limitation, no modification, attached to them.

One of the principal objects of returns of tax sales is that persons who are interested in the realty may be apprised of their situation. The return is: "the legal source from which the owner must ascertain what portion of his land, if any, has been sold for taxes, and . . . to learn what he is required to redeem."

The purchaser at a tax sale has no title till the expiration of the time for redemption. The deed is to be executed, but not delivered, immediately; it is to be put in the treasurer's office, and there remain two years, subject, meanwhile, on redemption from the sale, to cancellation. Redemption cuts off the purchaser's rights, and makes the original title absolute. This right of redemption need not be exercised unless it can be shown that the steps leading up to the sale have been taken in strict accordance with law. The doctrine of caveat emptor applies to such sales in its fullest force.

The right of redemption is a substantial one. *Old Town* v. *Robbins*, 285.

A lawful tax list requires the signatures of at least a majority of the Board of Assessors.

The tax list so signed may be the one retained by the assessors under Section 84, Chapter 13, R. S. 1930, or another committed by them to the collector under Section 81 of the same chapter.

If the list retained by the assessors is insufficient to constitute a lawful tax list because signed by only one assessor, yet if the list committed to the collector is lawful, so far as the tax list is concerned, recovery may be had of a judgment in personam for the tax.

Failure to describe the real estate in the tax list committed to the collector does not prevent recovery of a judgment in personam for the tax.

In order for a lien claimant to obtain a judgment in rem against a particular piece of real estate on which to levy to satisfy his lien, he must establish as a fact that the real estate specially attached is that on which his lien is a charge.

In the absence of any sufficient description in any valid tax list, either the one retained by the assessors or the one committed to the collector, there can be no enforcement of the tax lien.

A failure of the majority of the assessors to sign the tax list is fatal neglect to comply with the express provision of the statute and such a tax list can not be cured by amendment under Section 10 of Chapter 5, R. S. 1930.

Cassidy v. *Aroostook Hotels, Inc.*, 341.

R. S. 1930, Chap. 14, Sec. 64, provides that "the Mayor and Treasurer of any city, the Selectmen of any town, and assessors of any plantation to which a tax is due may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable." Compliance with such statutory provision is a condition precedent to the maintenance of such action. *City of Eastport* v. *Jonah*, 428.

In construing statutes relating to assessment of taxes it must be borne in mind that taxation is the rule and exemption the exception, and that the intention to exempt property from taxation must be expressed in clear and unambiguous language. *Terminal Co.* v. *Assessors of Portland*, 434.

TOWNS.

TRESPASS.

The gist of the actions of trespass *de bonis* is an injury to the plaintiff's possession. To maintain the action, it is essential only that the plaintiff at the time of the alleged trespass should have had either actual or constructive possession or a right to immediate possession of the personalty.

Title to the land from which goods were taken is not necessarily in issue. A simple verdict of "not guilty" in such an action does not establish a finding upon the issue of soil and freehold nor determine the title to the locus.

Susi v. *Davis*, 308.

TROVER.

All fixtures, for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover can not be maintained for a refusal to give them up.

Simpson v. *Emery*, 213.

Trover is "an action on the case" within the meaning of R. S. 1930, Chap. 105, Sec. 3.

A conditional sale vendee, without tender of his overdue indebtedness, and without demand, may not maintain trover against his vendor, who, having lawfully repossessed the property after default, has without foreclosure sold it to a third party.

Such a sale does not of itself effect a conversion of the right to redeem, for, without impairment of the right of redemption, at least in some degree, no wrong is done to the conditional sale vendee.

Such a sale by the conditional sale vendor does not necessarily give the vendee the immediate right of possession nor work a conversion without either of which trover may not be maintained.

Following such a sale, the conditional sale vendee must tender his overdue indebtedness and demand restoration of the property in order to obtain the right of immediate possession necessary for maintenance of trover.

Harvey v. *Anacone*, 245.

TRUSTS.

When a testator lodges discretion in his trustees it must be exercised in good faith according to their best judgment and uninfluenced by improper motives. When so exercised their discretion is not reviewable.

Wight v. *Mason*, 52.

ULTRA VIRES.

UNDUE INFLUENCE.

VERDICTS.

WAIVER.

WAREHOUSEMEN.

WATER COMPANIES.

WATERS AND WATER COURSES.

WIDOW'S ALLOWANCE.

WILLS.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

WRITS.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF MAINE

STATUTES OF THE UNITED STATES

STATUTES OF MASSACHUSETTS

SPECIAL LAWS OF MAINE

STATUTES OF MAINE

REVISED STATUTES

ERRATA

Substitute *United Company and Fay & Scott* v. *Grinnell Canning Company* for *United Co.* v. *Fay & Scott,* top of pages 118, 119, 120, 121.

Substitute *Eddy* v. *Bangor Furniture Company and Casualty Co.* for *Furniture Co.* v. *Casualty Co.,* top of pages 168, 169, 170, 171, 172, 173, 174.

Substitute citation *Henderson* v. *Robbins,* 126 Me., 284 for citation *Henderson* v. *Robbins,* 125 Me., 284., on page 217.

Substitute R. S. 1841 for R. S. 1840, second line from bottom of page 247.

Substitute *Stearns, Trustee* v. *Thompson et als.* for *Stearns* v. *Kerr et als.,* top of pages 352, 353, 354, 355, 356, 357.