MAINE REPORTS

135

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

DECEMBER 3, 1936, TO JULY 30, 1938

WALTER M. TAPLEY JR.
REPORTER

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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

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. FRANZ U. BURKETT

REPORTER OF DECISIONS

WALTER M. TAPLEY JR.

TABLE OF CASES REPORTED

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

BENJAMIN S. STERN *vs.* THOMAS F. SULLIVAN.

York. Opinion, December 3, 1936.

ABUSE OF PROCESS. FALSE IMPRISONMENT.

Design of Chap. 124, *Sec.* 2, *R. S.* 1930, *is to prevent unreasonable detention of the person by arrest, when there are no good grounds for believing that an intention existed on the part of the debtor to withdraw himself and his property from the jurisdiction of the State.*

Process for arrest of debtor, who is about to leave the state, for the collection of debt, is a drastic remedy, and the oath must be, not only practically perfect in form, but it must be based on good faith.

On general motion for new trial by defendant. An action on the case for abuse of process. Trial was had at the May Term, 1936, of the Superior Court for the County of York. The jury rendered a verdict for the plaintiff in the sum of $150. A general motion for a new trial was thereupon filed by defendant. Motion overruled. The case fully appears in the opinion.

Armstrong & Spill, for plaintiff.

Daniel F. Armstrong,

Hilary F. Mahaney, for defendant.

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

MANSER, J. On motion. Case for damages arising out of alleged abuse of process. Verdict was for the plaintiff in the sum of $150. Sullivan sued Stern in assumpsit upon an account annexed amounting to $200 and made the affidavit required by R. S., Chap. 124, Sec. 2, to authorize his arrest on mesne process. After the general provision that no person shall be arrested on mesne process in a suit on contract, the exception to this prohibition provided for in Sec. 2 reads as follows:

> "Any person, whether a resident of the state or not, may be arrested and held to bail, or committed to prison on mesne process on a contract express or implied, if the sum demanded amounts to ten dollars, or on a judgment on contract, if the debt originally recovered and remaining due is ten dollars or more, exclusive of interest, when he is about to depart and reside beyond the limits of the state, with property or means of his own exceeding the amount required for his immediate support, if the creditor, his agent or attorney makes oath before a justice of the peace, to be certified by such justice on said process, that he has reason to believe and does believe that such debtor is about so to depart, reside, and take with him property or means as aforesaid, and that the demand, or principal part thereof, amounting to at least ten dollars, is due to him."

For more than a hundred years, since the statute of 1835, Chap. 195 for the relief of poor debtors, the law has prohibited the arrest of a debtor on a writ declaring on a contract except in accordance with the provisions now found in the statute above cited. Soon after the passage of the original act, the Court in *Whiting* v. *Trafton*, 16 Me., 398 construed it as follows:

> "The design of this statute was not only to afford prima facie evidence that a debt was due to the plaintiff from the defendant, but also to prevent unreasonable detentions of the person by arrest, when there were no good grounds for believing that an intention existed on the part of the debtor, to withdraw himself and his property from the jurisdiction of the State, by establishing his residence beyond its limits. It certainly did not mean to give encouragement to capricious ar-

rests, when a person was preparing for a mere journey for a short time, with the intention of returning and maintaining his residence in the state, and to be amenable to the first execution, when it should be recovered against him . . . . It is a measure against the liberty of the citizen. And the preparatory steps must contain a full and clear compliance with the preliminary requirements of the statute."

Again in *Dunsmore* v. *Pratt*, 116 Me., 22, 99 A., 717, 718, the Court said:

"The process is a drastic remedy for the collection of debt, and the oath must be not only practically perfect in form, but it must be based on good faith. Creditors, their agents and attorneys, solemnly swear that they believe and have reason to believe the truth of all statements required by the statute. Such belief should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved by self-interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath."

The facts show that the writ in the original case was issued and placed in the hands of an officer on January 29, 1936. Both creditor and officer learned that Stern was then out of town, probably in Portsmouth, N. H. The officer held the writ for three days when Stern was arrested, not on the eve of his departure but upon his return to Biddeford, the city of his residence. The evidence fails to show any overt act on the part of Stern indicating that he was about to depart and reside outside the state. His office, in the same building with that of the creditor, remained in its usual condition. His home was undisturbed. The members then constituting his family were still in Biddeford, his wife at home, one daughter at work in a local factory and a son recently graduated from high school and not yet employed.

The present defendant must rely for justification in causing the arrest of Stern upon statements attributed to the latter concerning his intentions. Such statements were denied. As reported by witnesses for the present defendant, they were coupled with announcements that Stern intended to engage in business in new territory.

The record contains credible evidence from which the jury might have concluded that the inferences drawn by the creditor were not warranted or that the statements themselves were not made.

Again, it is essential not only that the creditor should have reason to believe and did believe that the debtor was about to depart and reside beyond the limits of the state, but also that he was to take with him property or means exceeding the amount required for his immediate support. This second element lacks any substantial support in the record. The creditor knew that the debtor was having a hard time to make a living; that he had no apparent means except what he had been able to earn as a window washer and janitor. He had recently taken the agency for the sale of automobile trade books which required that he make transient trips to other places, some within and some without the state. Aside from a few dollars for living expenses, the only property or means which the debtor took consisted of a bundle of books which he had for sale and which were not shown to be his own property.

The present defendant also contends that he should not be held responsible for the act of the deputy sheriff in making the arrest because the deputy did not obey his instructions. His complaint is, that the officer conferred with the attorney for the debtor, ascertained when he would return, arranged to make the arrest in the office of the attorney and provided an opportunity for the debtor to furnish bail. This, the present defendant terms collusion between the deputy and the plaintiff's attorney. It appears, however, that if there were any departure from instructions on the part of the deputy sheriff, his actions as to the arrest were not as drastic as the creditor desired. The jury would be warranted in finding that he directed the deputy to arrest the plaintiff without notice and take him to Alfred jail.

The defendant, in his brief, asserted that there was error prejudicial to his rights, by reason of certain comments and expressions during the course of the trial by the presiding Justice. No exceptions were taken and the defendant can not now complain. It may be noted, however, that an examination of the record shows only a proper supervision and direction by the presiding Justice as to the scope of inquiry and the admissibility of evidence.

The principles pertinent to abuse of process have been carefully

defined and elaborated by our court in *Saliem* v. *Glovsky et al.*, 132 Me., 402, 172 A., 4; *Lambert* v. *Breton*, 127 Me., 510, 144 A., 864, and the authorities therein reviewed. A restatement is unnecessary. Judged by the rules so well established, the defendant fails to show that the verdict was against either the law or the evidence.

The defendant complains that the damages awarded were excessive. The plaintiff had been a resident of Biddeford for sixteen years, had represented the city in the legislature for several terms, and might well be considered as in reputable standing in the community. He was in custody for an hour. He was obliged to obtain the sureties on his bail bond. Humiliation and mental distress are difficult to measure in money. The jury is ordinarily better qualified than the court to make the assessment in a given case. Applying the well-known rules as to damages, the Court can not say that the amount awarded was excessive.

Motion overruled.

STATE OF MAINE *vs.* SANDY KING.

Aroostook. Opinion, December 7, 1936.

CARRIERS. CONSTITUTIONAL LAW. POLICE POWER. P. L. 1935, CHAP. 146.

The right of a state in the exercise of its police power to prescribe uniform regulations necessary for public safety and order in respect to the operation of motor vehicles on its highways has been repeatedly recognized and sustained.

Reasonable classification in the selection of subjects for legislation is always permissible to the law-making power, and only when such classification is arbitrary or irrational does it come in conflict with the Constitution.

The state legislature has the power to regulate the business of the contract carrier, so far as he makes use of the state's public highways, without violating the due process and equal protection provisions of the State and Federal Constitutions, providing the regulatory statute is not arbitrarily discriminatory.

The principle that the State has a broad discretion in classification, is constantly recognized.

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute, or by its improper execution through duly constituted agents.

The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, and a state may classify the objects of legislation so long as its attempted classification is not clearly arbitrary and unreasonable.

The Fourteenth Amendment does not prevent reasonable classification as long as all within a class are treated alike, and is only operative when the restrictions imposed are unjustly arbitrary and discriminatory.

In order for one to show a state statute to be in violation of the Federal Constitution he must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.

In the case at bar, the Court holds, in so far as it has been attacked by the respondent, that P. L. 1933, Chap. 259, Secs. 2 and 5, as amended by P. L. 1935, Chap. 146, relating particularly to contract carriers, is constitutional.

On report. Respondent was indicted by the Grand Jury for the County of Aroostook, Superior Court, April Term, 1936, for violation of Sec. 5, Chap. 259 of the P. L. of 1933, as amended by Chap. 146 of the P. L. of 1935. The issue concerned the constitutionality of Sec. 5 of the above mentioned statute relative to the operation by a contract carrier of a motor vehicle for the transportation of property for hire on any public highway within the state, without having obtained a permit. Case remanded. Respondent to stand for trial. Case fully appears in the opinion.

George B. Barnes, County Attorney for State.

John O. Rogers, for defendant.

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

HUDSON, J. On report. The respondent stands indicted by the Grand Jury of Aroostook County for violation of Sec. 5, Chap. 259, P. L. 1933, as amended by Chap. 146, P. L. 1935; the chapter entitled "An Act Relative to Regulation of the Use of the Highways by Motor Vehicles Transporting Property for Hire." By

agreement, if this Court declares that "prosecution can be maintained, the case is to be remanded for disposition in accordance with the statute."

This chapter divides such users of the highways into two classes; first, *common carriers* "over regular routes between points within this state" (See Sec. 2), (in Sec. 6 special provision is made as to interstate carriers); and, second, *contract carriers*, defining them to be "all persons, firms or corporations operating, or causing the operation of, motor vehicles transporting freight or merchandise for hire upon the public highways, other than common carriers over regular routes; except that the term shall not be construed to include any person, firm or corporation regularly engaged in the transporation business but who on occasional trips transports the property of others for hire." (See Sec. 5.)

In Sec. 5, sub-division (A), it is provided:

> "No contract carrier shall operate, or cause to be operated, any motor vehicle or vehicles for the transportation of property for hire on any public highway within this state without having obtained a permit from the commission."

The respondent did not have the required permit. It is admitted that he is a contract carrier and in that capacity operated his leased truck on the public highways leading from Houlton to Patten (conveying cream from his collecting station in Houlton to the creamery in Patten). On these facts, the State contends he is guilty.

Guilt is denied by the respondent on the ground that the statute, so far as it concerns contract carriers, violates both State and Federal Constitutions in depriving him of "due process of law" and "equal protection of the laws."

As it relates to common carriers, this chapter has recently been passed upon by this Court. As to them, *In Re John M. Stanley, Exceptant*, 133 Me., 91, 174 A., 93, 95, holds it constitutional. This decision was affirmed by the United States Supreme Court, 295 U. S., 76, 55 S. Ct., 79 L. Ed., 1311. Now we are to pass upon its contract carrier provisions.

As to due process and equal protection, the respondent seeks cover under Article 1, Sec. 1 of the Maine Constitution, which provides:

> "All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.",

and the Fourteenth Amendment to the Federal Constitution, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

He challenges this statute as an unconstitutional deprivation of his right to conduct his business as a contract carrier. At the outset, it is to be noted that the respondent's business is not conducted only with his own property. A very big and essential part of it is in the use of the public highways, to which he has no special right but only that of the public at large.

In holding constitutional an ordinance of the Town of Eden, closing certain public streets to the use of automobiles, Justice King in *State* v. *Mayo*, 106 Me., 62, 75 A., 295, 297, said:

> "But the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority—the State, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the State, called its police power, be used. By the exercise of that power, through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, or even prevented, if manifestly necessary to develop the resources of the State, improve its industrial conditions, and secure and advance the safety, comfort and prosperity of its people. And it is fundamental law that no constitutional guaranty is violated by such an exercise of the police power of the State when manifestly necessary and tending to secure such general and public benefits." Also see *State* v. *Phillips*, 107 Me., 249, 78 A., 283.

In *State* v. *Robb, Appellant*, 100 Me., 180, 60 A., 874, 876, this Court said:

> "The constitutional guaranties that no person shall be deprived of life, liberty or property, without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws were not intended to limit the subjects upon which the police power of a state may lawfully be exerted."

Quoted therein with approval is this language from the *Slaughter House Cases*, 16 Wall., 36, 21 L. Ed., 394, viz:

> "The citizen owns his property absolutely, it is true; it can not be taken from him for any private use whatever, without his consent, nor for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally."

In *State* v. *Latham*, 115 Me., 176, 98 A., 578, Chief Justice Savage stated:

> ". . . that the Fourteenth Amendment was not designed to interfere with the proper exercise of the police power by the State was held in *Barbier* v. *Connolly*, 113 U. S., 26, and the doctrine has been reaffirmed since in many cases, both in the Federal and in the State Courts. It is settled doctrine, *State* v. *Montgomery*, 94 Me., 192; *State* v. *Mitchell*, 97 Me., 66; *State* v. *Leavitt*, 105 Me., 76."

In *Maine Motor Coaches, Inc., Petitioner* v. *Public Utilities Commission*, 125 Me., 63, 130 A., 866, 867, Chief Justice Wilson said:

> "In view of the well recognized control over highways by the legislature and of the public moneys spent in building permanent thoroughfares throughout the State and the possible menace to public safety and the rapid destruction of the roadbed by the operation of heavy, high-powered motor busses over them, the authority of the Legislature to prohibit the use of the public ways for such purposes cannot be doubted."

This case is cited with approval in Justice Sutherland's opinion in *Stephenson* v. *Binford*, 287 U. S., 251, 264, 53 S. Ct., 181, 184, 77 L. Ed., 288.

In *York Harbor Village Corporation* v. *Libby et al.*, 126 Me., 537, 140 A., 382, 385 (it was claimed that a village zoning ordinance interfered with the constitutional right to conduct private business), Justice Deasy said:

> "It" (meaning the police power) "is not the offspring of constitutions. It is older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved 'to the states respectively or to the people.' Limitations expressed or necessarily implied in the Federal Constitution are the frontiers which the Police Power cannot pass. Within those frontiers its authority is recognized and respected by the constitution and given effect by all courts. We have seen that private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare. Under the police power statutes and authorized ordinances give this condition practical effect by restrictions which regulate or prohibit such uses. If the use is actually and substantially an injury or impairment of the public interest in any of its aspects above enumerated a regulating or restraining statute or ordinance conforming thereto, if itself reasonable and not merely arbitrary, and not violative of any constitutional limitation, is valid."

In *State of Maine* v. *Chandler*, 131 Me., 262, 161 A., 148, Justice Sturgis said:

> "The right of a state in the exercise of its police power to prescribe uniform regulations necessary for public safety and order in respect to the operation of motor vehicles on its highways has been repeatedly recognized and sustained."

In *State of Maine* v. *Old Tavern Farm, Inc.*, 133 Me., 468, 180 A., 473, 475, Justice Dunn stated:

> "The Fourteenth Amendment was not designed to interfere with due exercise of the police power by the State."

And in the *Stanley Case*, supra,

"The exceptant (a common carrier) had no vested right to use the highways and other roads to carry freight for hire."

A fortiori is it true of a contract carrier, for his service is private, not public.

This also from the recent *Stanley Case*, supra:

"The streets belong to the public, and are primarily for use in the ordinary way. No one has any inherent right to use such thoroughfares as a place of business."

The Massachusetts Court in an advisory opinion, 251 Mass., on page 595, 147 N. E., 681, 693, has stated:

"The power of the General Court to regulate travel over the public ways of the Commonwealth for the general welfare is extensive. It may be exercised in any reasonable manner to conserve the safety of travellers. No one has a right to use streets and other public places as he chooses without regard to the presence of others. It is an underlying conception of streets and highways that they shall at all times be reasonably safe and convenient for public travel and that travellers thereon in the exercise of due care may be secure from preventable danger. Numerous statutes to that end have been enacted from early times to the present. All highways now are laid out and established by public authority. . . . The Commonwealth is the sovereign power and the proprietor may do with its own as the General Court may direct, provided its action can be said to be in the public interest and not violative of constitutional guaranties. . . . Reasonable classification in the selection of subjects for legislation is always permissible to a law making power. It is only when such classification is arbitrary or irrational that it comes in conflict with the constitution."

In *Morris et al.* v. *Duby et al.*, 274 U. S., 135, on page 143, 47 S. Ct., 548, 550, 71 L. Ed., 966, the court said:

"In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its

highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. *Hendrick* v. *Maryland*, 235 U. S., 610, 622 et seq.; *Kane* v. *New Jersey*, 242 U. S., 160, 167. Of course the State may not discriminate against interstate commerce. *Buck* v. *Kuykendall*, 267 U. S., 307."

And quoted, with approval, this from the last named case:

"With the increase in number and size of the vehicles used upon the highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles — particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject."

In *Hodge Drive-It-Yourself Co.* v. *City of Cincinnati*, 284 U. S., 335, 52 S. Ct., 144, 145, 76 L. Ed., 323, decided January 4, 1932, the Supreme Court said, on page 337:

"The State has power for the safety of the public to regulate the use of its public highways. *Hendrick* v. *Maryland*, 235 U. S., 610, 622. *Kane* v. *New Jersey*, 242 U. S., 160, 167. *Sprout* v. *South Bend*, 277 U. S., 163, 168. It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business. . . .

"This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain.

"A state ought never to be presumed to surrender this power" (its control over public highways), "because, like the taxing power, the whole community have an interest in preserving it undiminished; . . ." See Honnold on Supreme Court Law, Vol. 2 on page 1191, and cases therein cited.

A still later decision by the Supreme Court, on December 5, 1932, binding us but pleasingly in accord with the general principles enunciated in the Maine cases above mentioned, answers the question

whether the state legislature has the power to regulate the business of the contract carrier, so far as he makes use of the state's public highways, without violation of the due process and equal protection provisions of State and Federal Constitutions and says that it does, providing the regulatory statute be not arbitrarily discriminatory. *Stephenson et al.* v. *Binford*, 287 U.S., 251, 53 S.Ct., 181, 186, 77 L. Ed., 288. In that case it is held that such regulation of the private contract carrier is a legitimate subject for the exercise of the state legislative police power; that in the exercise of it, the legislature may authorize its Public Service Commission to fix the minimum rates of private contract motor vehicle carriers operating in competition with common carriers, which shall not be less than the rates prescribed for common carriers for substantially the same service; that the use of the highways of the state for purposes of gain is special and extraordinary and may generally be prohibited or conditioned by the legislature as it sees fit; that where the end is one for which the legislative power may properly be exercised, the extent to which the provisions of a statute as means conduce to that end, the degree of their efficiency, and the closeness of their relation to the end sought to be attained are matters addressed to the judgment of the legislature and not to that of the courts; that it is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end; that as to freedom of contract, when the exercise of that freedom conflicts with the power and duty of the state to safeguard its property from injury and preserve it for those uses for which it was primarily designed, such freedom may be regulated and limited to the extent which reasonably may be necessary to carry the power and duty into effect; and that if one of the aims of legislation is valid, it is not rendered invalid by the circumstance that the legislature had other purposes in view, which, considered apart, it had no constitutional power to make effective.

As we understand that decision (private contract carriers were attempting to prove the unconstitutionality of the Texas statute relating to transportation by common and private carriers), such a statute, although it interferes with the conduct of the business of the contract carrier, is constitutional when its purpose is to regulate the use of the state highways for the general welfare of the

public, provided it does not effect any arbitrary discrimination. The court recognizes that a statute whose necessary effect would be to legislate a contract carrier into a common carrier would constitute undue process and so be unconstitutional. It does not overrule its former decisions in *Michigan Public Utilities Commission, Appellants* v. *Duke*, 266 U. S., 570, 45 S. Ct., 191, 69 L. Ed., 445; *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S., 583, 46 S. Ct., 605, 70 L. Ed., 1101; and in *Smith, Appellant* v. *Cahoon*, 283 U. S., 553, 51 S. Ct., 582, 75 L. Ed., 1264; but, adhering, distinguishes them. From its examination of the Texas statute it discovers no intention of its legislature to legislate the contract carrier into a common carrier, as we do not in our statute. Provisions as to each were independently made in the Texas statute. Although there they happened to be included in one statute, yet they were independent in operation and in effect. The court points out that the harm in non-separation of provisions is their uncertainty, and says:

> "The vice of the statute" (the Florida statute dealt with in *Smith* v. *Cahoon*, supra) "was that all carriers for hire, whether public or private, were put upon the same footing by explicit provisions which could not be severed so as to afford one valid scheme for common carriers and another for private carriers, with the result that until the separability of these provisions should be determined by competent authority, they were void for uncertainty. In the Texas statute no such uncertainty exists."

The Texas statute was held constitutional because as framed and enacted without arbitrary discrimination, it was a proper employment of the State's right under the police power to regulate the use of its highways and the court found it unnecessary to pass upon the question as to whether the contract carrier was engaged in a business impressed with a public interest.

A careful examination of our statute reveals that in most instances it provides independent regulation as to the use of the highways by common and contract carriers and when not, its provisions for each are definite and specific. While some of the independent

provisions are identical, appropriately and naturally so considering the end to be attained in the interests of the public, yet there is no uncertainty as to the regulatory scheme provided for the one and the other. As to similarity, or even identity of the provisions in the Texas statute, the court said:

> "It is true that the regulations imposed upon the two classes are in some instances similar if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier, may not also be appropriate to the business of a contract carrier."

That our statute was enacted genuinely in the interest of the safety and welfare of the public, we have no doubt. Declaring its policy, the legislature said in Sec. 1 of this Act:

> "The business of operating motor trucks for hire on the highways of this state affects the interests of the public. The rapid increase in the number of trucks so operated, and the fact that they are not effectively regulated, have increased the dangers and hazards on public highways, and make more effective regulation necessary to the end that highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the state may be adjusted and correlated so that public highways may serve the best interest of the general public."

While this declaration of policy and legislative intent is not necessarily conclusive, yet certainly such a statement by a coordinate branch of our state government is entitled to a high degree of respect and credence. There appears nothing in the record to the contrary. On this score we have already said in the *Stanley Case*, supra:

"Moreover, the regulatory statute was enacted to preserve the ways, to prevent menace to present traffic, and further the safety of travelers generally."

As in *Stephenson* v. *Binford*, supra, it was held that the statute therein considered did not violate due process, applying its principles, we hold that our statute is constitutional in that regard.

There remains to be considered whether our statute effects unequal protection of the laws. Has the legislature acted arbitrarily so as to accord favoritism in the application and operation of the statute? If so, the law can not stand against the Fourteenth Amendment.

Classifications must not be arbitrary, unreasonable and unjust (*In Re John M. Stanley, Exceptant*, supra), but:

"When the classification made by the Legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. . . . The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court." *Borden's Farm Products Co. Inc.* v. *Baldwin, Comm.*, 293, U. S., 194, 209, 210, 55 S. Ct., 187, 191, 192, 79 L. Ed., 281, 288, 289.

The following rulings by the Supreme Court have pertinency:

"The equal protection clause is directed only against arbitrary discrimination; that is, such as is without any reasonable basis." *City and County of Denver et al.* v. *New York Trust Co. et al.*, 229 U. S., 123, 33 S. Ct., 657, 666, 57 L. Ed., 1101, 1124.

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday*

Lake Iron Co. v. *Township of Wakefield*, 247 U. S., 350, 352, 38 S. Ct., 495.

"The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind." *Soon Hing* v. *Crowley*, 113 U. S., 703, 5 S. Ct., 730, 733.

"A legislative classification may rest on narrow distinctions." *German Alliance Insurance Co. Appellant.* v. *Ike Lewis*, 233 U. S., 389, 34 S. Ct., 612, 621, 58 L. Ed., 1011, 1024.

"Class legislation, discriminating against some and favoring others, is prohibited. But legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connolly*, 113 U. S., 27, 5 S. Ct., 357, 360, 28 L. Ed., 923.

"The burden being upon him who attacks a law for unconstitutionality, the Courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism." *Middleton* v. *Texas Power & Light Co.*, 249 U. S., 152, 39 S. Ct., 227, 229, 63 L. Ed., 527.

"We said in that case" (*Magoun* v. *Illinois Trust & Savings Company*, 170 U. S., 283, 18 S. Ct., 594, 42 L. Ed., 1037) "that 'the State may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." *Orient Ins. Co.* v. *Daggs*, 172 U. S., 557, 19 S. Ct., 281, 43 L. Ed., 552.

"The practical convenience of such a classification is not to be disregarded in the interest of a purely theoretical or scientific uniformity." *Continental Baking Co.* v. *Woodring*, 286 U. S., 352, 52 S. Ct., 595, 601, 76 L. Ed., 1155.

"The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is

founded upon a reasonable distinction. . . . Or if any state of facts reasonably can be conceived to sustain it. . . . 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'" *State Board of Tax Comissioners* v. *Jackson*, 283 U. S., 527, 537, 51 S. Ct., 540, 543, 75 L. Ed., 1248.

Our Court has held:

"A State may classify the objects of legislation so long as its attempted classification is not clearly arbitrary and unreasonable." *Dirken* v. *Great Northern Paper Co.*, 110 Me., 374, 386, 86 A., 320, 326.

"It" (meaning the Fourteenth Amendment) "forbids what is called class legislation. . . . In a word, discrimination as to legal rights and duties is forbidden. All men under the same conditions have the same rights. Diversity in legislation to meet diversities in conditions is permissible but if in legislative regulations for different localities, classes and conditions are made to differ, in order to be valid, those differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification of such matters is forbidden by the constitution. If there be no real difference between the localities, or business, or occupation, or property, the State can not make one in order to favor some persons over others." *State of Maine* v. *Latham*, 115 Me., 176, 98 A., 578, 579.

"'A state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature intends to prevent, the 14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law.'" *State of Maine* v. *Dodge*, 117 Me., 269, 104 A., 5, 7.

"A classification must not be arbitrary. It must be natural and reasonable. . . . It must be based upon an actual difference

in the classes bearing some substantial relation to the public purpose sought to be accomplished by the discrimination in rights and burdens. . . . If a classification, though necessarily discriminatory, stands these tests, it is not a denial of equal protection of the laws." *York Harbor Village Corporation* v. *Libby et al.*, 126 Me., 537, 104 A., 382, 387.

"One of the essential requirements" of constitutional guaranty as to equal protection of the law "is that it must be natural and not capricious and arbitrary." *In Re Milo Water Company*, 128 Me., 531, 149 A., 299, 302.

"The Fourteenth Amendment does not prevent reasonable classification as long as all within a class are treated alike. The liberty guaranteed is not freedom from all restraints, but from restrictions which are without reasonable relation to a proper purpose, and are unjustly arbitrary and discriminatory." *State of Maine* v. *Old Tavern Farm, Inc.*, 133 Me., 468, 180 A., 473, 475.

The Fourteenth Amendment "does not prevent reasonable classification as long as all within a class are treated alike. . . . It does prohibit arbitrary discrimination between persons, or fixed classes of persons, such as that based on State citizenship." *State* v. *Cohen*, 133 Me., 293, 300, 177 A., 403, 407.

"The Fourteenth Amendment does . . . forbid unjust discrimination between persons, or fixed classes of persons, but not proper discrimination based on the requirement of the commonweal." *In Re Stanley*, 133 Me., 91, 174 A., 93, 97.

We now consider the respondent's detailed attack upon the constitutionality of this statute. It must be borne in mind that discrimination alone is not sufficient to render the Act unconstitutional under the Fourteenth Amendment. In order thus to void it, its provisions must either bear no actual relation between the means and the end considering the purpose of the Act or create a discrimination, unwarranted by actual differences, so that the statute is purely arbitrary and effects legislation which unreasonably and without proper distinction favors some persons or classes over others in like circumstances. Either such lack of relationship or the presence of arbitrariness spells unconstitutionality. To prevent law-

made favoritism and to supply full measure of evenly apportioned liberty to the people of this nation was the purpose of this amendment (adopted following the Civil War), as well as to place the slaves lately freed on a parity with any person within its jurisdiction.

We shall consider only the objections raised by the respondent, for, as has been held in a case hereinbefore cited, the Court need not ingeniously exert itself to discover reasons to justify it in wrecking legislation.

1. *Exemption of one hauling his own goods:* The statute provides:

> "Nothing in this act contained shall apply to persons, firms or corporations operating motor vehicles carrying property of which they are the actual and bona fide owners." Sec. 10 (A), Chap. 146, P. L. 1935.

Within the class created, that is, those hauling for themselves, it is not claimed there is any discrimination. They all fare alike. But it is contended that the statute works a discrimination against those hauling for others. Yes, but it is not arbitrary. As we view it, it is founded on actual differences. In *Stephenson* v. *Binford*, supra, the Supreme Court said:

> "Nor do we find merit in the further contention that the act arbitrarily discriminates against appellants because it does not apply to persons, commonly known as 'shipper-owners,' who are transporting their own commodities under substantially similar conditions."

In the earlier case of *Continental Baking Company* v. *Woodring*, supra, Chief Justice Hughes, speaking of a similar exemption in the Kansas Motor Vehicle Act of 1931, said:

> "The exemption runs only to one who is carrying his own live stock and farm products to market or supplies for his own use in his own motor vehicle."

And in sustaining the exemption, said:

> "The Legislature in making its classification was entitled to consider frequency and character of use and to adapt its regu-

lations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making the regulation imperative and created the necessity for the imposition of a tax for maintenance and reconstruction."

Also the court quoted with approval from the decision of the District Court in the same case (see 55 F. [2d] at page 352):

"The Legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all motor vehicles." (Also see *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S., 285, 55 S. Ct., 709, 79 L. Ed., 1439.) On the authority of those decisions, we hold this exemption valid.

2-a. *Exemption as to fresh fruits and vegetables:* The statute exempts motor vehicles "while engaged exclusively in the transportation of fresh fruits and vegetables from farms to canneries during the canning or packing season." This likewise we do not consider arbitrary.

In *Aero Mayflower Transit Company* v. *Georgia Public Service Commission et al.*, supra, decided April 29, 1934, the Supreme Court, with an opinion by Mr. Justice Cardozo, upheld an exemption in the Georgia statute of "the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle." It distinguished the case it had in hand from *Smith* v. *Cahoon*, supra, dealing with the Florida statute and on which case this respondent so strongly relies, by pointing out that the Florida statute "gave relief from its exactions to *any transportation company* engaged exclusively in the carriage of agricultural, horticultural, dairy or farm products, *whether for the producer or for anyone else.*"

Our statute, as the Florida statute, gives an exemption to motor vehicles engaged exclusively in the transportation of commodities named, regardless of ownership, and so, it is true, differs from the Georgia statute and may be said, so far, to be controlled by *Smith* v. *Cahoon*, supra; but there are other distinctions that take it out

from such control, we think, for the Maine statute exempts transportation only of fresh fruits and vegetables from farms to canneries during the canning or packing season, while the exemption in the Florida statute had not these limitations.

> "The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough." *Alward* v. *Johnson*, 282 U. S., 509, 513, 514, 51 S. Ct., 273, 274, 75 L. Ed., 496. Also see *Hicklin et al., Appellants* v. *Coney et al.*, 290 U. S., 169, 54 S. Ct., 142, 78 L. Ed., 247; *Aero Transit Company* v. *Georgia Commission*, supra, on page 292, and *Schwartzman Service Co.* v. *Stahl et al.*, 60 Fed. (2d), 1034.

Thus we perceive two actual differences, disproving the claim of arbitrariness; first, the haulings (only during the canning or packing season) are occasional and infrequent, not regular and constant, and so are less burdensome to the public highways; and, second, limitation of the exempted commodities to fresh fruits and vegetables. It is common knowledge that the post-harvest period in Maine for transportation of these commodities from the farms to the canneries is of exceedingly short duration, due to early frosts and road conditions. The legislature may well have thought — it certainly is easily conceivable — that it would be impossible for this transportation to be effected by either common or contract carriers, or by both. Without question, the canning should be as quickly done as possible, not only to preserve freshness but to avoid possibility of infection by delay. This particular kind of transportation, then, it may be said, is truly *sui generis* and reasonably distinctive from general transportation.

The fact that the exemption does not include every sort of a perishable farm product does not necessarily make it arbitrary. The statute creates a class of transporters of fresh fruits and vegetables and all within that class are treated alike

> "There is no constitutional requirement that regulation must reach every class to which it might be applied — that the legislature must regulate all or none. *Silver* v. *Silver*, 280 U. S., 117, 123, 74 L. Ed., 221, 225, 65 A. L. R., 939, 50 S. Ct.,

57. The State is not bound to cover the whole field of possible abuses. *Patsone* v. *Pennsylvania*, 232 U. S., 138, 144, 58 L. Ed., 539, 543, 34 S. Ct., 281. The question is whether the classification adopted lacks a rational basis." *Sproles et al.* v. *Binford*, 286 U. S., 374, 52 S. Ct., 581, 588, 76 L. Ed., 1167, 1183.

We hold that this classification of transporters of perishable fruits and vegetables with a limitation to seasonal haulings is natural and does not lack a rational basis. Furthermore, while it does not embrace every perishable farm commodity, as butter, eggs and milk, which come not directly from the soil, it does practically include all perishable farm products that are raised on farm lands.

2-b *Transportation of newspapers*: The statute provides "this act shall not apply to the transportation of newspapers." We do not consider this solely an arbitrary exemption. It is well defended in these words of the State's attorney:

> "In this day and age the speedy dissemination of news is a matter which vitally concerns the general welfare of society. Moreover, the transportation of newspapers is not such as to wear greatly on the highways. It seems to fall, naturally, into a class by itself in the whole transportation of property scheme and the exemption is neither arbitrary nor unreasonable."

The non-inclusion of books and magazines is justified by readily conceivable distinctions. The newspaper, with its up-to-the-last-minute news, its legal notices, reports financial and weather, including forecasts, and much other information essential to present-day life, it probably is true, has no substitute in the dissemination of like reading matter possible of transportation. An exemption that permits its unlicensed conveyance by motor vehicles to every nook and corner in the state, in many instances to places not served by common, nor even by contract, carriers, is warranted. Newspapers may be separately classified without favor, for the peculiar character of the business of the newspaper publisher, the speed and frequency with which the transportation of newspapers should take place, the purposes newspapers serve and the resulting benefits to the people generally, sufficiently indicate non-similarity to the busi-

ness of publishing books and magazines, however beneficial and essential they may be regarded. It was not necessary for the legislature to regulate the transportation on the highways of all published matter or none, so long as the classification relating solely to newspapers did not lack a rational basis.

We have discussed this objection (perhaps should not), in spite of the fact that we do not see how the respondent is injured by the claimed discrimination between newspaper and other publishers, for he is neither.

> ". . . One who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averment and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution." *Standard Stock Food Company, Appellant* v. *Wright as State Food & Dairy Commissioner of Iowa*, 225 U. S., 540, 32 S. Ct., 784, 786, 56 L. Ed., 1197, 1201; *Southern Railway Co., Petitioner* v. *King*, 217 U. S., 524, 534, 30 S. Ct., 594, 54 L. Ed., 868, 871; Honnold on Supreme Court Law, Vol. 3, Page 1826, and cases cited therein.

3. *Rate exemptions*: The statute provides "there shall be exempted from the foregoing provisions as to rate regulation the transportation by motor vehicle of property . . . (3) when consisting of logs, wood or lumber moving to mills for manufacture." Chap. 146, P. L. 1935, Sec., 10 (B). It is to be noted that this does not exempt motor vehicles transporting logs, wood or lumber to mills for manufacturing from the general operation of the statute but simply relieves such transporters from the provisions as to rate regulation.

Did the legislature have the right to single out the transportation by motor vehicle of logs, wood, and lumber moving to mills for manufacture and relieve it from rate regulation by the Commission? We think it did, because we can see that that particular kind of transportation presents real differences from common carrier and other kinds of transportation, as in equipment used, the seasonal or irregular and non-constant haulings, and the apparent

inaptitude of that kind of transportation to rate regulation. These distinctions the legislature might well have had in mind. As Chief Justice Savage said, in *State* v. *Latham*, supra, "diversity in legislation to meet diversities in conditions is permissible." Also see *State ex rel Coney et al.* v. *Hicklin*, 167 S. E., 674 (S. C.), and *Stephenson* v. *Binford*, supra. The last named cases upheld an exemption for the transportation of logs and lumber from the forest to the shipping points. It would seem that if the transportation itself could be exempted without offending the Fourteenth Amendment, that the provision affording relief from rate regulation would also be reasonable and not indicate an arbitrary distinction.

It being urged that Chap. 258, P. L. 1909, entitled "An Act Relating to the Employment of Labor" was repugnant to the Fourteenth Amendment, as well as to our State Constitution, this Court in *Dirken* v. *Great Northern Paper Company*, supra, considered the business of cutting, hauling and driving logs in comparison with the pulp and paper business and held the statute constitutional because of diverse and distinctive conditions in their conduct.

4. *Exemption depending on the origin or terminus of the cargo:* Sec. 10 (A), Sub-division (1) of said Chap. 146 exempts motor vehicles "while being used within the limits of a single city or town in which the vehicle is registered by the Secretary of State or in which the owner maintains a regular and established place of business or within fifteen miles by highway in this state of the point in such single city or town where the property is received or delivered, but no person, firm or corporation may operate, or cause to be operated, any motor vehicle for the transportation of property for hire beyond such limits without a certificate of public convenience and necessity or a permit to operate as a contract carrier; nor may any such person, firm or corporation participate in the transportation of property originating or terminating beyond such limits without holding such a certificate or permit unless such property is delivered to or received from a carrier over the highways operating under a certificate or permit issued by the Commission or a steam or electric railway, railway express or water common carrier, . . ."

The validity of exemptions, first while operating wholly within a city or village, and, second, of private motor carriers operating within a radius of twenty-five miles beyond the corporate limits of

a city or village, has been passed upon and declared in *Continental Baking Company* v. *Woodring*, supra. With reference to the city or village exemption, Chief Justice Hughes, in the opinion in that case, said that it,

> ". . . has an obviously reasonable basis, as such operations are subject to local regulations. In protecting its highway system the State was at liberty to leave its local communities unembarrassed, and was not bound either to override their regulations or to impose burdensome additions."

Having discussed the distinctions as to the radius or zone, the town's "penumbra," the Chief Justice continued:

> "We think that the legislature could properly take these distinctions into account and that there was a reasonable basis for differentiation with respect to that class of operations. In this view, the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn. In exercising that discretion, the Legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in territory bordering on its various municipalities."

The exemption as to property delivered to or received by certain designated carriers remains to be considered. Apparently the statute divides them into two classes, those using the highways as licensed common or contract carriers and those not ordinarily using them, although common carriers, as the steam and electric railways, the railway express and water common carrier. As to the first class, it is easily conceivable that the legislature thought that merchandise received from or delivered to it had in reality one carriage and that inasmuch as part of the transportation was done by a licensed carrier, that there was ample justification for the exemption. It might have reasoned that there was a relationship between the licensed and unlicensed carrier, as it were of agency, and that

consequently if the principal were licensed, the agent need not be or vice versa.

As to the second class, the railways (steam and electric), the railway express and water common carrier, we think that application of the law as enunciated in *Sproles* v. *Binford*, supra, warrants a holding that such a provision does not constitute an arbitrary discrimination. In that case, the statute having definitely fixed the length of motor vehicles and the weight of their loads, permitted longer vehicles to be used and heavier loads to be transported between points of origin, or destination, and 'common carrier receiving or loading' or unloading, points." The court commented upon the fact found by the District Court that the exemption related to short hauls and then said:

> "But the legislature in making its classifications was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their extensive as well as constant use of the highways brought about the conditions making the regulations necessary."

That, too, might have been a reason entertained by the legislature in making this exemption in our statute.

In *Sproles* v. *Binford*, supra, it was argued that the effect was to favor railroad transportation over that by motor trucks, to which the court replied:

> "The state has a vital interest in the appropriate utilization of the railroads which serve its people as well as in the proper maintenance of its highways as safe and convenient facilities. The state provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It can not be said that the state is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. . . . We perceive no constitutional ground for denying to the state the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain. This is

not a case of a denial of the use of the highways to one class of citizens as opposed to another or of limitations having no appropriate relation to highway protection. It is not a case of an arbitrary discrimination between the products carried, as in the case of *Smith* v. *Cahoon.*"

Were the policy of the exemption debatable, we are not concerned with the wisdom of the legislature's decision upon it and, as said in *Stephenson* v. *Binford*, supra:

> If it "so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong. . . . Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment. *Sproles* v. *Binford*, 286 U. S., 374, 388, 389, 76 L. Ed., 1167, 1178, 1179."
>
> "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Rast* v. *Van Deman & Lewis Co.*, 240 U. S., 342, 36 S. Ct., 370, 374, 60 L. Ed., 679.

Here again we have discussed this objection — as others raised by the respondent — although we do not see how, as said in *Standard Stock Food Company, Appellant* v. *Wright as State Food & Dairy Commissioner of Iowa*, supra, "the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution."

We conclude that this statute, insofar as it has been attacked by this respondent, is constitutional. In accordance with the stipulation in the agreed statement of facts, we remand the case to the Trial Court for disposition in accordance with the statute.

Case remanded. Respondent to stand for trial.

BARTLETT FOLEY *vs.* H. F. FARNHAM COMPANY.

PATRICK MALLOY *vs.* H. F. FARNHAM COMPANY.

Cumberland. Opinion, December 8, 1936.

NEGLIGENCE. NUISANCE. TRESPASS.

Negligence and nuisance are frequently coexisting and inseparable.

Actionable negligence only exists when the party, whose negligence occasions the loss, owes a duty, arising from contract or otherwise, to the person sustaining the loss.

A public nuisance is anything wrongfully done, or permitted, which violates public rights, producing a common injury; when it injures that portion of the public that necessarily comes in contact with it.

A nuisance consists in a use of one's own property in such manner as to cause injury to the property, or other right, or interest of another.

In order that a trespasser may recover for an injury, he must do more than show negligence, he must show that a wanton or intentional injury was inflicted on him.

On report. An action on the case to recover damages for injuries sustained from sign falling from defendant's premises. Judgment for defendant. Case fully appears in the opinion.

Richard E. Harvey, for plaintiff.

William B. Mahoney, Theodore Gonya, for defendant.

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

DUNN, C. J. After the conclusion of the evidence, the Superior Court reported these cases, the parties consenting, for final decision, with regard both to facts and law, on such of the evidence as is legally admissible.

The actions are against the owner and occupier of a sash and blind factory, closely fronting a Portland street, to recover damages for personal injuries to two pedestrians, who, one becoming

wearied, approached from the street, and sat upon a doorsill of the building, where a falling sign hurt them.

The counts in the declaration in the writs predicate liability on the theory that the suffering by an individual, in distinction from the public generally, of special damage, from a public nuisance, gives him a private right of action, provided he has shown affirmatively all the other facts which are necessary to entitle him to recover. R. S., Chap. 26, Sec. 19; *Cole* v. *Sprowl*, 35 Me., 161; *Dickey* v. *Maine Telegraph Company*, 46 Me., 483; *Brown* v. *Watson*, 47 Me., 161; *Veazie* v. *Dwinel*, 50 Me., 479; *Gerrish* v. *Brown*, 51 Me., 256; *Davis* v. *Winslow*, 51 Me., 264; *Dudley* v. *Kennedy*, 63 Me., 465; *McPheters* v. *Log Driving Co.*, 78 Me., 329, 5 A., 270; *Holmes* v. *Corthell*, 80 Me., 31, 12 A., 730; *Davis* v. *Weymouth*, 80 Me., 307, 14 A., 199; *Lynn* v. *Hooper*, 93 Me., 46, 44 A., 127; *Smart* v. *Aroostook Lumber Co.*, 103 Me., 37, 68 A., 527; *Smith* v. *Preston*, 104 Me., 156, 71 A., 653; *Cobe* v. *Banton*, 106 Me., 418, 76 A., 907; *Mitchell* v. *Railroad*, 123 Me., 176, 122 A., 415; *Yates* v. *Tiffany*, 126 Me., 128, 136 A., 668. See, too, *Pennsylvania, etc., Co.* v. *Graham*, 63 Pa. St., 290.

The torts of negligence and nuisance may be, and frequently are, coexisting and practically inseparable. A thing may be lawful in itself, and yet become a nuisance through negligence in the maintenance or use of it. *McNulty* v. *Ludwig & Company*, 138 N. Y. S., 84.

Fault, in the sense the law employs the term, must have been proximately, which means directly, causative of harm. *Carl* v. *Young*, 103 Me., 100, 68 A., 593. "The very act . . . . is *per se* proof . . . . of negligence, sufficient to sustain the charge of nuisance." *State* v. *Portland*, 74 Me., 268, 272.

Actionable negligence exists only when the party, whose negligence occasions the loss, owes a duty, arising from contract or otherwise, to the person sustaining such loss. *Kahl* v. *Love*, 37 N. J. L., 5. Disregard, and nothing more, of a general duty to the public is not a sufficient basis for a suit by an individual for negligence. Co. Litt., 56; Willes, 74a; *Quincy Canal* v. *Newcomb*, 7 Met., 276, 283.

In order to maintain an action for injury from negligence, there must be shown to exist some obligation or duty from the person in-

flicting the injury, to the person on whom it was inflicted, and that such obligation or duty was violated by a want of ordinary care on the part of the defendant. *Sweeny* v. *Old Colony, etc., Company*, 10 Allen, 368. There can be no negligence unless there is a duty, which, through either commission or omission, has not been observed. *Boardman* v. *Creighton*, 95 Me., 154, 49 A., 663.

A public nuisance, on the other hand, may be said to be anything wrongfully done, or permitted, which violates public rights, and produces a common injury; when it injures that portion of the public that necessarily comes in contact with it. 20 R. C. L., 383.

Nuisance is a violation of an absolute duty; negligence, a failure to use the requisite degree of care in the particular circumstances. *Herman* v. *Buffalo*, 214 N. Y., 316, 108 N. E., 451. Whenever an absolute duty is imposed, the question ceases to be one of negligence. *Pennsylvania, etc., Co.* v. *Graham*, supra.

A nuisance, in many if not in most, instances, especially with respect to buildings or premises, presupposes negligence. *Uggla* v. *Brokaw*, 102 N. Y. S., 857, 862.

The maintenance on private property of a dangerous menace to public travel, is a nuisance; and when the danger is of such character as ought to awaken in a prudent owner a reasonable foresight of hurt to highway travelers, the duty to take care is undeniable. *Ruocco* v. *United Advertising Corporation*, 98 Conn., 241, 119 A., 48.

"A nuisance . . . consists in a use of one's own property in such a manner as to cause injury to the property, or other right, or interest of another." *Norcross* v. *Thoms*, 51 Me., 503.

If the sign was a nuisance, it was so because it endangered the public use of the way. *Staples* v. *Dickson*, 88 Me., 362, 34 A., 168. The hurt to plaintiffs must come, *qua* nuisance, to give a cause of action. *Jackson* v. *Castle*, 80 Me., 119, 13 A., 49; *Whitmore* v. *Brown*, 102 Me., 47, 58, 65 A., 516. Their hurt must be different in kind as well as degree from that suffered by others. *Franklin Wharf* v. *Portland*, 67 Me., 46; *Taylor* v. *Railway*, 91 Me., 193, 39 A., 560; *Whitmore* v. *Brown*, supra.

There is little, if any, dispute in the evidence reported.

The building, built in 1912, was a wooden one, the walls covered with galvanized iron; it had always been tenanted by defendant.

The sign, twenty-one feet long, as many inches wide, of beveled edge, proclaiming defendant's name, was, at the completion of the building, put up by a sign maker; he removed it several times, for the purpose of repainting, the latest occasion five years or more before it fell.

Meantime, security of the sign, flat against the building, had not been a matter of attention; however, nothing appears to have indicated, before the sign fell, that it was unstable.

The sign was fastened, thirteen feet from the ground, over double doors six feet wide, styled by a witness (to differentiate from other doors, one marked "office") the "shipping door," in the center of the front of the building, by pieces of iron; one end of each iron was turned to form a "hook" for the top, and a "lug" for the bottom of the sign; the other end of the iron (it resembled a spike) was driven into the wall.

The sill on which plaintiffs sat was seven and one-half inches wide; it projected from beneath the shipping door to within four inches of the street line.

The space between building and street was paved; nothing visibly marked the location of the dividing line between the street and defendant's premises.

Sunday, August 5, 1934, the day of the occurrence in question, was bright and fair; hourly wind velocity, varying from nineteen to twenty-five miles, was not extraordinary.

Of the plaintiffs, Patrick Malloy, aged sixty years, lived in a house not far from the sash factory. Industrial accident, of four years' standing, had totally incapacitated him from work.

On the day of definite mention above, he was out for an afternoon walk. Coming to a bridge, he stayed for ten minutes; thence to Commercial Street, to near defendant's building; his entire travel, he estimated, while giving testimony, at three hundred to four hundred yards. On his sworn word, he was, from his walk, tired, and his leg ached.

Bartlett Foley, the other plaintiff, fifty years old, a common laborer, came along on foot; the two men, inferably acquaintances or friends, went to and seated themselves on the doorsill.

The building was closed; no persons are shown to have been in it; none, except plaintiffs, outside.

Plaintiffs, as they testify, after being on the sill five minutes, began making ready to go to their homes.

Their postures were: Malloy had his left leg straightened out, his right hand outstretched to his cane, which pointed into the street, in which direction his body, too, was inclined; Foley's feet were on the pavement; he states that his back was not against the door.

It was under these circumstances that the sign dropped, suddenly and unexpectedly, without previous warning, striking plaintiffs, and fracturing their spines.

A witness who came to the scene shortly, and took note, says that the fallen sign was on the pavement, three feet from the building; of the fasteners, two remained on the sign; of the loosed ones, "the ends were rusted where they had gone into the building."

Counsel for plaintiffs instances *Murray* v. *McShane*, 52 Md., 217, and strenuously insists it an analogous case.

There narratio, or declaration, averred, among other things, that the plaintiff, traveling afoot, on a public way, turned from the sidewalk to the doorway of an abutting building, to tie his shoe string, and, while sitting in the doorway for such purpose, his head projecting over the sidewalk, a brick from the wall struck him.

Narratio was bad on demurrer; on appeal, reversed.

The proof, in the cases in hand, does not show that either plaintiff, when injured, was a traveler on a public way. Both had been, and intended continuing, but they had not resumed traveling.

The evidence may afford an inference that, had plaintiffs been walking, or standing near the edge of the street, the falling sign might have done them damage. What happened, when and as it did, and not what might have happened in some other manner, is of present consideration.

To avoid a possible misconception, it may be noticed that the question is not whether, if plaintiffs, in the stead of suing, were sued, they could, or not, on the facts, excuse their use of the doorsill, on the ground of temporary delay and rest, not unreasonable in time or place.

Matters of technical pleading will, where a case is submitted on report of the evidence, be regarded, unless the contrary appears, as having been waived. *Pillsbury* v. *Brown*, 82 Me., 450, 19 A., 858.

The situation here is not restricted to abstract bounds.

The arguments were made, and the briefs submitted, to aid in determining whether, under the facts and circumstances in proof, questions of both technical and substantive pleading aside, liability might be imposed on defendant.

Property has its duties as well as its rights.

The owner or occupant of land, who induces or leads others to come upon it for a lawful purpose, is liable in damages to them, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and he negligently suffered it to exist without giving timely notice thereof to them or the public. *Carleton*, v. *Franconia, etc., Company*, 99 Mass., 216; *Bennett* v. *Louisville, etc., Co.*, 102 U. S., 577, 26 Law Ed., 235; *Parker* v. *Publishing Co.*, 69 Me., 173.

No express invitation brought plaintiffs to defendant's premises. An invitation, to be sure, is sometimes inferable. *Bennett* v. *Louisville, etc., Co.*, supra; *Printy* v. *Reimbold* (Iowa), 202 N. W., 122, 205 N. W., 211; *Kidder* v. *Saddler*, 117 Me., 194, 103 A., 159.

And a person may be a licensee.

There is a distinction, not always easy to be made, between an implied invitation and a mere license. The distinction seems to be that an invitation may be implied where there is a common interest or mutual advantage (as in the case of coming to a store), while only a license is implied where the object is solely that of the user. A licensee is one who is present by sufferance; he is closely allied to a trespasser. *Sweeny* v. *Old Colony, etc., Company*, supra.

The law, as the last word in the sentence just above connotes, has not only those respectively of invitee and licensee, but still another status to which it assigns persons who make entry on the lands of others; meaning now unlawful entry. Every unauthorized entry on another's property is a trespass, and anyone who makes such an entry is a trespasser. *Heller* v. *New York, etc., Co.*, 265 F., 192.

Ordinarily, when people come, for their own purposes, on the lands of others, without right, they must take the lands as they find them. *Printy* v. *Reimbold*, supra. Toward trespassers, it is the universal rule, the owner or occupier owes only the bare obligation to avoid inflicting wilful injury. *Frost* v. *Eastern Railroad*, 64 N. H., 220, 9 A., 790.

No rule is so general which admits not some exception.

But the printed pages of the report of these cases do not bring them within exception to the usual rule.

To entitle a trespasser to recover for an injury, he must do more than show negligence. It must appear that a wanton or intentional injury was inflicted on him. *Gillespie* v. *McGowan*, 100 Pa. St., 144.

A trespasser entered an abandoned and decaying freight house, and was injured by a piece of the building being blown against him in a sudden storm. He could not recover of the company; it owed him no duty. *Lary* v. *Cleveland, etc., Co.*, 78 Ind., 323, 41 Am. Rep., 572.

Liability in the spring-gun class of cases, to notice an urge in argument, arises from the fact, as Mr. Justice Holmes has pointed out, that the owner or tenant of the land, expecting the trespasser, prepared an injury, no more justified than if he had held the gun and fired it. *United Zinc, etc., Co.* v. *Van Britt*, 258 U. S., 268, 66 Law Ed., 615.

There was, on the part of defendant, no premeditation, no formed intention to do injury, by violence, to the person of either plaintiff; there was no wantonness; not even a recklessness that might be said to partake of the nature of wantonness.

"A man must use his property so as not to incommode his neighbour." "But the maxim," to quote Gibson, C. J., "extends only to neighbours who do not interfere with it or enter upon it." *Knight* v. *Abert*, 6 Barr., 472. He who suffers himself to trespass assumes all risks incident to it. No one is under responsibility to keep his place in safe condition for the visits of trespassers. Cooley on Torts, Sec. 93.

Viewed from any angle, on the evidence presented, neither plaintiff may prevail.

The cases are, on the authority of the report, remanded, that, in the Superior Court, there may be, in each case, the entry of:

Judgment for defendant.

STATE OF MAINE *vs.* JAMES BROWN.

Hancock. Opinion, December 10, 1936.

MUNICIPAL CORPORATIONS. LICENSES.

When a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes its power of legislation is limited to the cases and objects specified, and if a by-law or ordinance is outside the scope of the grant and exceeds the power to legislate conferred upon the municipality, it is invalid.

Business, in a legislative sense, is that which occupies the time, attention and labor of men for the purposes of livelihood or for profit, and constitutes a considerable part of their occupation, business or vocation.

A by-law or ordinance of a town or city, which is unreasonable and oppressive, is not valid.

The power of a municipal corporation to license an occupation or privilege or to impose a license tax thereon is not an inherent power, but can be exercised only when conferred by the State either in express terms or by necessary implication.

If a license fee is so high as to be virtually confiscatory or prohibitive of a useful and legitimate occupation or privilege, the ordinance imposing it is invalid.

On report on an agreed statement of facts. Respondent in Bar Harbor Municipal Court, on plea of not guilty, was adjudged guilty, sentenced to fine and costs. Appealed to the September Term, 1936, of the Superior Court for the County of Hancock. Case remanded to Superior Court for entry of *nolle prosequi*. Case fully appears in the opinion.

Percy T. Clarke, County Attorney for the State.

Blaisdell & Blaisdell, for respondent.

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

STURGIS, J. The respondent was convicted in the Bar Harbor Municipal Court on a complaint charging that, without a license

from the municipal officers and in violation of the local ordinance, he peddled and vended on the streets of Bar Harbor certain farm and orchard products not produced by himself. On appeal, the case is reported to the Law Court on an agreed statement with a stipulation that, if upon the record the respondent has committed an offense, judgment shall be rendered for the State, otherwise a *nolle prosequi* is to be entered. It is agreed that all formal requirements of the law were complied with in the passage of the ordinance. The respondent admits that he committed the acts as charged in the complaint. The validity of the ordinance only is in issue.

Municipal corporations are authorized by R. S., Chap. 5, Sec. 136 to pass ordinances "not inconsistent with law" for the purposes and with the limitations there defined. Amendments adding Paragraph XIV to that general law were enacted in Chap. 247, P. L. 1931, and in Chap. 158, P. L. 1935, giving towns, cities and village corporations power to pass by-laws and ordinances relating to hawkers and peddlers. The purposes for which such by-laws or ordinances may be passed and the limitations thereon as there defined and now in force read:

> "XIV. For regulating and controlling the business of hawking and peddling of goods, wares and merchandise at retail within their limits, for the issuing by their municipal officers of municipal licenses and the imposing of license fees therefor.
>
> "This paragraph shall not apply to commercial agents or other persons selling by samples, lists, catalogues or otherwise, goods, wares or merchandise for future delivery, persons selling fish, or persons selling farm, dairy or orchard products, of their own production, and persons selling bark, wood or forest products and persons selling newspapers or religious literature."

Effective as of July 15, 1935, a date when Chap. 158, P. L. 1935 was in force, the municipal authorities of the Town of Bar Harbor, by way of amendment to their existing by-laws, passed the following by-law:

> "Section 4A. No person, firm or corporation, without a license from the Municipal Officers of the Town of Bar Harbor,

shall hawk, peddle or vend farm, dairy or orchard products on the streets of the Town of Bar Harbor, unless such person, firm or corporation so hawking, peddling or vending farm, dairy or orchard products, shall have produced them himself.

"Licenses for hawkers, peddlers and vendors, under this ordinance may be issued by the Selectmen of the Town of Bar Harbor, upon proper application, in writing therefor, at the rate of $15.00 a day for the time the license is granted; but no license, under this ordinance, shall be issued unless and until said applicant shall first furnish a bond in the sum of $500.00 approved by the Board of Selectmen of the Town of Bar Harbor that he will not violate any of the provisions of this ordinance.

"Any person, firm or corporation violating any of the provisions of this ordinance shall upon conviction forfeit and pay a fine of not more than fifteen dollars ($15.00) for each offense, and not more than fifteen dollars ($15.00) for every day thereafter, so long as the said violation exists, and a fine of not more than one hundred dollars ($100.00) for subsequent violations.

"This ordinance shall become effective July 15, 1935."

It is agreed by counsel on both sides that this by-law was passed pursuant to the authority conferred upon municipalities by Paragraph XIV, Sec. 136, Chap. 5, R. S., as amended by Chap. 158, P. L. 1935. The respondent attacks the ordinance on the grounds (1) that it does not conform with the express grant of authority for its passage as set forth in the statute; and (2) that by reason of the license fees exacted and the penalties provided in the ordinance, the regulation is unreasonable and oppressive. The State on the brief, does not refute the claim that the ordinance goes beyond the authority expressly granted to the town by the statute and naively admits that the purpose of the ordinance "is to restrict and not to regulate."

It is an accepted rule that when a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes its power of legislation is limited to the cases and objects specified. *Ex parte Mayor, etc. of Anniston*, 90 Ala., 516, 7 So., 779; *Mernaugh* v. *Orlando*, 41 Fla., 433, 27

So., 34; *Huesing* v. *Rock Island*, 128 Ill., 465, 21 N. E., 558; *State* v. *Butler*, 178 Mo., 272, 77 S. W., 560; *State* v. *Ferguson*, 33 N. H., 424; Dillon Mun. Corp. (5th Ed.), Vol. II, Sec. 586; 43 Corpus Juris, 520. And it is held that if a by-law or ordinance as drawn is outside the scope of the grant and exceeds the powers to legislate conferred upon the municipality, it is invalid. *Newton* v. *Belger*, 143 Mass., 598, 10 N. E., 464.

The ordinance, violation of which is here charged, contains provisions entirely outside the authority conferred upon municipalities by Paragraph XIV, Sec. 136, Chap. 5, R. S., as now amended. The statute authorizes the passage of ordinances "for regulating and controlling the business of hawking and peddling of goods, wares and merchandise at retail," and no more. In the original amendment by Chap. 247, P. L. 1931, the regulation and control of the business of hawking and peddling within municipal limits was authorized without limitation as to whether the business be carried on at retail or wholesale. In the amendment in Chap. 158, P. L. 1935, the power to regulate the business of hawking and peddling was expressly limited to retail transactions. The legislative intent to exclude wholesale transactions of this kind from the operation of this law as now in force is undeniably apparent. Again, the legislative grant of authority is limited to the regulation and control of the "business" of hawking and peddling at retail, and not to single or isolated transactions. Business, in a legislative sense, is that which occupies the time, attention and labor of men for the purposes of livelihood or for profit, and constitutes a considerable part of their occupation, business or vocation. *State* v. *Littlefield*, 112 Me., 214, 91 A., 945. Nor does the statute authorize the regulation of the business of vending goods, wares and merchandise as distinct from hawking or peddling the same. The term "vend," although it may include hawking and peddling, has a broader meaning. It may be properly applied to any sale. *Webster's International Dictionary.*

The by-law, disregarding the limitations of the statute, purports to regulate and provide for the licensing not only of hawkers and peddlers of farm, dairy or orchard products, which are of course goods, wares and merchandise, but of hawkers, peddlers or vendors of the same regardless of whether their transactions be at retail or at wholesale, carried on as a business or only as a single transaction

or on rare occasions. It includes vendors, whether they be hawkers or peddlers, or not. It is apparent that the passage of this by-law was not authorized by Paragraph XIV, Sec. 136, Chap. 5, R. S.

In view of the conclusion reached upon the first objection raised, it is not strictly necessary to proceed further with this case. It should prove profitable, however, to briefly discuss the reasonableness of the fees and penalties provided for in the by-law, that further manifest error in that regard may not re-appear. Too much emphasis can not be laid upon the rule that a by-law or ordinance which is unreasonable and oppressive is not valid.

The power of a municipal corporation to license an occupation or privilege or to impose a license tax thereon is not an inherent power, but can be exercised only when conferred by the State either in express terms or by necessary implication. The power to license and impose a license tax is generally implied from the power to regulate an occupation or privilege. *Commonwealth* v. *Plaisted*, 148 Mass., 375, 19 N. E., 224, 37 Corpus Juris, 178 n., 46; Dillon Mun. Corp. (5th Ed.), Sec. 665. Again, the power to regulate and to license does not generally include the power to impose license taxes for revenue unless that power be expressly conferred. Under a general power to regulate and license, a municipality can not, directly or indirectly, entirely prohibit a useful occupation or privilege. And the general principle is that the amount of the fee imposed in the exercise of the delegated police power for the purposes of regulation must be limited and reasonably measured by the necessary or probable expenses of issuing the license and of such inspection, regulation and supervision as may be lawful and necessary. If a license fee is so high as to be virtually confiscatory or prohibitive of a useful and legitimate occupation or privilege, the ordinance imposing it is invalid. So, too, lacking an express authority therefor, if under the guise of police regulation a tax for revenue purposes is levied. *State* v. *Glavin*, 67 Conn., 29, 34 A., 708; *State* v. *Jensen*, 93 Minn., 88, 100 N. W., 644; *State* v. *Angelo*, 71 N. H., 224, 51 A., 905; *People* v. *Jarvis*, 46 N. Y. S., 596; *State* v. *Bevins*, 70 Vt., 574, 41 A., 655. See *State* v. *Snowman*, 94 Me., 99, 46 A., 815. Also 17 Ruling Case Law, 533; 37 Corpus Juris, 190 and cases cited.

Applying these rules to the by-law of Bar Harbor, applicable as it is to each and every sale on the streets of the town by any person,

firm or corporation, of farm, dairy or orchard products produced by others, a license fee of $15 a day, which would necessarily include any part of a day, with a further requirement that a bond of $500 be furnished with the application, is manifestly disproportionate to the necessary or probable expenses of issuing the license, and of necessary inspection, regulation and supervision of the acts of the licensee thereunder. In accordance with the admitted intention of its sponsors, it is restrictive rather than regulatory. The amounts of its license fee requirements further mark it as a revenue measure. It is the manifest duty of the court to declare this by-law unreasonable and oppressive, and therefore void.

In accordance with the alternative presented by the stipulation in the report, the case is remanded to the Superior Court for the entry of a *nolle prosequi.*

Case remanded to Superior Court for entry of nolle prosequi.

THE ALROPA CORPORATION

vs.

COLLETT E. BRITTON AND SHIRLEY K. BRITTON.

RUMFORD FALLS TRUST COMPANY AND RUMFORD NATIONAL BANK TRUSTEES.

Oxford. Opinion, December 30, 1936.

STATUTE OF LIMITATIONS. ACTIONS. BILLS AND NOTES.

An instrument bearing only a scroll in the form of the printed word "Seal" inclosed in brackets is not a sealed instrument and an action upon it must be brought in assumpsit.

The general statute of limitations provides that actions of assumpsit founded on any contract or liability, express or implied, shall be commenced within six years after the cause of action accrues and not afterwards.

The form of action adopted by the pleader, rather than the cause of action upon which it is based, determines the period within which it may be commenced.

It is well settled that the question as to the proper form for a given action is a matter of procedure and governed by the law of the forum. If by the law of the forum a scroll is considered to be a seal, although it is not a seal by the law of the jurisdiction where the instrument was executed, the action must be brought in covenant or debt.

The law of the place of contracting undoubtedly determines the validity and effect of a sealed instrument, but this does not deny the right of the forum to apply its rules of procedure and limitations when its jurisdiction is invoked in an action upon a foreign contract.

On report on an agreed statement of facts. An action in assumpsit to recover from the defendants amounts due on three promissory notes made by the defendants at Miami, Florida. The parties having stipulated that if the action is barred, judgment shall be entered for the defendants. The case must be remanded to the court from which it originated and that entry made upon the docket. So ordered.

Hugh W. Hastings, for plaintiff.

Ralph T. Parker, for defendants.

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

STURGIS, J. This action of assumpsit, commenced on July 31, 1936, is brought to recover the amounts due upon three promissory notes made by the defendants on December 16, 1925, at Miami, Florida. The defendants, having resided at Rumford, Maine, more than six years next prior to the commencement of this action, pleaded the statute of limitations. The case is reported on an agreed statement of facts.

The notes in suit were each for $3125 and payable respectively in twelve, twenty-four, and thirty-six months after date. They were written into forms on which appeared at the right of both lines for signatures the printed word "Seal" inclosed in brackets. No seals by impression, wafer or wax were affixed. Incidental provisions as to interest, protest and collection costs appear in the notes but are here immaterial and need not be recited.

It is agreed in the statement accompanying the case that under the law of the State of Florida the notes are sealed instruments and an action may be begun on them in that jurisdiction within twenty years after they became due. Lacking judicial knowledge, we must assume for the purposes of this case that this statement of that law is correct. It does not, however, give the plaintiff a right to recover in this action. In this state, an instrument bearing only a scroll in the form of the printed word "Seal" inclosed in brackets is not a sealed instrument. Action upon it must be brought in assumpsit. *Manning* v. *Perkins*, 86 Me., 419, 29 A., 1114. Furthermore, the general statute of limitations here provides that actions of assumpsit founded on any contract or liability, express or implied, shall be commenced within six years after the cause of action accrues and not afterwards. R. S., Chap. 95, Sec. 90, Par. IV. Personal actions on any contract not otherwise limited may be brought within twenty years after the cause of action accrues. R. S., Chap. 95, Sec. 97. Actions on sealed instruments in the form of covenant broken or debt are governed by this twenty-year limitation. If brought in assumpsit as permitted by R. S., Chap. 96, Sec. 27, that form of action is "otherwise limited" by the general statute of limitations. It is the form of action adopted by the pleader, rather than the cause of action upon which it is based, which determines the period within which it may be commenced.

It is well settled that the question as to the proper form for a given action is a matter of procedure and governed by the law of the forum. Beale on Conflict of Laws, Vol. III, 1602. Thus it is held that assumpsit is the appropriate form of action upon an instrument which is not a specialty in the jurisdiction where the action is brought, although it would be deemed a sealed instrument in the place where the agreement was entered into. *LeRoy* v. *Beard*, 8 How., 451; *Andrews* v. *Herriot*, 4 Cowen, 508; *Douglas* v. *Oldham*, 6 N. H., 150; *Nowell* v. *Waterman*, 53 R. I., 16, 163 A., 402. But if by the law of the forum a scroll is considered to be a seal, although it is not a seal by the law of the jurisdiction where the instrument was executed, the action must be brought in covenant or debt. *McClees* v. *Burt*, 5 Metc. (Mass.), 198; *Trasher* v. *Everhart*, 3 Gill & J. (Md.), 234. In the light of these authorities, it must be held that this action on notes which are not specialties under the law of

this state was of necessity brought in assumpsit. Common-law rules of procedure rather than the statute compel this form of pleading.

Statutes of limitation, which do not extinguish the right itself, operate merely on the remedy and, in the absence of statute to the contrary, all questions arising thereunder must be determined by the law of the forum and not by the law of the situs of the contract. If the action is barred by the local statute of limitations, the suit may not be maintained. In such a situation, the statute of limitations in the jurisdiction in which the cause of action accrued is immaterial. *Lamberton* v. *Grant*, 94 Me., 508, 48 A., 127; *Thompson* v. *Reed*, 75 Me., 404; *Thibodeau* v. *Levassuer*, 36 Me., 362; *Bank of United States* v. *Donnally*, 8 Peters, 361; *Watson* v. *Brewster*, 1 Barr. (Pa.), 381; *Mandru* v. *Ashby*, 108 Md., 693, 71 A., 312; *Kirsch* v. *Lubin*, 228 N. Y. S., 94; Beale on Conflict of Laws (1935), Vol. III, Sec. 603; Wood on Limitations, Vol. I, Sec. 8; 37 Corpus Juris, 729 n. The following cases aptly illustrate the application of this rule.

In *Bank of United States* v. *Donnally*, supra, an action of debt was brought in Virginia upon a promissory note made in the State of Kentucky, which under the laws of that jurisdiction could be sued upon as a sealed instrument. It was held, however, that under the laws of the forum the instrument was not a specialty and action thereon was barred by the general statute of limitations. Mr. Justice Storey, delivering the opinion of the court, said:

> "The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the law of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky, on an unsealed contract made in that state; therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy, which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought. The nature, validity

and interpretation of the contract may be admitted to be the same in both states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought, may essentially differ. The remedy, in Virginia, must be sought within the time, and in the mode, and according to the descriptive characters of the instrument, known to the laws of Virginia, and not by the description and characters of it, prescribed in another state."

In *Watson* v. *Brewster*, supra, the plaintiff brought an action on notes executed and payable in New York and bearing a scroll seal which under the laws of that state was not sufficient to make the note a sealed instrument and take it out of the ordinary statute of limitations. In Pennsylvania where the action was brought, a scroll was recognized as a seal and the period of limitations there applicable to sealed instruments governed the case.

In *Mandru* v. *Ashby*, supra, on similar facts the same rule was applied.

In *Kirsch* v. *Lubin*, supra, in an action brought in New York upon an instrument executed in the province of Quebec, not having the seal of a party but bearing a notarial seal and regarded as a specialty where made, the instrument not being a sealed instrument under the laws of New York it was held that the general statute of limitations rather than that applicable to sealed instruments applied.

We find nothing in the Restatement of the Law of Conflict of Laws, Sec. 335, relied upon by counsel for the plaintiff, which conflicts with the foregoing rules. The law of the place of contracting undoubtedly determines the validity and effect of a sealed instrument. This is not a denial of the right of the forum to apply its rules of procedure and limitation when its jurisdiction is invoked in an action upon a foreign contract.

This action of assumpsit on these notes, having been brought more than six years after the cause of action accrued, is here barred by the statute of limitations. The parties have stipulated that, if the action is barred, judgment shall be entered for the defendants. The case must be remanded to the court from which it originated and that entry made upon the docket.

So ordered.

LLOYD W. TOZIER, COLLECTOR *vs.* PAUL L. WOODWORTH.

Somerset. Opinion, December 30, 1936.

TAXATION. CONTRACTS. CORPORATIONS.

A tax collector is a public officer, owing to the public, and not to the town alone, the duties imposed by statute.

A tax collector, as such, cannot maintain an action except when empowered by statute to do so.

When a corporation ceases to do business that fact does not work a dissolution thereof.

Mere forbearance to sue does not constitute a good consideration for a promise unless, at the time it was made, promisee had a cause of action against the promisor on which the former might have maintained an action, either in law or equity.

On exceptions by the plaintiff. An action in assumpsit by tax collector, in his official capacity, for breach of an alleged express agreement against a new owner of real estate for payment of taxes imposed previous to the transfer. Exceptions overruled. Case fully appears in the opinion.

Harry R. Coolidge, for plaintiff.

Paul L. Woodworth, pro se.

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

DUNN, C. J. In 1934, plaintiff was chosen, and qualified, as collector of taxes in the Town of Unity. A tax collector is a public officer, owing to the public and not to the town alone, the duties imposed by statute. *Thorndike* v. *Camden*, 82 Me., 39, 44, 19 A., 95. The assessments committed to this collector included a tax on certain land and buildings, title to which appears to have, since the levying of the tax, come, by conveyance from the record owner, to defendant.

The instant action is assumpsit, plaintiff suing in his official capacity, for breach of an alleged express agreement, on the part of the new owner of the real estate, to pay the amount of the imposition which, previously to transfer, had been laid against the property.

There is allegation in effect in the declaration in the writ, that over a stipulated period of time no longer existing, plaintiff, confiding in and relying on the promise of defendant, forbore all effort to collect the tax; and of violation by defendant of his aforesaid engagement.

On the case being reached for trial, a jury was waived, and hearing had before the court, Mr. Justice Worster presiding.

In paving the way for decision, which went for defendant, the Justice ruled, and held, in substance, that at all events, the undertaking by defendant was founded upon an illegal consideration, namely, omission by plaintiff, in contravention of public policy, to do his duty.

Specific exceptions are a vehicle bringing contention to the contrary forward.

The findings and rulings, mentioned before, aptly and correctly recite the situation in full aspect, and give reasons for conclusions reached below, as follows:

> "This is an action on the case brought by the plaintiff, as collector of taxes of the town of Unity, against the defendant on his oral promise of May 14th, 1935 to pay the plaintiff the 1934 taxes on real estate, which had been assessed against the Unity Lake Land and Improvement Association, which promise was made after the real estate had been conveyed to the defendant by his parents by deeds dated August 6th, 1934, containing provisions to the effect that the defendant assumed and agreed to pay 'taxes, as known to the grantee.'
>
> "Among other things it is, in effect, alleged in the plaintiff's declaration, that said 1934 taxes were assessed against the Unity Land & Lake Improvement Association, which was the owner of said land on April 1, 1934.
>
> "But, according to the evidence, no taxes were assessed against it by that name. A tax, however, was assessed against

the Unity Lake Land and Improvement Association, and the name, last given, appears as the corporate name in the copy of a mortgage given by it, which was admitted in evidence.

"Whether the word 'Lake' should precede or follow the word 'Land' in the corporate name would not affect the identity of the corporation or the validity of the tax, so far as this case is concerned, if it should be made to appear that the corporation was known as well by the one name as the other. *Farnsworth Co.* v. *Rand*, 65 Me., 19, 23.

"At the Hearing, Mr. Knight, one of the assessors, was asked, 'Did you make an assessment to the Unity Lake Land and Improvement Association?'

"The defendant objected on the ground that it was not material. Asked by the Court to state the ground of his objection, the defendant said:

"'This is a tax against a named defendant, and the tax collector is bound to sue those parties named in the book, and not any strangers. I have no connection with the Unity Lake Land and Improvement Association, and never did have.' He further said: 'I wish to have exceptions upon those points. The warrant tells him to collect the tax against the person named in the book, and my name is not in the book.'

"No objection was interposed based upon any alleged variance in the corporate name. The point not having been made, it is not now open to the defendant. Had the point been made at the hearing, the plaintiff would have had opportunity to offer evidence as to the corporate identity.

"The mere fact that there was no allegation of identity in the declaration would not have barred the plaintiff from establishing the contention that the corporation was known as well by the one name as the other, if it was so known. *Dodge* v. *Barnes*, 31 Me., 290; Approved in *Vumbaca* v. *West*, 107 Me., 130, 132; *Farnsworth Co.* v. *Rand*, supra.

"This point avails the defendant nothing.

"But, the defendant claims, and I find, that on April 1, 1934, this real estate was not owned by said corporation, by any name whatsoever.

"Plaintiff proved, however, that the taxes on said real estate were assessed against the Unity Lake Land and Improvement Association in the year 1933, and claimed that because of that fact the assessment was properly made against it in 1934, since no notice of change of ownership or occupancy had been given. Sec. 26, Chap. 13, R. S. Maine.

"Defendant, in reply, contends that on April 1, 1934 this corporation was 'defunct'; and that the cited statute did not authorize this assessment against a 'Defunct' corporation merely because the taxes had been assessed against it the previous year.

"The case of *Morrill* v. *Lovett*, 95 Me., 165, is not in point. It was there held that such a statute did not authorize an assessment of taxes against a dead man merely because the taxes on the same property had been assessed against him the year before.

"But it does not appear that this corporation has even yet been dissolved, so it cannot be said that it was 'dead' or 'defunct' on April 1, 1934.

"Evidence that the Unity Lake Land and Improvement Co. was, on September 2, 1925, excused from filing corporate returns, and that it has ceased to do business, falls far short of proof of dissolution, even if it should be conceded that it is the same corporation as the Unity Lake Land and Improvement Association.

"Merely ceasing to transact business does not work a dissolution. *Prop. of Baptist Meeting-House* v. *Webb*, 66 Me., 398.

"While no direct evidence was offered to identify the land described in the assessment books as being the same land described in the deeds to the defendant by words of description unlike the description recorded in said books, yet, since the defendant entered into negotiations with the plaintiff relative to the payment of these 1934 taxes without raising any objection as to the identity of the land, and does not raise the point in the record, it is fairly inferable, and for the purposes of this case, I find, that the land described in the assessment books is the same land described in said deeds to the defendant.

"But, even conceding that it is the same land yet this action cannot be maintained on the theory that the defendant became liable to pay this tax because of his assumption and agreement to pay, under the provisions in said deeds. Defendant did not therein assume and agree to pay *all taxes* which theretofore may have been assessed on said real estate, against all persons and corporations whatsoever. He only agreed to assume and pay '*taxes, as known to the grantee,*' spoken of as '*certain taxes*' in two of the three deeds to him. What taxes were they? The plaintiff offered no direct evidence that at the time the real estate was conveyed to the defendant, the taxes mentioned here were 'known to the grantee.' But even if it should be established that they were yet it is unnecessary to consider this aspect of the case further, because the plaintiff has not here declared on any alleged liability arising out of that undertaking.

"The plaintiff declares on the defendant's promise to him, of May 14th, 1935, to pay him this tax. He alleges in his declaration that 'the defendant did thereafterwards on May 14, 1935 promise the plaintiff that if he would wait until the fall of 1935 that he, the defendant, would pay said tax, and in reliance upon said promise the plaintiff did promise to and did, wait until the fall of 1935 for the defendant to pay said tax, but the defendant has neglected to do so.' This allegation the plaintiff proved.

"Moreover, defendant frankly admits that he made that promise, but, he says: 'I afterwards discovered that there was no tax laid against either of my parents but there was a tax which I believed to be absolutely illegal and void assessed against the corporation which was defunct. I could see no legal consideration for my promise, and for that reason I did not pay the tax. I made the promise under the understanding that there was an outstanding assessment against my grantors, and there was none.'

"In short, the defendant claims: (1) That there was no consideration for his promise; (2) But even if there were a valid consideration this action on the case cannot be maintained against him by the plaintiff in his capacity as tax collector.

"Was there a valid consideration for the defendant's promise of May 14th 1935?

"That the plaintiff waited until the fall of 1935 pursuant to his promise to do so, in reliance on the defendant's promise to the plaintiff to pay him, is not in dispute.

"But, mere forbearance to sue would not constitute a good consideration for the defendant's promise unless, at the time it was made, the plaintiff had a cause of action against the defendant on which the plaintiff might have maintained an action, either in law or equity. *Foster* v. *Metts & Co.*, 55 Miss., 77; *Palfrey* v. *R. R. Co.*, 4 Allen, 55.

"In *Packard* v. *Tisdale*, 50 Me., 376, the Court held that an action could not be maintained by a town collector upon a promise to pay him a tax in consideration that he would forbear to collect the same in the manner required by law, although by such neglect he became liable to account for the tax and actually paid it to the town. It was pointed out in that case that the only consideration for the promise was 'the plaintiff's neglect to perform his duty.'

"In *Embden* v. *Bunker*, 86 Me., 313, the Court cited *Packard* v. *Tisdale*, and held that there was no valid consideration to support a promissory note, given in payment of taxes.

"But, the plaintiff contends, that those cases are unlike the case at bar. There the promises were made by the tax debtor while in the instant case it was made by a purchaser of the land who was not the tax debtor. He relies on *Burr* v. *Wilcox*, 13 Allen, 269, where it was held that forbearance, at the request of the purchaser of the land 'especially if thereby the land became discharged of the lien,' constituted a good consideration for the promise of the purchaser to pay the taxes.

"In *Burr* v. *Wilcox* and in *Packard* v. *Tisdale* the plaintiff alleged, in effect, that relying on the defendant's promise he (the tax collector) forbore to seasonably enforce collection of the taxes and because thereof lost his tax lien on the real estate.

"There is no such allegation or claim in the instant case. Here the land was not discharged of any tax lien as a result of forbearance in reliance on the defendant's promise of May 14th, 1935.

"This was a non-resident tax; and the assessors' warrant to the tax collector is dated April 26th 1934. So the time to enforce a tax lien on the real estate under sections 28 and 72 of Chapter 14, R. S. Maine, and under the provisions of Chapter 244 of the Laws of Maine, 1933, had expired before the promise of May 14th 1935 was made.

"It is true, as above stated, that the defendant assumed and agreed to pay 'taxes, as known to the grantee'; but as already pointed out, when considering another aspect of this case, no direct evidence was offered by the plaintiff to prove that the taxes in question were 'known to the grantee' at the time of the execution and delivery of the deeds. To the contrary, the defendant testifying concerning the making of his promise of May 14th 1935 said: 'I made the promise under the understanding that there was an outstanding assessment against my grantors, and there was none.'

"But, even if it be conceded that the defendant then knew of the assessment of taxes against the Unity Lake Land and Improvement Association, and that the provisions in said deeds had reference to those taxes, yet the plaintiff, in his capacity as tax collector could not have maintained an action against the defendant on the undertaking assumed in said deeds. I do not rest this ruling on the lack of privity, as in the cases of *State ex rel. Cain Tax Collector* v. *Foote Lumber Co.* (La.), 135 So., 769, 771; and *Nehalem Timber &c. Co.* v. *Columbia County et al*, 189 Pac., 212, 191 Pac., 318; but on the broader ground, that, in this State, a tax collector, as such cannot maintain an action except when empowered by the statute so to do, as held in *Packard* v. *Tisdale*, supra. No statute in this State confers upon a tax collector authority to bring such an action as this.

"This ruling is not in conflict with the principles laid down in *Cumberland National Bank* v. *St. Clair*, 93 Me., 35, and cases therein cited. In those cases there was no limitation on the capacity of the plaintiff to sue, whereas, in the instant case there is a limitation on capacity of a tax collector to sue.

"Since, then, this plaintiff as tax collector, had no cause of action against the defendant at the time he made the prom-

ise of May 14th 1935, which could have been enforced, it follows, that the forbearance relied upon did not constitute a good consideration for the promise.

"But, even if there were a valid consideration for that promise yet this action cannot be maintained. The plaintiff has brought this action in his capacity as tax collector. As shown above, a tax collector, in this State, can only maintain such actions as are authorized by statute. It was so held in *Packard* v. *Tisdale*, supra. That was the rule applied in 1862, when a tax collector had but few remedies. With much greater reason should the rule be now applied, since additional statutory remedies have been conferred upon him. No statute authorizes or empowers him to bring such an action as this, therefore he cannot recover. It is unnecessary to consider the other points which were argued.

"This ruling is not in conflict with *Burr* v. *Wilcox*, 13 Allen, 269, relied on by the plaintiff, because there the right of action was conferred on the tax collector by statute."

The findings and rulings are, in respect to the questions here presented, adopted and approved.

The exceptions must be overruled.

Exceptions overruled.

GERTRUDE B. ANTHONY

vs.

ALFRED WILLIAMS ANTHONY AND LEWISTON TRUST COMPANY.

Androscoggin. Opinion, January 5, 1937.

HUSBAND AND WIFE. EQUITY.

Suits between husband and wife, with certain exceptions of equity suits involving doctrine of separate estate, to prevent fraud, to relieve from coercion, to enforce trust, and to establish other conflicting rights concerning property, are not authorized in Maine.

Statutory provision, R. S., Chap. 74, Sec. 5, does not empower wife to sue husband at law.

On report. A suit in equity brought by a wife against her husband for an accounting. Bill dismissed on the merits. The case fully appears in the opinion.

John Adams Wickham,
Skelton & Mahon, for plaintiff.
Robinson & Richardson,
Richard Small,
Fred H. Lancaster, for defendants.

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

DUNN, C. J. This is a suit in equity, brought by a wife against her husband, primarily for an accounting. The allegations of the bill, in effect, are that, through the indorsement of checks drawn to her order, and by means of checks of which she was maker, plaintiff, from her individual funds, (a) entrusted to defendant, over a period of years, monies, totaling a large sum, which he, in the stead of conserving, in and upon parol trust, for her exclusive benefit, as he had agreed, invested in his own name; (b) that plaintiff defrayed legal obligations of defendant, under conditions entitling

her to reimbursement. The Lewiston Trust Company is also named as defendant, to subject to execution any property confided to it by the first defendant, in trust relationship.

Prayer is for special and general relief.

Suits between spouses, with certain exceptions of equity suits involving the doctrine of separate estate, to prevent fraud, to relieve from coercion, to enforce trusts, and to establish other conflicting rights concerning property, are not authorized in Maine. The statutory provision, Revised Statutes, Chapter 74, Section 5, that a married woman may, in her own name, and as though she were single, prosecute and defend suits at law or in equity, either in tort or contract, for the preservation and protection of her property and personal rights, or for the redress of her injuries, does not empower the wife to sue her husband at law. As to actions on contracts with her husband, or for torts committed by him, the common-law immunity of the husband, and disability of the wife, remains, at least during coverture. *Perkins* v. *Blethen*, 107 Me., 443, 78 A., 574; *Mott* v. *Mott*, 107 Me., 481, 78 A., 900; *Greenwood* v. *Greenwood*, 113 Me., 226, 93 A., 360; *Sacknoff* v. *Sacknoff*, 131 Me., 280, 282, 161 A., 669. That is the general rule. Some special ground for relief, as those hereinbefore enumerated, must be substantiated, that the equitable jurisdiction, whether at common law, or as statute has broadened its scope, may be invoked. R. S., *supra*, Sec. 6; *Walbridge* v. *Walbridge*, 118 Me., 337, 108 A., 105.

The case at bar is presented on report. The printed record comprises bill, demurrer, (which, exception saved, the justice below overruled), amended bill, pleas, answers, and all the evidence.

There is no need to discuss at length any legal principle; the cause calls for application of no rule of law except that applying where, as here, and regardless of the nature of particular transactions, that is, if they be such as to impose fiduciary duties, or indicate otherwise what would be cognizable in equity, plaintiff's proof, conceding thereto for the moment full convincing power, is met by evidence which negatives her prevailing.

The transcript may be summarized briefly.

Plaintiff and defendant, persons of high intelligence and culture, residents of Lewiston, Maine, were married in 1903. The family home was in that city. In 1915, plaintiff, as beneficiary under a

trust created by her father's will, became the recipient of instalments of income approximating, on average, upwards of $18,000 annually. During the years 1915 to 1919, both inclusive, plaintiff, so she testifies, transferred her income checks to defendant, to collect, and keep the proceeds until desired by her, this for the reason that she herself was unaccustomed to money, or its equivalent, to such extent, while he was of experience in finance.

In 1920, as for a time preceding, and several years subsequent, the parties were living in Scarsdale, New York.

Between April 2, 1920, and October 16, 1923, averment, which testimony has been introduced to sustain, is that plaintiff delivered additional amounts of money to defendant, these in the form, as before stated, of her personal checks, on the aforesaid trust.

Plaintiff alleges, more fully to note the second predication, and bears witness, that from January 1, 1920 to December 31, 1927, she, in most instances at the specific request of defendant, expended for necessities for herself and children, and miscellaneous household expenses, for which defendant solely was responsible, thousands of dollars, which, in equity and good conscience, he should repay, with interest.

Husband and wife became definitely estranged; matters threatened to become acute, not in consequence of any intentional wrong, but seemingly because of irritation and incompatibility. They viewed the same facts from entirely different angles, with tendency to twist fact to viewpoint.

Each had, however, an abiding sense of justice, and purpose to protect their children, for whom there was marked affection.

When, efforts to bring about reconciliation having failed, separation was suggested, plaintiff at first insisted that home life be preserved.

She, being nervously ill, requested the lessening of living arrangements, and releasement from unnecessary care and responsibility, in the hope that by travel, visiting, and activities of her own choosing, she might regain health and strength.

Her wishes were respected.

A lawyer early retained, whose method of approach had been constructive rather than destructive, still represented plaintiff in direct negotiation with her husband and his attorney.

Plaintiff and defendant could not, or would not, live together.

In January, 1928, they separated, by voluntary consent.

An understanding, and an intended settlement of things in difference appears to have been arrived at.

Adjustment being concluded, plaintiff had:

As to freedom, all there was, to go and come as she pleased, and live as she might desire, without interference by defendant;

As to property, inclusive of money, all she had insisted her due, or that she asked for, tendered—despite denial of the existence of any trust, direct or express, or raised by implication, and of any contract, by whatsoever name known—unconditionally, in and with meaning to clear off obligation and liability, adequately, effectively, completely; and so accepted.

The situation was at rest for a number of years. Nothing new has arisen.

No showing for equitable relief is made.

The bill must be dismissed.

Bill dismissed on the merits.

ANHEUSER-BUSCH, INC. AND THE WEST END BREWING COMPANY

vs.

DAVID WALTON, LOUIS F. FLEMING, AND JOHN B. COUTURE, AS AND CONSTITUTING THE STATE LIQUOR COMMISSION OF THE STATE OF MAINE, AND CLYDE R. CHAPMAN, ATTORNEY-GENERAL OF THE STATE OF MAINE.

Androscoggin. Opinion, January 9, 1937.

RULES AND REGULATIONS.

The plaintiffs in this case, so long as they comply with the laws of the State of Maine, except for restrictions lawfully effective, have the right to a free market for their products.

The power of the State Liquor Commission to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the legislature.

This case attacks the authority of the State Liquor Commission in the promulgation and enforcement of its regulations numbered 1, 2 and 4. The Court holds that the commission exceeded its authority in making these rules and regulations, and further, was without power to enforce the same.

On appeal by the defendants from a decree enjoining the enforcement of regulations 1 and 2 of the State Liquor Commission. Appeal dismissed. Decree below affirmed. Case fully appears in the opinion.

Jacob H. Berman,
Edward J. Berman,
M. J. Donnelly, for plaintiffs.
Clyde R. Chapman,
John P. Carey, for defendants.

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

THAXTER, J. The plaintiffs, Anheuser-Busch, Inc., and The West End Brewing Company, are foreign corporations located respectively in the states of Missouri and New York. They have brought a bill in equity seeking to enjoin the enforcement by the defendants, who constitute the State Liquor Commission of this state, of regulations 1, 2 and 4 which purport to have been promulgated by the commission in accordance with legislative authority. A decree was entered by the sitting Justice enjoining the enforcement of regulations 1 and 2. From this decree the defendants have appealed.

The plaintiffs are brewers of beer and malt beverages and sell their products to wholesalers in the State of Maine, who are licensed by this State to sell and distribute the same here. The sales are made f.o.b. at the factories of the plaintiffs, and the commodity is transported by the purchasers at their expense to their places of business in the State of Maine. It is conceded that the sales are consummated and title passes at the point of shipment outside of this state. The plaintiffs have built up a lucrative business, and now

claim that putting into effect the regulations of the commission will constitute an unlawful interference with the resale of their products by their customers here, and that thereby the good-will of their business may be destroyed.

In 1933 an act was passed by the legislature authorizing the manufacture and sale under various restrictions of malt liquors. P. L. 1933, Chap. 268. A state licensing board which, under the provisions of P. L. 1934, Chap. 300, has now become the State Liquor Commission, was established. It was given the usual administrative duties of such a board, among which was the power to issue licenses in accordance with the provisions of the statute. Its authority to make regulations is conferred by the following provisions of the statutes:

P. L. 1933, Chap. 268, Sec. 5, Par. 2:

> "To adopt rules and regulations for the administration of this act and for the supervision and regulation of the manufacture, sale and transportation of malt beverages throughout the state; the manufacture, sale and transportation of which is hereby permitted and authorized."

P. L. 1935, Chap. 179, Sec. 2:

> "The commission shall have the right to establish regulations for clarifying, carrying out, enforcing and preventing violation of all or any of the laws pertaining to liquor and such regulations shall have the force and effect of law unless and until set aside by some court of competent jurisdiction or revoked by the commission. The commission shall have power by regulation to shorten the permissible hours of sale in state stores and to prevent the sale by licensees of wine and spirits to minors or persons under the influence of liquor. The commission shall at least annually on or before June 30th of each year publish in a convenient pamphlet form all regulations then in force and shall furnish copies of such pamphlets to every licensee authorized by law to sell liquor."

The legislature likewise provided for various kinds of licenses and for the fees for each type. The pertinent part of these provisions for the purposes of this case reads as follows:

P. L. 1935, Chap. 159, Sec. 8:

"Licenses for sale and distribution of malt beverages at wholesale under such regulations as the state licensing board may prescribe may be issued by the state licensing board upon an application in such form as may be prescribed by said board and upon payment of an annual fee of $300 *for each distributing center or warehouse of said wholesale licensee.* A manufacturer's license issued under the preceding section shall include the right to such licensee to sell and distribute malt beverages at wholesale without the payment of any additional fee."

There is also provided by Sec. 19 of the 1933 act an excise tax.

"Whereas the license fees hereinbefore provided for under this act are for the purpose of regulating the manufacture and sale of malt beverages, now, therefore, in addition thereto, there is hereby levied and imposed an excise tax on all malt beverages of $1.24 on each and every barrel containing not more than 31 gallons and at a like rate for any other quantity or for the fractional parts of a barrel. The payment of said tax shall be evidenced by a stamp affixed to each barrel, bottle or other container containing malt beverages. Said stamp shall express the amount of the tax paid evidenced thereby. No malt beverage shall be sold in or from a container unless such stamp shall be affixed thereto."

The regulations of the commission which are attacked in this bill read as follows:

"*Manufacturers and Foreign Wholesalers.* No manufacturer or foreign wholesaler of malt liquors shall hold for sale, sell, offer for sale, in intrastate commerce malt liquors or transport or cause the same to be transported into the State of Maine for resale unless such manufacturer or foreign wholesaler has obtained from the Commission a certificate of approval. The fee for a certificate of approval issued shall be two hundred dollars per annum, which sum shall accompany the application for such certificate.

"All manufacturers or foreign wholesalers to whom a cer-

tificate of approval has been granted shall furnish the Commission with a copy of every invoice sent to Maine wholesale licensees. They shall also furnish a monthly report on or before the tenth day of each calendar month in such form as may be prescribed by the Commission, and further, shall not ship or cause to be transported into the State of Maine malt liquors until the Commission has certified that excise stamps have been requisitioned and paid for by said Maine wholesale licensee.

"The purposes of the section are to regulate the importation, transportation and sale of malt liquors, also in addition thereto, to regulate and control the collection of excise taxes.

"The fee received under this section shall be used by said Commission for carrying out the purposes of this section.

"2. *Wholesalers.* No Maine wholesale licensee shall purchase or cause to be transported into this State malt liquors from an individual, partnership, or corporation, manufacturer of malt liquors or foreign wholesaler of said malt liquors, to whom a certificate of approval has not been granted by the Commission.

"All purchase order forms are to be furnished by the Commission, and all orders are to be executed in quintuplet. The original copy is to be sent direct to the brewery or foreign wholesaler. Three copies of the order are to be mailed to the Commission with a check for the amount of excise tax stamps required to cover the amount of the order. The Commission shall mail one copy, after having certified thereon that the excise tax stamps thereon have been purchased, to the brewery or foreign wholesaler with whom the order has been placed. One copy shall be mailed to the Maine wholesale licensee with a notation that the excise tax stamps have been paid, with the excise tax stamps, which stamps shall be kept for monthly cancellation. The brewery or foreign wholesaler may ship upon receipt of the original order upon permission being granted to do so by the Commission."

"No Maine wholesale licensee shall sell malt liquors to another Maine wholesale licensee, which were not purchased from a brewery or foreign wholesaler holding a certificate of approval.

"4. *Excise Tax Stamps.* Excise tax stamps on bottles or containers in lieu thereof shall be denominated as follows: sixteen ounces or under, one-half cent, thirty-two ounces or under, one cent.

"Excise tax stamps on barrels shall be denominated as follows: One dollar and twenty-four cents for a barrel, sixty-four cents for a half barrel, and thirty-two cents for a quarter barrel."

To compel the foreign manufacturer or wholesaler to pay the fee prescribed by regulation 1 the commission has resort to the customers of such manufacturer in the State of Maine, who, under the provisions of regulation 2, are prohibited under penalty of forfeiture of their local licenses, from purchasing from any manufacturer who has not complied with the requirements of section 1. By pressure on the purchaser here in Maine compliance is sought from the plaintiffs and others similarly situated without the state. It is a case of the manufacturer paying the fee or losing his market in the state.

Regulation 4 provides for a different tax than that prescribed by the legislature in Sec. 19 *supra*. The act provides specifically that the excise tax shall be $1.24 on each and every barrel containing not more than thirty-one gallons "and at a like rate for any other quantity or for the fractional part of a barrel." The commission by its regulation, however, has attempted to increase the tax from sixty-two cents for a half barrel to sixty-four cents and from thirty-one cents to thirty-two cents for a quarter barrel. Furthermore, in spite of the legislative mandate, the commission has prescribed a flat rate of one-half cent for beer in containers of less than sixteen ounces and one cent for beer in containers of less than thirty-two ounces. The effect of this provision is to raise the rate for each thirty-one gallons of beer in twelve ounce bottles from $1.24 as provided in the statute to $1.65.

The sitting Justice made no decree with respect to regulation 4, because holding Secs. 1 and 2 invalid gave to the plaintiffs in his opinion all necessary relief. Under the provisions of regulation 2, however, no wholesaler in Maine can import the plaintiffs' products until the stamps have been purchased by the wholesaler as required

by Sec. 4. Under such circumstances we feel that it is proper to discuss the validity of Sec. 4.

The defendants claim that the plaintiffs have no standing before the court: in the first place because they are non-residents, carry on no business in Maine, and as the sale of their products takes place outside of the state are not amenable to the laws of Maine; and, secondly, because they do not come before the court with clean hands.

There is a touch of irony in the defendants' claim that the plaintiffs are not subject to the laws of this state; for the whole purpose of the regulations in questions is to bring them under the control of the local commission and to force from them the payment of a tax. But be that as it may, their right to attack the validity of these regulations seems to be established both by reason and by authority.

The competitive conditions, under which a business is carried on today, make it more than ever important that its normal current shall not be even temporarily checked or diverted. What gives to a business its vitality and strength is its good-will, its attribute as a going enterprise. These elements are a species of property which the law will protect from unlawful injury. It makes no difference that the transactions in question are carried on by a foreign corporation, or whether a particular sale may have been consummated within or without the state. In its practical effect there is no difference in the attempt to stop the flow of trade by bringing unlawful pressure within a state on the customers of a foreign manufacturer and in the effort to stop unlawfully at its source the movement of commodities in interstate commerce. The damage is the same in either case. And the right to relief does not depend on the particular manner in which the injury is inflicted. So long, therefore, as these plaintiffs comply with our laws, they have, except for restrictions lawfully effective, the right to a free market for their products within our borders.

The case of *Savage* v. *Jones*, 225 U. S., 501, 32 S. Ct., 715, 56 L. Ed., 1182, is an authority exactly in point. The plaintiff was a manufacturer in Minnesota of a stock food. The sales were made f.o.b. Minneapolis and the freight was paid by the out-of-state purchasers. A statute of Indiana provided that such a product should be so

branded as to show the ingredients. An injunction against the enforcement of the law, which was claimed to be unconstitutional, was sought by the plaintiff on the ground that the officials charged with the enforcement of the act in Indiana were threatening prosecution of the plaintiff's customers there. The court, though deciding that the act was valid, held that the plaintiff could properly contest its constitutionality. The opinion says, page 519:

> "An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, —a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the state chemist had threatened the complainant that, in default of such compliance, he would cause the arrest and prosecution of every person dealing in the article within the state, and had distributed broadcast throughout the state warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands."

In *Pierce* v. *Society of the Sisters of The Holy Names of Jesus and Mary*, 268 U. S., 510, 45 S. Ct., 571, 69 L. Ed., 1070, the court upheld the right of the proprietors of a private school to attack the constitutionality of a statute which required all children of certain ages to attend the public schools. We find the following language in the opinion, pages 535–536:

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference

with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in *Truax* v. *Raich*, *Truax* v. *Corrigan*, and *Terrace* v. *Thompson*, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."

See also to the same general effect as the above cases *Buchanan* v. *Warley*, 245 U. S., 60, 38 S. Ct., 16, 62 L. Ed., 149; *Station W B T, Inc.* v. *Poulnot*, 46 Fed. (2d), 671.

Counsel for the defendants have cited two cases which they hold are authorities for the proposition that these plaintiffs have no standing in court.

The first of these, *Premier-Pabst Sales Company et al.* v. *McNutt et al.*, 17 F. Supp., 708, U. S. District Court for the Southern District of Indiana, Indianapolis Division, decided by a three-judge court February 18, 1935, holds valid an act of the Indiana Legislature and certain regulations promulgated in accordance with its provisions which imposed certain restrictions on the importation of liquor into Indiana. The case goes no farther than to decide that the state could lawfully put such a burden on interstate commerce.

The second case, *F. W. Cook Brewing Co.* v. *Garber*, 168 Fed., 942, holds that the plaintiff had no standing in court to attack the validity of the prohibition law of Alabama, because neither the plaintiff nor its customers in Alabama, even with that particular law out of the way, would have had the right to sell its product in Alabama. The court points out that the only effect of the threats against the plaintiffs' customers would be "to prevent either the complainants or the wholesalers and retailers from doing that which the law forbids them to do." The principle of this case is the same as that of *Premier-Pabst Sales Company* v. *Grosscup* (U. S. Supreme Court, May 18, 1936), 80 L. Ed., 1155, 298 U. S., 226, 56 S. Ct., 754.

Each of these cases is distinguishable from the one before us; but if there is anything in the opinion in either which counsel for the defendants can construe as supporting their contention, it is only

necessary to point out that it is in conflict with the principle laid down in *Savage* v. *Jones*, supra.

The argument that the plaintiffs do not come into court with clean hands seems to be based on the claim that they have solicited trade in the State of Maine not having been licensed so to do. The plaintiffs have done no more, however, than to build up a market for their products here by advertising. This they had a perfect right to do. The sales have been made by duly licensed wholesalers. The defendants' contention is without merit.

This brings us to a consideration of the validity of the regulations promulgated by the commission. The plaintiffs attack these on two main grounds: first, that the commission was without the power to make such regulations; second, that they impose an unlawful burden on interstate commerce.

The view, which we take as to the power of the commission, renders a discussion of the second question unnecessary. In connection therewith, however, we call attention to the recent case of *State Board of Equalization of California et al.* v. *Young's Market Company et al.* (U. S. Supreme Court November 9, 1936), 81 L. Ed., 37, 57 S. Ct., 77.

The plaintiffs' claim that the State Liquor Commission had no power to enact the regulations in question must be sustained. No principle is more firmly embedded in our concept of government than that the laws under which we live shall be enacted by the people or by their representatives in legislature assembled. By Article III of our Constitution exercise by one department of government of the prerogatives of another is specifically forbidden.

> "Sec. 1. The powers of this government shall be divided into three distinct departments, the Legislative, Executive and Judicial.
>
> "Sec. 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

By adherence to this principle we have been saved from the tyranny consequent on the promulgation of executive edicts, by which the liberties of peoples in other lands have been destroyed,

and have established here in the apt phrase of the declaration of rights of the Commonwealth of Massachusetts "a government of laws and not of men."

Citation of authority to support a doctrine so fundamental seems hardly necessary but we call attention to two recent well-known cases where the principle has been reiterated. *Panama Refining Company* v. *Ryan*, 293 U. S., 388, 55 S. Ct., 241, 79 L. Ed., 446; *A. L. A. Schechter Poultry Corporation* v. *United States of America*, 295 U. S., 495, 55 S. Ct., 837, 79 L. Ed., 1570.

What has this commission attempted to do? In the face of a statute which fixes an annual fee of $300 on wholesalers of malt liquors in the State of Maine, it has put an additional yearly tax of $200 on the foreign manufacturer for the issuance of a so-called certificate of approval, and attempts to force the payment of such exaction by threats of prosecution of wholesalers within this state who purchase from a foreign manufacturer who has not paid such tax and procured such certificate of approval. Furthermore, this regulation was promulgated in spite of the fact that at its eighty-seventh session the Maine Legislature refused to pass an amendment to P. L., Chap. 159, Sec. 8, the purpose of which was to forbid the wholesale licensee within this state from purchasing malt liquors from a foreign manufacturer who had not procured such certificate of approval. Legislative Record Eighty-Seventh Session of Maine Legislature 1935, Pages 447, 643, 681, 819, 829, 908, 947.

By regulation 4 the commission seeks to increase the excise tax fixed by the legislature and attempts to force a compliance by providing in regulation 2 that the brewery or foreign wholesaler may ship its product with the commission's permission, when the commission has been notified that the wholesale licensee within the state has paid such tax.

Nowhere in the statutes relating to this subject is there the slightest indication that the legislature even attempted to give to the State Liquor Commission the authority which it now claims to have. Its power to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the legislature. What the commission has attempted to do in this instance constitutes a flagrant usurpation of a

prerogative which belongs to the legislature, and is subversive of those principles which are the foundation of orderly government. The regulations in question are invalid, and the attempt of the commission to enforce them was properly enjoined.

Appeal dismissed.
Decree below affirmed.

PUBLIC UTILITIES COMMISSION

vs.

SACO RIVER TELEGRAPH AND TELEPHONE COMPANY.

Kennebec. Opinion, January 9, 1937.

PUBLIC UTILITIES. EXCEPTIONS.

Appeal from a decree based on findings of the Industrial Accident Commission was premature when record shows case had never been closed before commission.

Until an enforcible order is made, it is impossible for a party claiming to be aggrieved to show that the rulings excepted to are prejudicial, and prejudice being necessary, exceptions to such rulings can not be sustained.

On exceptions to rulings, findings and decisions of the Public Utilities Commission. Case dismissed. Case fully appears in the opinion.

Benjamin F. Cleaves, for plaintiff.

Hiram Willard, for defendant.

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

THAXTER, J. The respondent, Saco River Telegraph and Telephone Company, purports to bring this case before this Court on exceptions to certain findings and alleged rulings of the Public Utilities Commission.

The proceeding originated on a complaint filed by the Standish

Telephone Company against the respondent, seeking to determine the ownership of certain poles and equipment used in furnishing telephone service in the towns of Buxton and Hollis, and to establish the respective rights of the two companies to supply telephone service to such towns. The commission, not being satisfied that the matter was properly before it, entered a complaint on its own motion. The respondent filed an answer, in which was included by agreement what was in substance a cross complaint.

Hearings were had before the commission which made certain findings. These are to the effect that the Saco River Telegraph and Telephone Company had unlawfully extended its service to a certain portion of the area in question; that with respect to that part of the territory in which both companies have for some time operated, matters should for the present be left *in statu quo*, until the ownership of certain of the facilities should be settled. The final paragraph of the findings reads as follows:

> "In view of the foregoing conclusions we shall make no definite order herein at this time but the case will remain open on the Commission's docket for such further hearing and order as may be required."

The respondent excepted to the exclusion of certain evidence and to the admisson of other evidence, also to the findings of the commission. These exceptions were allowed.

The case is not properly before us. The commission has made no order. It has suggested in its findings what order it may make under certain conditions. But exceptions do not lie to what is nothing more than an expressed intent to do something in the future. The case is still open on the commission's docket. A somewhat analagous situation was presented in the case of *Guthrie* v. *Mowry*, 134 Me., 256, 184 A., 895, where it was held that an appeal from a decree based on findings of the Industrial Accident Commission was premature when the record showed that the case had never been closed before the commission.

The result is the same with respect to the exceptions to the admission and exclusion of evidence. Until an enforcible order is made, it is impossible for a party claiming to be aggrieved to show that the rulings excepted to are really prejudicial. The showing of

prejudice is necessary, if exceptions to such rulings are to be sustained. *Damariscotta-Newcastle Water Co.* v. *Damariscotta-Newcastle Water Co.*, 134 Me., 349, 186 A., 799.

In any event, orderly procedure requires that, except under certain well-recognized conditions not here present, cases shall not be brought before the Law Court piecemeal.

Case dismissed.

LESTER P. GERRISH, EXECUTOR

vs.

MARION M. CHAMBERS

AND

FIRST NATIONAL BANK OF LEWISTON, TR.

LESTER P. GERRISH, EXECUTOR

vs.

MARION M. CHAMBERS AND JAMES E. MONROE.

Androscoggin. Opinion, January 11, 1937.

EQUITY. TRUSTS. EXCEPTIONS.

The findings of fact of a Justice sitting below are not to be reversed upon appeal unless they are clearly wrong, and burden of showing error is upon appellant.

Fraud in equity includes all wilful or intentional acts, omissions or concealments by which an undue or unconscientious advantage is taken over another.

Whenever a fiduciary or confidential relation exists between the parties to a gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other. In transactions between them wherein the superior party obtains a possible benefit equity presumes the existence of undue influence and the invalidity of the transaction. The burden of proof of showing affirmatively is upon the party against whom the existence of undue influence is

presumed, and he must show that he acted with entire fairness and the other party acted independently, with full knowledge and of his own volition, free from undue influence.

Exceptions must present, in clear and specific phrasing, the issues of law to be considered, with each ruling objected to clearly and separately set forth.

The presentation of a general exception to a judgment rendered by a Justice at nisi prius *does not comply with the statute.*

Lester P. Gerrish, Executor v. *Chambers and trustee*; this case at law on exceptions by defendant. *Lester P. Gerrish, Executor* v. *Chambers et al.*; this case in equity on appeal by defendants. Both cases heard by single Justice by agreement. In the case at law exceptions overruled. In the case in equity appeal dismissed and decree below affirmed. Cases fully appear in the opinion.

Alice M. Parker,
Ralph W. Crockett, for plaintiff.
Benjamin L. Berman,
David V. Berman, for defendants.

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

STURGIS, J. These cases, the one at law and the other in equity, by agreement were heard together by a single Justice sitting in vacation as permitted by the laws of this jurisdiction. The action at law comes forward on exceptions and the equity suit on appeal. Numbers 105 and 106 have been assigned to these cases on the docket of this Court. They will be considered in reverse order.

No. 106 — EQUITY.

LESTER P. GERRISH, EXECUTOR
vs.
MARION M. CHAMBERS AND JAMES E. MONROE.

The complainant, Lester P. Gerrish, in his capacity as executor under the last will and testament of Mary R. Smith, late of Lisbon, Maine, deceased, seeks in this action to impress a trust upon and recover thirty-five hundred dollars or property into which it has

been converted, which it is alleged the defendant, Marion M. Chambers obtained from the testatrix, Mary R. Smith, by fraud and undue influence. The sitting Justice hearing the cause on Bill, Answer and Replication ordered the defendants to forthwith pay the complainant the full amount claimed with interest, otherwise execution to issue.

The printed case shows that on July 2, 1934, Mary R. Smith, a widow, eighty-two years old, suffering from a rectal cancer of long standing and requiring constant nursing and regular medical attendance, through arrangements made by her family physician entered the private hospital maintained and operated at Lisbon Falls, Maine, by the defendant, Marion M. Chambers. It was arranged that the defendant Chambers, who was a trained and registered nurse, should personally care for the testatrix and that the charges for her board and care should be twenty-five dollars a week for the first two weeks and thirty-five dollars a week thereafter. Medical and surgical supplies were to be paid for by the patient. The nurse, Mrs. Chambers, was an entire stranger to the testatrix when she came to the hospital and her care and the charges to be made were arranged on a strictly business basis. Mrs. Smith then had property aggregating more than ten thousand dollars in value, the larger part of which was in the form of deposits in local or near-by banks. Receipted vouchers exhibited at the hearing indicate that she paid all her current bills, including the hospital and nurse's charges, either in advance or as they became due.

After Mrs. Smith was admitted to this hospital, her disease, then in advanced stages, progressed rapidly. The evidence clearly indicates that there was a gradual and progressive weakening of her mental and physical processes. She realized that death was approaching. Within a few weeks after her admission, her condition was such that it was necessary for her to use opiates and tincture of opium was regularly prescribed by her physician in increasing doses and administered by the nurse.

From the time Mrs. Smith entered this hospital, she was entirely dependent upon the defendant, Marion M. Chambers, for care, attention and assistance in the few business matters which she undertook. Her nearest relatives were two granddaughters of whom she

had been very fond and had given substantial presents, who apparently continued in her good graces and were the sole beneficiaries of a substantial part of her property under a will she had previously executed and had never revoked, but they were young girls living in Methuen, Massachusetts, and unable to care for the testatrix or often visit her. She had cousins who called occasionally, but like her friends and neighbors were not regularly available for advice or assistance. The nurse Marion M. Chambers, her sister Gladys Nickerson, also a patient in the hospital, and a cousin James E. Monroe, named defendant in this action, all strangers, were the persons with whom Mrs. Smith was in regular contact and association.

On October 5, 1934, Mary R. Smith signed an order drawn upon her savings deposit in the Manufacturers National Bank of Lewiston, Maine, for the sum of thirty-five hundred ($3500) dollars payable to herself or order. The body of the order was in the handwriting of the defendant Marion M. Chambers. It was signed, however, by Mrs. Smith, who also wrote below her signature, "October 5th, 1934. Lisbon Falls Maine. Please send me a cashiers check." On the same day, Mrs. Chambers presented this order at the bank on which it was drawn, and when asked what Mrs. Smith was going to do with this money by the assistant cashier, as he says, replied, "I don't know, but she is all right." Obtaining the cashier's check, Mrs. Chambers brought it back to the hospital where Mrs. Smith indorsed on it, "Pay only to Marion Chambers." As soon as the check was indorsed, Mrs. Smith gave it to Mrs. Chambers who forthwith returned to Lewiston and deposited it in her own savings account which she carried in the First National Bank of Lewiston. On October 22, 1934, Mrs. Smith died. Eighteen days later, on November 9, 1934, Mrs. Chambers drew thirty-five hundred ($3500) dollars from her savings account, purchased a house in Lisbon Falls, and caused a deed thereof to be given to her cousin, the defendant James E. Monroe, who on the same day executed a will devising the property back to her at his death.

The complainant charges that the money turned over to the defendant Marion M. Chambers by his testatrix was obtained by fraud and undue influence and the transaction was unconscionable. This is the ground upon which the learned Justice sitting

below rendered his decree. His findings of fact are not to be reversed upon appeal unless they are clearly wrong. The burden to show the error is upon the appellant. *Savings Institution v. Johnston and Jose,* 133 Me., 445, 180 A., 322; *Meader* v. *Cummings,* 131 Me., 445, 163 A., 792; *Adams* v. *Ketchum,* 129 Me., 212, 151 A., 146; *Merryman* v. *Jones,* 126 Me., 130, 131, 136 A., 667.

Fraud in equity includes all wilful or intentional acts, omissions or concealments by which an undue or unconscientious advantage is taken over another. Undue influence is a species of constructive fraud. Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his or her position will not be permitted to retain the advantage.

The term "Fiduciary or confidential relation" embraces both technical fiduciary relations and those informal relations which exist whenever one person trusts in and relies on another. And the rule is that whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them by which the superior party obtains a possible benefit equity presumes the existtence of undue influence and the invalidity of the transaction, and casts upon that party the burden of proof of showing affirmatively by clear evidence that he or she acted with entire fairness and the other party acted independently, with full knowledge and of his own volition free from undue influence. *Burnham* v. *Heselton,* 82 Me., 495, 500, 20 A., 80; *Eldridge* v. *May,* 129 Me., 112, 116, 150 A., 378; *Mallett* v. *Hall,* 129 Me., 148, 153, 150 A., 531.

The defendants insist that the money which Mrs. Chambers received from Mary R. Smith was a voluntary and unsolicited gift and attempt to sustain the validity of the transaction by the testimony of the following witnesses.

Gladys Nickerson, a sister of the defendant Marion M. Chambers, testifies that she came to her sister's hospital as a patient on Labor Day 1934 and stayed there until October 12th following,

and making the acquaintance of Mrs. Smith who occupied the next room visited her frequently and often sat with her on the piazza. She insists that from the time she arrived until October 7, 1934, Mrs. Smith was at all times mentally alert, interested in current events, and apparently entirely rational in her speech and actions. She claims that Mrs. Smith told her on several occasions that the nurse, Mrs. Chambers, had been very kind and attentive to her and that she was going to make her a good present, the amount not being stated, and on one of these occasions, speaking of her granddaughters, said she had plenty left for them. This witness insists that she was present in the forenoon of Friday, October 5, 1934, when Mrs. Smith dictated the order directing the Manufacturers National Bank to send her a cashier's check for thirty-five hundred ($3500) dollars. She says that Mrs. Chambers wrote out the order in accordance with the dictation and that she saw Mrs. Smith sign the paper and add in her own handwriting the direction to the bank for the transmission of the funds by cashier's check. Her statement is that when Mrs. Chambers brought the check back she gave it to Mrs. Smith who endorsed it making it payable "Only to Marion Chambers" and passed it to Mrs. Chambers with the remark, "Here is a present I am giving you of $3500." Her recital of what then occurred is that Mrs. Chambers thanked Mrs. Smith "and said it pleased her." And finally, she says that when Mrs. Chambers had returned from depositing the endorsed check in her own bank account, Mrs. Smith asked the witness to write a letter for her stating that she had given this money to Mrs. Chambers as a gift and of her own free will. She insists that Mrs. Smith dictated each and every word of the letter and she wrote it down for her and saw her sign it.

An elderly neighbor, Josephine O. Coolidge, who made frequent but brief calls on Mrs. Smith states that, although she found her a very sick woman and very weak, she was, in so far as she observed, up to the last time she saw her, still rational and in possession of her faculties. And another friend, Alice H. Elder, insists that she saw her up to October 15th and goes so far as to say she never saw any breaking down of her mental faculties.

Arrayed against this testimony are the statements of relatives and friends who saw Mrs. Smith before and after this money was

turned over. Druggist's records and medical testimony are in the record. The following summary sets forth some of this rebuttal evidence.

Annie M. Swett, a neighbor who had known Mrs. Smith for more than forty years, frequently visited her before she came to the hospital and after her arrival there called usually once a week. This apparently disinterested witness testifies that she noticed that Mrs. Smith was gradually growing weaker. On at least six occasions, at the request of Mrs. Chambers, she went to the hospital to care for Mrs. Smith. She was there on Labor Day, the first Monday of September, 1934, and stayed there until late in the evening. She reports that Mrs. Smith was confused during her stay. The following Wednesday, Mrs. Swett was again at the hospital during the late afternoon and evening. At that time she had difficulty in keeping her in bed. She was tearing up cotton and, without cause, insisting that she must wipe the floor and wash the walls. She was finally quieted and induced to return to her bed. The inference to be drawn from this testimony is that the testatrix was not rational at that time. On September 30, 1934, Mrs. Swett called at the hospital again and says she was told by the nurse, Mrs. Chambers, that the testatrix "was bad" and "wasn't any better from her trouble than she was the last time I was down there." Mrs. Swett was allowed to go in and see the patient, however, but she was in bed lying face to the wall, appeared very weak and "didn't make any talk."

William C. Robinson, a cousin to Mrs. Smith at whose home she had lived prior to her going to this hospital, called on her in the latter days of September and found her in bed in a drowsy condition, unable or at least unwilling to carry on conversation. He called three times in October but Mrs. Chambers, the nurse, did not allow him to go into the room.

Albert Prosser, at whose home Mrs. Smith had lived some years previously, called on her at the hospital and testifies that she grew continuously worse. He saw her on an average of once a week and says that she failed rapidly. He was there on October 6, 1934, the day after the alleged gift here in controversy was consummated, and states that Mrs. Smith was at that time in bed, her mouth was drawn and she was gasping for breath. She gave no indication that she knew her visitor. Mr. Prosser said to the nurse, Mrs. Chambers,

"I don't think she will live through the night," and received the reply from her, "I don't think she will myself." Mr. Prosser called a week before and Mrs. Smith at that time looked very badly, volunteered no conversation and was in a weak condition. He says that Mrs. Chambers at that time told him that Mrs. Smith was "about the same, only gradually growing weaker."

On October 9, 1934, Marion J. Ricker, an officer of a lodge to which Mrs. Smith belonged, called and found her in a very low condition, apparently in a stupor. Her eyes were closed and her mouth was open. Mrs. Chambers told the visitor that the physician didn't think the patient would live through that night. This witness saw the testatrix again on October 17th and again her condition was worse.

The granddaughters, Annie and Nancy Collinson, visited the testatrix at the Chambers hospital in August before her death and agree that, although during the week they stayed there Mrs. Smith was twice wheeled out on the piazza, at other times she was confined to her bed. They say she was very sick and weak, forgetful but otherwise generally rational. In September, they visited her again for a brief stay and found her much worse, quickly wearied by conversation. On October 12th, when they came in response to a letter written by Mrs. Chambers on October 7th notifying them that their grandmother was in a most serious condition and must be seen soon if at all, they found her in a wasted condition and noticeably weaker. They were then told by Mrs. Chambers, the nurse, that Mrs. Smith was taking heavy and increasing doses of opium.

The records of the druggists who filled the prescriptions show that from and after July 30, 1934, the testatrix was continually using tincture of opium. At that time, the dose was 25 drops a day and was gradually increased until on September 28th her prescription called for 80 drops per day. On and after October 9th, it was increased substantially, and a physician testifies that the continued administration of opium in such quantities after two or three weeks creates a craving for the drug, affects the memory of the patient and impairs the power of initiative and resistance, and the general morale, and this to a more marked degree when the patient is physically weak and aged as was the testatrix in the case at bar.

It has not been deemed necessary to review all of the evidence in this case. It was carefully considered at the hearing below and has been fully examined and weighed here in all its details. The sitting Justice evidently did not give full credence to the testimony of the witnesses for the defenese. It is as difficult for this Court, after reading this record, to believe that the testatrix, Mary R. Smith, when the money in controversy was turned over by her to the defendant, Marion M. Chambers, was in full possession and control of her normal mental faculties and, of her own volition, free from undue influence, intentionally diverted practically a third of her entire estate from the natural objects of her bounty and conferred so munificent a reward upon one whom she had known only for a few months, who had rendered no special or unusual care or attention, and whose charges for services had been fully paid. The facts proven and every fair inference to be drawn from them indicate that the testatrix by reason of her age, the toxic effect of her cancer and the continued use of opiates, had been reduced to a weakened mental condition commensurate with the breakdown and wearing away of her physical processes. And this, of necessity, was known and appreciated by Marion M. Chambers. Mrs. Smith was entirely dependent upon her nurse for her every care and comfort, including the administration of the opiate when her cravings for the drug and the sufferings of her body demanded relief. There can be no doubt that a confidential relation existed between Mrs. Smith and her nurse. Indeed, it would be difficult to visualize a more complete condition of dependence and trust between any patient and her caretaker. It is an entirely warranted conclusion that, even permitting Mrs. Smith, without impartial and disinterested advice, to make this transfer of this large sum of money to her, the defendant Marion M. Chambers took an unconscionable and unfair advantage of her patient. The presumption of fraud which the law casts upon transactions of this kind is not overcome by the evidence. It is confirmed. The decree below was in accordance with established equitable principles. It must be affirmed and the appeal dismissed.

Appeal dismissed.
Decree below affirmed.
Costs of this appeal to be added to bill of costs below.

No. 105 — LAW.

LESTER P. GERRISH, EXECUTOR

vs.

MARION M. CHAMBERS AND TRUSTEE.

In this action, the presiding Justice, jury being waived and the right of exceptions reserved, found that the plaintiff was entitled to recover four hundred and five ($405) dollars and gave judgment accordingly. The exception reserved was to this ruling and is presented in this form:

> "The Court in this law action ruled that the plaintiff was entitled to recover from the defendant the sum of Four hundred and five ($405) Dollars, and rendered judgment for said amount. To this ruling, of the Court, the defendant, being aggrieved thereby excepts and prays that exceptions may be allowed."

The entire record of the evidence, including the exhibits and the decision of the trial Judge, are made a part of the bill of exceptions.

The exception is not properly presented. It is not stated whether the error alleged is based upon the erroneous application of established rules of law or upon findings of fact unsupported by evidence or on other exceptionable ground. The exception is directed generally and indiscriminately to the ruling below giving the plaintiff judgment.

When the court is held by one Justice, any party aggrieved by any of his opinions, directions or judgments in any civil or criminal proceeding may present written exceptions in a summary manner, which when duly allowed are transmitted to this Court for decision. R. S., Chap. 91, Sec. 24. This Court has recently pointed out that the purpose of a bill of exceptions is to present in clear and specific phrasing the issues of law to be considered. Each ruling objected to should be clearly and separately set forth. Rulings which are claimed to be erroneous should be "stated separately, pointedly, concisely." *Dodge* v. *Bardsley et al.*, 132 Me., 230, 169 A., 306. The presentation of a mere general exception to a judgment rendered by a Justice at *nisi prius* does not comply with the statute.

Exception overruled.

ANNIE SYLVIA *vs.* SAMUEL ETSCOVITZ.

Aroostook. Opinion, January 16, 1937.

NEGLIGENCE.

When a car in good operating condition suddenly leaves the road, the occurrence itself is prima facie evidence of negligence.

Care and negligence are questions of fact, when reasonable and fair-minded men may arrive at different conclusions.

It is error to direct a verdict for defendant when there are questions of fact and inferences which might be drawn by reasoning minds in favor of the plaintiff.

On exceptions by plaintiff to a directed verdict for the defendant. An action in tort to recover for injuries sustained by plaintiff while riding in an automobile operated by servant of the defendant. Trial was had at the September Term, 1936, of the Superior Court for the County of Aroostook. The court directed a verdict for the defendant. The plaintiff filed exceptions. Exceptions sustained. Case fully appears in the opinion.

Herschel Shaw,
G. C. Gray, for plaintiff.
Herbert E. Locke,
W. S. Brown, Jr., for defendant.

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

MANSER, J. On exceptions to a directed verdict for the defendant. The action is one of negligence to recover for injuries sustained by the plaintiff while riding in an automobile operated by the servant of the defendant. The plaintiff was employed in the defendant's home as a maid. By request of the defendant she accompanied his children upon an automobile trip in a car operated by

his chauffeur. Etscovitz was in the business of buying and selling automobiles, had sold the car in question in the preceding April and had taken it back the day the accident occurred. He made a personal inspection and test. He stated that it was in good mechanical condition, including particularly the steering gear and brakes, and the tires were practically new. After driving about eight miles under favorable conditions on a fair day in August with a good road and no traffic in sight, at a moderate rate of speed, the car suddenly left the right hand side of the road and crashed into a cement abutment causing the physical injuries sustained by the plaintiff.

If nothing more were shown the doctrine of *res ipsa loquitur* would apply. Given a car in good operating condition, in the control of the defendant's servant, which suddenly leaves the road and crashes into an obstacle, the occurrence itself is prima facie evidence of negligence. It is one which in the ordinary course of events does not happen if due care has been exercised.

Counsel for defendant do not question the applicability of this rule under such circumstances. There was, however, further testimony. On the part of the plaintiff, it was to the effect that immediately before the happening of the accident she asked the driver for a cigarette; that he reached in his pocket and passed her one. The driver, one Brown, called by the plaintiff, related the same incident, stating that he lifted the cigarette from his shirt pocket with his left hand, and gave it to the plaintiff. In direct examination this witness stated that he did not know what happened to cause the accident. In cross-examination he said that he knew of no mechanical trouble with the car until it turned sharply to the right and the steering gear seemed to be locked, or "froze" just before the moment of impact and he was unable even with the use of great strength to control it; that the car travelled the very short distance of three to five feet before it struck the abutment. Several witnesses for the defense, besides the defendant, and including his salesman, the man who formerly owned the car, and the driver all testified that they had driven the car just prior to the accident and the steering gear was apparently in perfect condition and the tires were good. The defendant, interrogated as to the condition of the

car after the accident, was asked the question, "You say the tire was cut and the rim was bent? A. Yes, where the wheel struck the cement abutment."

The question for decision is whether a verdict for the defense was properly ordered.

> "It is a well established rule of procedure in this State, resting for foundation on the axiomatic principle that prevention is better than cure, that a verdict may and should be directed for either party when, giving the evidence introduced full probative value, it is plain that a contrary verdict could not be sustained. When only one inference can be drawn from the evidence by reasoning and reasonable men, the question is one of law and not of fact." *Weed* v. *Clark*, 118 Me., 466, 109 A., 8, 9.

However,

> "Ordinarily care and negligence are questions of fact, and this is so, even if the circumstances attending it are agreed to or admitted, or are undisputed, when reasonable and fair minded men may arrive at different conclusions." *Water Co.* v. *Steam Towage Co.*, 99 Me., 473, 59 A., 953, 958.

The narration of testimony as to incidents connected with the accident, leads to the inquiry whether, under the foregoing rule, there were any questions of fact or differing inferences from asserted facts which might be drawn by reasoning men.

The defendant contends, *inter alia*:

(1) That the plaintiff herself knew nothing as to the cause of the accident and that she testified to no negligent act of the driver connected with the passing to her of the cigarette.

(2) Any imputation of negligence from the cigarette incident would be merely conjecture or surmise.

(3) If this act in its essence be negligent, the plaintiff can not complain because she requested it.

As to the first contention, the plaintiff did show that the car was under the control and management of the defendant's servant; that the accident was one unusual, uncommon and unlikely to happen with the exercise of ordinary care, and unless satisfactorily explained, such as would justify an inference of negligence on the part of the driver. As to the second, if the imputation of negligence made by the plaintiff amounted only to conjecture, then it would not destroy the presumption already existing.

The answer to the last hypothesis is that the jury might conclude the plaintiff had a right to assume that an act such as the passing of a cigarette is commonly performed by experienced drivers while engaged in the operation of a car and may be expected to be accomplished without hazard. It is a matter of common knowledge that the driver may remove one hand from the steering wheel to open a window, to adjust a rear-vision mirror, to turn on the lights or radio, to light a cigar or do many things of like nature and still continue to properly manage and control the operation of the car.

The principal claim of the defendant is that the driver has given an explanation of the occurrence which removes conjecture, puts the case within the realm of pure accident, removes all question of negligence, and renders inapplicable the *res ipsa loquitur* doctrine. He asserts as a demonstrated fact that one tire was punctured before the accident and this caused difficulty with the steering apparatus.

Does the evidence in this respect reach the importance so confidently asserted of a proven fact, or is it but the reasoning developed upon adroit questioning of one naturally desirous of exonerating himself from blame for a serious accident and ready to adopt favorable suggestion, although not in consonance with his previous statement that he knew not what caused the accident? Especially so, when contrasted with an inference of possibly equal force that the tire was cut when the front wheel was doubled up and the edge of the fender forced against the tire by the impact.

Our Court has so recently passed upon and elaborated the principle of *res ipsa loquitur* and its application that repetition is unnecessary. *Chaisson* v. *Williams*, 130 Me., 341, 156 A., 154; *Edwards* v. *Power & Light Co.*, 128 Me., 207, 146 A., 700; and *Shea* v. *Hern*, 132 Me., 361, 171 A., 248, 249.

Granted that before explanation the circumstances in this case brought it within the purview of the rule, then, as stated in a nut shell in the last case cited *supra*,

> "The explanation must be a reasonable one with as much probative force as the inference itself."

This may be coupled with the further observation of the Court in that case:

> "It is common knowledge that many automobile casualties occur without apparent reason. Injury may result from mere inattention on the part of an operator of a car, from his fleeting glance to left or right, which cannot be detected by those seated beside him and of which he himself may be almost unconscious, from his failure to call into use those mental processes which control the action of eyes and hands and feet. For such lapses, incapable of accurate determination, an injured person is not without a remedy."

Enough has been set forth as to the record in this case to require the conclusion that there were questions of fact and inferences which might be drawn by reasoning minds which would justify a verdict for the plaintiff, and hence, exceptions to one directed for the defendant must be sustained.

So ordered.

FORT FAIRFIELD NASH COMPANY ET AL. *vs.* WILLIAM NOLTEMIER.

Aroostook. Opinion, January 27, 1937.

EXECUTORS AND ADMINISTRATORS. PLEADING AND PRACTICE.

Foreign administrators and executors at common law can not, merely by virtue of their offices, prosecute actions in courts of other states.

Sec. 7, Chap. 101, and Sec. 57, Chap. 96, R. S. 1930, refer to executors and administrators appointed within the state.

Non-capacity is pleadable only in abatement and, unless so pled, is waived.

Matters in abatement must be interposed promptly according to established form, otherwise the objection is deemed to be waived.

Lack of knowledge of matters forming basis for plea in abatement is no excuse for failure to plead in abatement, as pleader is bound to know, and failing to know, he is deemed guilty of laches.

Report in equity on agreed statement of facts. Complainants seek to enjoin and restrain respondent from the enforcement of two judgments, alleged to have been unlawfully recovered by him as a foreign executor. Bill dismissed. Case fully appears in the opinion.

Albert F. Cook, for plaintiffs.

Ralph K. Wood, for defendant.

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

HUDSON, J. Report in equity on agreed statement of facts. Sec. 56, Chap. 91, R. S. 1930. The complainants seek to enjoin and restrain the respondent from the enforcement of two judgments (and executions issued thereon), alleged to have been unlawfully recovered by him as a foreign executor.

Otto Baumer, residing in New Jersey, sued the Fort Fairfield Nash Company on its overdue promissory notes and entered his writ at the November Term, 1931, of the Superior Court in Aroostook County, where the Company, a Maine corporation, had its place of business. Its attorney answered and by agreement the action stood continued to the next February Term, when, Mr. Baumer's death having been suggested on the docket, it was continued to the following April Term. Then, William Noltemier of New Jersey, having qualified only in that state as executor of the last will and testament of the deceased plaintiff, appeared and this docket entry was made: "William Noltemier, Executor, appearing by his attorney, R. K. Wood," following which the "action was defaulted by agreement," judgment rendered and execution issued.

The judgment unpaid, Mr. Noltemier then sued the attachment-releasing bond given to him as executor by the Nash Company, principal, and Solomon and Wachlin, sureties. This bond suit upon

entry was answered to generally by the same attorney who appeared for the defendant in the first action. It, too, was defaulted by agreement and judgment rendered, on which execution issued. From these judgments and executions the complainants seek relief.

Not until December 19, 1933, did the Nash Company, its sureties or their attorney learn that Mr. Noltemier had received no local appointment. He did, however, on May 15, 1934.

As contended by the complainants, foreign administrators and executors at common law can not merely by virtue of their offices prosecute actions in courts of other states. Schouler on Wills, Executors and Administrators, Vol. 4, 6th Ed., Sec. 3501, page 2803, and cases cited therein; *Stearns* v. *Burnham*, 5 Greenl., 261, 262; *Sidensparker* v. *Sidensparker*, 52 Me., 481; *Saunders, Admr.* v. *Weston*, 74 Me., 85, 90; *Brown* v. *Smith*, 101 Me., 545, 547, 64 A., 915; *Chadwick, Exr.* v. *Stilphen*, 105 Me., 242, 247, 74 A., 50.

These judgments, it is also claimed, are void for failure of Mr. Noltemier to comply with the provisions either of Sections 14 and 16 of Chapter 76, R. S. 1930, providing for the allowance and recording of wills proved and allowed in other states and the settlement of such estate as is found in this state, or of Section 68 of the same chapter providing for the granting of a license to a foreign executor to collect and receive personal estate in this state.

By Section 7 of Chapter 101, R. S. 1930, it is provided that "when the only plaintiff or defendant dies while an action that survives is pending, . . . his executor or administrator may prosecute or defend, . . ."

Section 57 of Chapter 96 also makes provision for voluntary and cited-in appearance of an executor or administrator following the death of a party to a suit that survives.

Although the two statutes last mentioned do not distinguish between executors or administrators appointed *within* and *without* the state, we have no doubt that what is meant is only such as are locally appointed.

The first action, being in contract, survived. *Stimpson* v. *Sprague, Admr.*, 6 Me., 470; Sec. 8, Chap. 101, R. S. 1930. It could lawfully remain on the docket awaiting the voluntary or

compelled appearance of a party plaintiff. If a foreign executor complies with the statutory requirements, he may come in as such plaintiff and prosecute the action to its conclusion. Mr. Noltemier did not comply and thus acquire capacity to act as executor in Maine. As an individual he came voluntarily and placed himself as a person within the local jurisdiction, although not possessed of the capacity of an executor. This was also true as to the second action.

But can these complainants, the then defendants, take advantage now of what was then available as defence? We think not. Non-capacity is pleadable only in abatement and, unless so pled, is waived. Not so as to lack of jurisdiction. No pleas were filed either in the first or second action.

In *Strang* v. *Hirst*, 61 Me., 9, Chief Justice Appleton stated:

> "When one sues as administrator or executor his capacity to prosecute a suit as such can only be questioned by plea in abatement."

As to necessity of pleading in abatement, also see *Brown, Admx.* v. *Nourse et al.*, 55 Me., 230 (a foreign administratrix case); *Pope et al.* v. *Jackson*, 65 Me., 162; *Inhabitants of School District No. 6 in Dresden* v. *Aetna Insurance Co.*, 66 Me., 370. In the last mentioned case, it is stated:

> "We are aware that a different rule prevails in some of the states, but that is no reason for disregarding our own rule. Such a defense, if made at all, should be made promptly. By holding that it can only be made by plea in abatement, and within the time allowed for filing such pleas (which is the first two days of the first term,) this promptitude is secured. The rule is therefore a good one and should not be departed from."

Also see *Abbott* v. *Chase*, 75 Me., 83; *Stewart* v. *Smith, Exr.*, 98 Me., 104, 56 A., 401.

As to the first action, while our Rule of Court (Rule V) requires the filing of a plea in abatement "within two days after the entry of the action," yet where the cause for abatement does not arise until afterwards, the plea must be filed "at the first reasonable oppor-

tunity," else the matter in abatement will be regarded as waived. 1 C. J. S., Sec. 193, pages 248 and 249.

In the second action, the abatable matter preceded its entry in point of time and therefore the Rule of Court had application.

In *Moore, Admr.* v. *Philbrick*, 32 Me., 102, relied upon by the complainants, the Probate Court in Penobscot County without any jurisdiction (because the intestate died in Piscataquis County) appointed the plaintiff administrator. No plea in abatement was filed. The case came to the Law Court on an agreed statement of facts. It being submitted "without any stipulation, that it shall be made to depend upon the pleadings, or that their effect shall be controlled by them," the Court held that it was not called upon to determine by what plea the defence could be put in issue and that if the facts would verify any plea, it would be a bar to the action. On the contrary, we must consider the pleadings, because the instant case is reported as consisting of "all pleadings . . . docket entries," as well as the facts agreed upon. Still, in the Moore case the Court did say, "But the facts in this case do show a bar to the action, and might be received in evidence under a plea in bar," citing as its principal support *Langdon et al., Admr.* v. *Potter*, 11 Mass., 313. This was *obiter dicta*, the force of which we think is destroyed by later decisions to which we shall refer. Speaking of the Langdon case, *supra*, Judge Kent said in *Brown, Admx.* v. *Nourse et al.*, supra:

> "The principal question is, whether under the general issue, the defendant admits the plaintiff's capacity as administratrix, or whether that is or can be put in issue by that plea. This question seems to have been directly determined by this Court in the case of *Clark* v. *Pishon*, 31 Me., 503. It was there held that,—'by pleading the general issue the defendant admitted the plaintiff's capacity.' This case was decided after the decision in *Langdon* v. *Potter*, 11 Mass., 315, in which a different doctrine is indicated, although that case was cited by counsel in *Clark* v. *Pishon*. On examination of the authorities, we are satisfied that the decision by our own Court is, to say the least, as well supported in every respect as the contrary doctrine."

In *Stewart* v. *Smith*, supra, our Court accepted the law as enounced in *Brown* v. *Nourse*, supra, as opposed to that in the Langdon case and held that the fact the defendant was not executor when sued could not be pleaded in a brief statement under the general issue but only in abatement. Reason therefor was given in the following quotation from *Brown* v. *Nourse*, supra:

> "The principle which lies at the bottom is, that where, independently of all merits, a party would deny the capacity of the plaintiff and his right to be heard in court in the case, the objection must be interposed in limine, so as to prevent unnecessary costs and delay. It is a safe and extremely convenient rule in practice, and not unreasonable in its requirements. It only demands that what is preliminary in its nature shall be interposed and determined before the merits are reached. We do not see any sufficient reason for overruling *Clark* v. *Pishon*."

Stewart v. *Smith* is approved in *Leonard Advertising Company* v. *Flagg*, infra.

In *Anthes* v. *Anthes*, 121 Pac., 553 (Idaho), an action brought by a foreign executor who had not taken out ancillary administration, the court said on page 555:

> "Now it is clear from the foregoing provision of the statute that the objection here raised has been waived, unless it goes to the jurisdiction of the court or the sufficiency of the facts pleaded to constitute a cause of action. There can be no question as to the jurisdiction of the court, because the party came into the court and subjected himself to its jurisdiction, so that question is at once eliminated. The facts pleaded are also sufficient to constitute a cause of action and, if proven, to entitle the one who pleads them to a judgment. If, however, the party who pleads these facts, as in the case at bar, is not legally and lawfully entitled to maintain the action by reason of never having been duly appointed and constituted the executor and legal representative of the estate he assumes to represent, then the objection is purely one going to the capacity of the pleader to maintain his action. He is in this respect on a parity with a foreign corporation which comes into the state and com-

mences an action and fails to show that it has complied with the Constitution and laws of the state, so as to give it a legal status in this state and entitle it to a hearing before the courts of the state."

In *Leonard Advertising Company* v. *Flagg*, 128 Me., 433, 148 A., 561, this Court held that the fact a foreign corporation had not complied with the statute imposing conditions precedent to its right to maintain an action in the state where such action is brought is a matter for abatement and must be so pleaded.

In *Dearborn* v. *Mathes, Admr.*, 128 Mass., 194, Chief Justice Gray said:

"The objection that the original action could not be maintained, for want of the issue of Letters of Administration to the plaintiff in this Commonwealth before it was brought, could not be availed of without being pleaded, and affected only the capacity of the plaintiff to sue, and not the jurisdiction of the Court."

In an article in the *Harvard Law Review* (Vol. 48, on page 918), the authors say: "Cases in several jurisdictions hold that objection to suit by a foreign administrator goes only to the capacity of the plaintiff, and not to the merits of the case" and cite *Anthes* v. *Anthes*, supra. *M'cGrew* v. *Browder*, 2 Mart. (N. S.), 17; *Langdon* v. *Potter*, 11 Mass., 313; *Gregory* v. *McCormick*, 120 Mo., 657, 25 S. W., 565; *Wilson* v. *Wilson*, 26 Ore., 251, 38 Pac., 185; *Security First-National Bank* v. *King*, 46 Wyo., 59, 23 Pac. (2nd), 851, with only two cases contra, viz.: *Louisville & Nashville R. R.* v. *Brantley's Administrator*, 96 Ky., 297, 28 S. W., 477, and *Lefebure et al.* v. *Baker et al.*, 69 Mont., 193, 220 Pac., 1111.

". . . He who is entitled to avail himself of such defence" (meaning abatement) "must interpose it promptly according to established form, otherwise the objection is deemed to be waived; even ignorance of a cause of abatement is insufficient to justify the defendant in raising the objection after the limited time has expired. This defence, being a dilatory one, can

not ordinarily be made after a demurrer or after an answer to the merits or plea in bar, unless it be for a matter occurring thereafter, after the parties have gone to trial on the merits, *or after judgment.*" See 1 Am. Juris., Sec. 73, page 66, and cases there cited.

In 1 C. J. S., *supra*, Sec. 205, it is stated:

". . . The general rule is that defendant is bound seasonably to make inquiry and that ignorance is no excuse and does not even authorize the court to allow the plea to be filed after its proper time and order of pleading."

As an excuse for not pleading in abatement, it is urged that the complainants had no knowledge that the executor had not complied with the statutory requirements but they could have had it easily, simply by examining the probate records. This language of Chief Justice Bigelow in *Hastings* v. *Inhabitants of Bolton*, 83 Mass., 529, is apt:

"It was suggested that the facts on which the answer in abatement was founded were not known to the defendants until after the case had been in court for more than one term, and after an answer to the merits had been filed. But this is wholly immaterial. The defendants were bound seasonably to make inquiry and ascertain whether the plaintiff had brought his action in the proper county. By omitting to do so they were guilty of laches, and the law will not relieve them from the consequences of such negligence."

So the lack of knowledge by these complainants can not now avail them as an excuse for failure to plead in abatement. They were bound to know, else be deemed guilty of laches, with the result that the judgments thus obtained and by their consent following general appearance are as well founded as though there had been compliance with the statutes.

The complainants also say they were misled by the entry on the docket and in the second writ, that Noltemier was executor, and that relying thereon they agreed to the default. A false statement is essential to such fraud. This statement was simply that he was

executor and that was true. It was not said he had been appointed executor in Maine, although that was a possible inference. That it was his intent so to be understood is negatived by the stipulated fact that, "said docket entry was made and said action brought by said Noltemier's counsel without actual intent by said counsel to deceive, but through his overlooking the necessity of ancillary administration."

The complainants have failed to establish grounds for the relief sought and the entry must be,

Bill dismissed.

NONOTUCK SAVINGS BANK

vs.

IRVING T. NORTON AND ARLENE C. NORTON.

York. Opinion, January 30, 1937.

BILLS AND NOTES.

The execution, construction and validity of a note, constituting a contract made in the Commonwealth of Massachusetts, must be determined by the law of that state.

An accommodation party, under the laws of the Commonwealth of Massachusetts, is liable on the instrument to a holder in due course, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Representation made to an accommodation party to her husband's note by the vice-president of a bank that she would not be liable on the note would not excuse or limit her liability to the bank under the laws of the Commonwealth of Massachusetts.

On report. Action of assumpsit against an accommodation en-

dorser for an amount due on a note. Case remanded for entry of judgment for the plaintiff. Case fully appears in the opinion.

Ralph W. Hawkes,
Albertus D. Morse, for plaintiff.
Nicolaus Harithas,
Charles E. Drapeau, for defendant.

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

HUDSON, J. Action of assumpsit, reported to the Law Court for determination "upon the evidence or so much thereof as is legally admissible." When brought, both Mr. and Mrs. Norton were named as defendants, but later the action was dismissed as to him.

The joint and several note in suit, dated May 2, 1932, and payable on demand to the plaintiff or order, is a renewal of their note given on May 1, 1931. The latter note likewise was a renewal in a series of notes given by Mr. Norton to the plaintiff.

The note sued, constituting a contract made in the Commonwealth of Massachusetts, its execution, construction and validity must be determined by the law of that state. *Bond* v. *Cummings*, 70 Me., 125; *Roads* v. *Webb, Admx.*, 91 Me., 406, 40 A., 128.

That Mrs. Norton signed the 1931 and 1932 notes as an accommodation maker does not seem to be questioned. Within the definition of "an accommodation party" as it appeared in the Negotiable Instrument Law of the Commonwealth of Massachusetts (see General Laws, Chap. 107, Sec. 52), she signed the notes as maker, received no value therefor, and lent her name. In the same section it is provided "such a person is liable on the instrument to a holder in due course, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Under Section 18 of that chapter a holder is "the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof" and under Section 82 "every holder is deemed prima facie to be a holder in due course. . . ."

The fact that one is the payee in a note does not prevent him

from being a holder in due course. *Lowell* v. *Bickford et al.*, 201 Mass., 543, 88 N. E., 1; *Karlsberg* v. *Frank*, 282 Mass., 94, 184 N. E., 387; *Tanners' National Bank of Woburn* v. *Dean*, 283 Mass., 151, 186 N. E., 219.

We are satisfied that under the Massachusetts law the plaintiff is a holder in due course and the present defendant an accommodation maker of the note in suit.

Mrs. Norton's principal contention is that she signed for the bank's rather than her husband's accommodation. If she signed "only at the request and for the benefit" of the plaintiff, as claimed by her counsel, she would not be liable. *Conners Brothers Company* v. *Sullivan et al.*, 220 Mass., 600, 108 N. E. 503.

Then for whose accommodation did she sign? The evidence that will determine this fact clusters about the execution of the 1931 note, for, as stated in the brief of the defendant's counsel, the second note "was signed 'under the same conditions' as the first note."

On June 16, 1931, Mr. Whitbeck, treasurer of the bank, wrote a letter to *Mr. Norton* asking "for additional collateral" on account of the 1931 note, and said: "If you can not supply the same, we would request that your wife and father or mother join you in the note." Upon receipt of this letter, Mr. Norton immediately showed it to his wife. He told her about the note and requested her to go to the bank with him. This she did on June 19, 1931, and signed it as an accommodation maker. There is a sharp conflict of testimony as to the conversation that took place between the treasurer and Mr. and Mrs. Norton. The defence claims that he told Mr. Norton that if his wife signed the note she "wouldn't be liable." This the plaintiff definitely denies.

If Mrs. Norton signed only for the accommodation of her husband, then under the well-established law in Massachusetts, the alleged statement as to non-liability was not admissible. *Davis, Receiver et al.* v. *Randall*, 115 Mass., 547; *Commonwealth Trust Co.* v. *Coveney et al.*, 200 Mass., 379, 86 N. E., 895; *Neal, Receiver* v. *Wilson*, 213 Mass., 336, 100 N. E., 544; *Prudential Trust Co.* v. *Moore*, 245 Mass., 311, 139 N. E., 645; *Tanners' National Bank of Woburn* v. *Dean*, supra; *Salem Trust Co.* v. *Deery*, 289 Mass.,

431, 194 N. E., 307; *Commissioner of Banks* v. *Cincotta*, 199 N. E., 910 (Mass.).

In *Salem Trust Company* v. *Deery*, supra, the court said, on page 435:

> "Moreover, if she signed the note for her husband's accommodation, the representation made by the Vice-President of the plaintiff that she would not be liable on the note would not excuse or limit her liability."

We are convinced that Mr. Norton was the one accommodated. It can not be denied that her interest was naturally in his welfare rather than that of the bank. True, he was being pressed, but that is not necessarily of controlling moment. Its effect upon her as a wife might have influenced her all the more to "lend her name" to him. So doing, she would be none the less liable even had she been solicited directly by the bank. *Neal, Receiver* v. *Wilson*, supra; *Tanners' National Bank* v. *Dean*, supra; *Commissioner of Banks* v. *Cincotta*, supra.

The manner of procuring her signature is significant. He induced her to go to the bank. She went, knowing the contents of the letter, and that he must comply in some way with the bank's suggestion. She knew, too, that her husband had no additional collateral that he could offer. She testified that he wanted her "there as an answer to the letter." When she was asked, "What did you think you were going to do when you got there?" she said, "To see if it was necessary" and admitted that she "went down, acting on this letter, at his request." She also said, "He took me down there with the understanding I might have to sign it" and stated that probably she would not have signed it, if it had been anybody else's note except her husband's. When asked, "The reason you signed the note was because it was your husband's obligation, wasn't it?" she answered, "Well, primarily, yes."

Mr. Norton's testimony does not differ materially. Still, when pressed upon cross-examination as to why he took his wife to the bank unless to have her sign for his accommodation, he replied, "I took her down partially as a witness, because at that time, knowing my financial situation I knew that there had got to be a show-down of some kind. . . . I wanted her to know what my dealings were." We

are not impressed with that as an explanation in view of the fact that by her own admission she already had that information.

As she signed the earlier note for his accommodation, so did she the note sued. It being only for his accommodation, even if the treasurer told her she would not be liable—and we doubt it—it would constitute no defence to this action, according to the Massachusetts cases above cited.

The entry must be, *Case remanded for entry of: Judgment for the plaintiff.*

STATE OF MAINE *vs.* ERNEST E. TRUE.

Androscoggin. Opinion, February 9, 1937.

PERJURY.

Test of materiality, in question of perjury, is whether testimony given could have probably influenced the tribunal before whom the case was tried, upon the issue involved therein. If so, it was material.

Relevant testimony, whether on the main issue or some collateral issue, is so far material as to render a witness who knowingly and wilfully falsifies in giving it guilty of perjury.

False and sworn statement as to matter material to an inquiry before a grand jury acting within its authority is perjury.

Materiality of a statement or testimony assigned as false is a question of law.

On appeal from denial of motion for new trial and exceptions reserved during trial. Case one of perjury tried at March Term, 1936 of Superior Court for County of Androscoggin. Respondent found guilty. Appeal dismissed. Exceptions overruled. The case fully appears in the opinion.

Frank T. Powers, County Attorney for the State.

John G. Marshall, for respondent.

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

BARNES, J. The respondent was tried and convicted of perjury, when testifying before the grand jury of his county.

Thereafter, in due course, he presented to the presiding Justice his motion for a new trial. This was denied, and the case is before this Court on appeal from such ruling.

We have for consideration also exceptions reserved during the trial.

It appears in the record that about midnight of July 5, 1935, respondent was riding as a guest passenger of one Maurice Davis, who was driving his automobile toward the City of Lewiston, when the Davis car collided with another automobile, with resultant serious property damage and personal injury.

Respondent was taken at once to the Central Maine General Hospital where he received treatment for a fractured collar bone, an injured leg and "some lacerations."

At the September Term of the Superior Court following, while the grand jury was investigating charges that the said Davis, at the time of the collision above referred to was driving his automobile while under the influence of intoxicating liquor, the respondent was introduced, duly sworn, and interrogated as to his acts and the acts of Mr. Davis on the evening before the collision.

It appears in the record that by appointment Mr. Davis, with his wife, met the respondent in Lewiston and drove out with him to a camp in the Town of Leeds, where they passed the evening, and that they were on their way homeward at the time of the collision, respondent then in the rear of the car, asleep, or otherwise unaware of the occurrence of the collision; that he had taken to the camp that night a quart bottle of applejack brandy, while Mr. Davis brought a case of beer; that about half of the brandy and several bottles of the beer were drunk at the camp; that a bottle half-full of applejack brandy and a case containing five empty beer bottles and three, filled with beer, were found near the location of the Davis car at the scene of the collision.

Joseph A. Picard, captain of the Lewiston police, an active member of that department for twenty-four years, visited the respond-

ent in the hospital "from two and one-half to three hours after the accident," in the course of his duty, as an investigator of the facts leading up to and accompanying the Davis automobile collision, and made a second visit on the same day, with the County Attorney and Eugene A. Cloutier, Deputy Sheriff and a former inspector of the Lewiston Police Department. Quoting from the record, as to Captain Picard's first interview with respondent, at the hospital,—

"Q. Did you (Picard) inquire of him (True) relative to Mr. Maurice Davis' condition, so far as drinking intoxicating liquor prior to the accident?

A. I did.

Q. What did he say?

A. He said he, Mr. True, had been drinking . . . had taken at least two or three drinks of applejack brandy and about two or three drinks of beer. He mentioned consuming some four or five bottles of beer, and that Mr. and Mrs. Davis had taken a drink for each drink he had taken. . . .

Q. Is there any question in your mind but what Mr. True told you in the hospital that morning, Saturday morning, that he saw Maurice Davis drink applejack brandy at the Kelley camp?

A. There isn't any doubt in my mind."

From Deputy Sheriff Cloutier's testimony—

"Q. And what did he (True) say about their drinking, he and Davis especially, that night?

A. Said that after they got into camp there they opened the bottle of brandy and they all had a drink of brandy, and then had some beer; and in answer to a question put by the County Attorney said that they had had either two or three drinks of applejack brandy and that he couldn't remember how much beer but they had drunk either four or five bottles of beer . . . .

Q. What did he say about Davis drinking?

A. He said Davis had—Davis and Mrs. Davis had drink for drink. Whenever he had a drink they had a drink."

In the grand jury investigation respondent, testifying under oath, was asked by the County Attorney,

"Q. Did you see Mr. Davis drink any applejack brandy that evening, in the cottage or out of it?"

Respondent answered, "I did not." He was asked, "Did you tell the officers (meaning Picard, Cloutier and the County Attorney) on Saturday morning, July 6, 1935, in the hospital that Maurice Davis drank some of the applejack brandy the night before, or words to that effect?" Respondent answered, "No"; and for this, because it was believed to be a false reply, wilfully and corruptly given, he was indicted and tried.

Within this state, "Whoever, when required to tell the truth on oath or affirmation lawfully administered, wilfully and corruptly swears or affirms falsely to a material matter, in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is authorized by law, is guilty of perjury." R. S., Chap. 133, Sec. 1.

That respondent answered "No," when under oath, before a judicial tribunal is not disputed; but he urges in defense that the matter inquired of was not material to the question at issue.

As before stated, the issue between the State and Maurice Davis was whether at the time of the collision the said Davis was operating an automobile "when intoxicated or at all under the influence of intoxicating liquor." R. S., Chap. 29, Sec. 88.

Generally speaking, any statement which is relevant to the matter under investigation is sufficiently material to form the basis of a charge of perjury.

"The ordinary test of materiality is whether the testimony given could have probably influenced the tribunal before whom the case was being tried, upon the issue involved therein. If it tended to do so, it was material." *State* v. *Miller*, 26 R. I., 282, 58 A., 882, 884, Editor's note, Am. and Eng. Ann. Cas., Vol. 3, p. 945, *State* v. *Sargood*, 80 Vt., 415, 68 A., 49; *State* v. *Howland*, 63 Colo., 414, 167 P., 961.

"It may be laid down as a general rule that any testimony which is relevant in the trial of a case, whether on the main issue or some

collateral issue, is so far material as to render a witness who knowingly and wilfully falsifies in giving it guilty of perjury." 21 R. C. L., 259; *State* v. *Shupe*, 16 Ia., 36, 85 Am. Dec., 485; *State* v. *Miller*, supra, *Fields* v. *State*, 94 Fla., 490, 114 So., 317.

On the issue of Davis being under the influence of intoxicating liquor while driving at midnight of a certain day, it is clear that testimony of his drinking brandy in the evening hours of the same day is material.

In the process of rendering clear the drinking or not drinking of intoxicating liquor by Davis, on that evening, the grand jury had the right to demand all the evidence available; and the duty to consider it all, weighing all with care.

It was for them to determine what to believe; what to discard, and what an actor in the scene said, a few hours after the occurrence, about the drinking of Davis, as well as how he replied to questions before them; to determine the truth of respondent's replies, aided by their experience with men, and all the attendant circumstances and facts pertinent to the issue before them; to conclude that before them, upon inquiry under oath defendant testified truthfully or falsely.

It is not denied that respondent told the investigating officers that he drank applejack brandy on the evening at the camp and that Davis drank with him, drink for drink.

The fact that he had told of Davis drinking, meaning that he saw Davis drink intoxicating liquor, could have been shown to affect his credibility as a witness, and such evidence was therefore material. *State* v. *Crabb*, 131 Me., 341, 163 A., 83.

A false and sworn statement as to matter material to an inquiry before a grand jury acting within its authority is perjury. *Smith* v. *State*, 163 Ark., 223, 227, 259, S. W., 404; *Com.* v. *Warden*, 11 Metc., 406; *Chapman* v. *Gillet*, 2 Conn., 40, 49; *State* v. *Fasset*, 16 Conn., 457.

But it is argued that at most we have here only two contradictory statements, made at different times.

This is not the situation.

Respondent was presented to the trial Court for stating under oath to the grand jury that he did not tell the officers, at the hospi-

tal, "that Maurice Davis drank some of the applejack brandy the night before, or words to that effect," a statement which the grand jury had believed to be false.

So far as the record shows, respondent had not been asked before as to this question, has not made two contradictory statements thereon.

The grand jury has found that when asked, for the first time this question, respondent gave to them a false answer. So answering the witness committed perjury, for two officers testified to a contrary state of facts and the grand jury believed them.

The respondent gains nothing from the exceptions argued.

The first exception arose during the cross-examination of Inspector Cloutier when the Justice presiding ruled inadmissible a charge bearing on an allegation in the first count of the indictment, which was not incorporated in the second count.

As to the first count, the record shows that an entry *nolle prosequi* was authorized.

Trial was limited to the charges in the second count. The ruling challenged was correct.

As to the second exception, the following questions by the County Attorney and answers by respondent appear:

"Q. Do you remember of testifying before the grand jury that you did not drink that day before you went out with Mr. Davis to the Kelley camp that night? . . .

A. Yes.

Q. That was your testimony first, that you did not drink any beer before going with Mr. Davis to the Kelley camp that night?

A. Yes.

Q. Did you later come before the grand jury and testify that that was not true?

A. Yes. . . .

Q. You did lie before the grand jury in that respect, under oath?"

Counsel for the respondent interjected a remark which the court apparently interpreted as an objection; whereupon the court said:

"That is all right. You asked him about the truth of his testimony before the grand jury. I think it is perfectly proper for the State to put in evidence that he lied in other respects having to do with this particular case on this particular investigation. I think it is proper evidence and I will admit it."

Exception was taken, and counsel argues that by his statement quoted the Justice expressed his opinion.

No such interpretation of the statement of the Justice is founded on his words.

In determining the truth or falsity of respondent's statements the jury were entitled to recital of his affirmations and denials of incidents once stated by respondent as having occurred upon the day of the accident.

The second exception is overruled.

In his charge the presiding Justice quoted the question asked respondent as to his telling officers of Davis' drinking applejack brandy in the camp and said:

"I instruct you as a matter of law that the inquiry was material in this case."

To this instruction, exception was taken.

We take it to be settled law that the materiality of a statement or testimony assigned as false is a question of law for the court and should not be submitted to the jury.

The decisions on this issue may be found in 48 C. J., p. 906, Sec. 178.

"And the materiality of what is falsely sworn, where an element of the crime of perjury, is one (a question) for the court." *Sinclair* v. *United States*, 279 U. S., 263, 298, 49 S. Ct., 268, 273.

Appeal dismissed.
Exceptions overruled.
Judgment for the State.

FRANK T. HINES,

ADMINISTRATOR VETERANS' ADMINISTRATION

vs.

EDMUND J. AYOTTE,

GUARDIAN OF WALTER J. AYOTTE.

Aroostook. Opinion, February 9, 1937.

TRUSTS.

The duty of a guardian is to invest his ward's funds in such a manner as to produce an income, and unless the statute expressly requires it, the guardian can make such investments without an order of court.

A trustee must conduct himself faithfully and exercise a sound discretion in the investment of trust funds, considering the probable income as well as the probable safety of the capital to be invested.

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.

This case comes up on exceptions, and by appeal from the decision of the Supreme Court of Probate dismissing appeal from the ruling of the Judge of Probate Court, to charge off as loss the deposit in the name of appellant as guardian in the interest-bearing, savings department of a trust company, a portion of the ward's fund, "tied up" in a trust company closed by order of the state officials, on March 4, 1933, found insolvent and not since opened for business.

Exceptions overruled. Decree of the lower court affirmed. The case very fully appears in the opinion.

C. M. Fitzgerald, for appellant.

Parker P. Burleigh

Pattangall, Williamson & Birkenwald, for appellee.

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

BARNES, J. This case comes up on exceptions by appellant, as Administrator of the Veterans' Administration, to rulings of the Supreme Court of Probate of Maine, arising in litigation over the correctness of an account of the guardian, which was approved and allowed by the Probate Court.

From a time prior to April 12, 1921, to June 6, 1935, appellee, as guardian of Walter J. Ayotte, an incompetent beneficiary of the Veterans' Administration, a resident of Aroostook County, Maine, received and accounted to the Probate Court for funds of his ward.

From first to ninth account, filed January 10, 1934, the guardian reported as on deposit in the interest-bearing, savings department of the Van Buren Trust Company an annually increasing amount which reached the sum of $12,125.56, the amount reported in the ninth and tenth accounts as "tied up."

All accounts to and including the eighth, filed January 5, 1933, report the receipt of interest on deposits in savings departments of banks.

The characterization of deposit in a bank as "tied up," following the order to close the banks, issued by the bank commissioner, on March 4, 1933, is well understood by citizens of this state to mean unavailable at date of such closing, and probably subject to discount.

In his eleventh account as guardian the appellee included the following prayer:

> "Your accountant from time to time, in his capacity as Guardian of Walter J. Ayotte, deposited funds belonging to his said ward, in the Van Buren Trust Company of Van Buren, Maine, in the name of 'Edmund Ayotte, Guardian of Walter Ayotte.' On March 4th, 1933, the Van Buren Trust Company was closed by the State Bank Commissioner and is now in receivership. Your accountant proved his claim before the Commissioners appointed, asking that this claim be allowed as a preferred claim, which claim was disallowed. An appeal was taken and the Comissioners findings were confirmed. He has

done everything in his power to protect his said claim. All of these deposits were made in good faith, your accountant believing the said bank to be in a good, sound financial condition, at the time of making such deposits. Your accountant now believes that said deposit is of no value and asks to be allowed to charge off said asset, be relieved of responsibility therefor, and take a loss of $12,125.56."

Decree of the court on the eleventh account was made at the July Term, and reads as follows:

"STATE OF MAINE

AROOSTOOK, ss.

At a Probate Court held at Van Buren in and for the County of Aroostook, on the third Tuesday of July in the year of our Lord one thousand nine hundred and thirty-five,

NOTICE having been given pursuant to the Order of Court on the foregoing account, and the same with the vouchers produced having been examined by the Court, and the said accountant having made oath thereto, and it appearing that said account is just and true, it is decreed that the same be allowed and recorded.

Ira G. Hersey, Judge of Probate"

and from this decree appeal was duly taken, by the appellant as an administrative officer or agent of the United States Veterans' Bureau. U. S. Statutes, U. S. C. C. Edition, Title 38, Sec. 425.

The position taken by the exceptant is that the appellee by depositing and leaving for a period of years, funds of his ward in the savings department of the Van Buren Trust Company did not make such investment of funds as shall protect a guardian from personal liability for depreciation of such funds by reason of the insolvency of the bank.

Before the time when the Uniform Veterans' Guardianship Act, P. L. of Maine, 1929, Chap. 31, R. S., Chap. 81, became effective, express provision for investment of his ward's funds by a guardian may be found only in R. S., Chap. 80, Sec. 22, which reads as follows:

"On petition of the guardian or any party interested, the judge, with or without notice to other persons interested, as he deems necessary, may authorize or require the guardian to sell or transfer any personal property held by him as guardian, or any pews or interest in pews, belonging to such estate, as goods and chattels, and to invest the proceeds of such sale, and also all other moneys in his hands, in real estate, or in any other manner most for the interest of all concerned; and may make such further order, and give such directions, as the case requires, for managing, investing, and disposing of the effects in the hands of a guardian, or for buying in any particular estate, remainder, reversion, mortgage, or other incumbrance upon real estate belonging to the ward."

Subsequent to effective date of Veterans' Guardianship Act, *supra*, a further provision reads: "Every guardian shall invest the funds of the estate in such manner or in such securities, in which the guardian has no interest, as allowed by law or approved by the court." R. S., Chap. 81, Sec. 12.

Within this state then the money of a ward must be invested "in real estate, or in any other manner most for the interest of all concerned."

Security of the investment, availability as need arises, and the rate of return are considerations governing a guardian.

First and most important is the probability of security of the investment, and on this phase of the case the guardian and the Judge of Probate knew that the law which provided for the security of deposits in the savings departments of trust companies, at the time these deposits were made read as follows: "Every trust company soliciting or receiving savings deposits . . . 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 . . . ."

"Such assets so segregated and set apart shall be held in trust for the security and payment of such deposits . . . ." R. S. 1930, Chap. 57, Secs. 89, 90.

It is true that the guardian may not be relieved of responsibility if without inquiry he deposits funds of his ward in a bank then insolvent or of questionable soundness.

But it would be unjust and inequitable to require guardians to deposit the funds belonging to their wards in banks at their own or their bondsmen's peril.

Such a rule would impose unreasonable responsibilities upon them and prevent prudent business men from assuming such responsibilities.

The true rule, expressed by a unanimity of both federal and state authorities is well stated in 12 R. C. L., p. 1131: "No duty is more clearly imposed by the very nature and purpose of a guardianship than to invest the ward's funds in such a manner as to produce an income, and unless the statute expressly requires it, the guardian can make such investments without an order of court.... In making investments the guardian must act in absolute good faith, and with reasonable diligence to insure the safety of the investment.

"The motto 'safety first' applies nowhere more strongly than in the investment of trust funds . . . in investing trust funds the element of speculation and that of favoritism are alike forbidden. On the other hand skilled financiers cannot usually be obtained as guardians; the office is very often a labor of love, and if the rule of prudent investment were applied too strictly, injustice might often be done, and ordinary persons would be unwilling to accept the responsibility. Only such care as may be expected from honest and faithful men of reasonable intelligence should be required."

The rule in Maine is expressed in *Emery* v. *Batchelder*, 78 Me., 233, 241, 3 A., 733, 737, adopting the expression of the Massachusetts court, 9 Pick., 461; "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested." See also *Mattocks* v. *Moulton*, 84 Me., 545, 24 A., 1004; *Moore, Appellant*, 112 Me., 121, 90 A., 1088, 1089.

It is not argued that the deposit of $4442.97 in the savings department of the bank prior to August, 1924, was not justified, nor that the return expected and for years realized was not satisfactory.

With the safeguard of sound assets, under the statute, segregated to assure the security of "savings deposits" in trust companies, and in reliance upon the surveillance of the department of banking of the state, it seems unquestionable that a guardian was justified in considering such a deposit as a safe investment.

No evidence was introduced that anyone was apprehensive of loss on deposits in this bank until the closing of all banks in 1933. A trustee would have learned, upon inquiry among men interested to know of the ability of trust companies to pay deposits in full, during the period under discussion here, that their reputation was generally good.

No evidence appears that the Van Buren Trust Company was an exception.

The diligent, discreet and prudent investor of trust funds should be held harmless when, under the circumstances of this case, insolvency of the bank occurs.

Moreover, at intervals, this guardian filed for scrutiny and allowance eight accounts of the discharge of his trust, and upon each received the approval of the Probate Court.

He had the sanction of the Probate Court upon his investments, for as this Court has said in *Moore, Appellant*, supra; "To investigate the character of investments upon the allowance of a guardian's account is clearly within the duty of the Probate Court:" and "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." *Chaplin* v. *National Surety Corporation*, 134 Me., 496, 185 A., 516.

Further, under the Uniform Veterans' Guardianship Act, provision is made for furnishing the United States Veterans' Bureau a copy of each account as presented in probate court for settlement; as follows,

> "Every guardian who shall receive on account of his ward any moneys from the bureau, shall file with the court annually on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account in duplicate under oath of all

moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. The court shall fix a time and place for the hearing on such account not less than fifteen days nor more than sixty days from the date of filing same and notice thereof shall be given by the register to the aforesaid bureau office not less than fourteen days prior to the date fixed for the hearing. Said notice of the return day shall be given in writing by mail post-paid to said bureau office, together with a copy of said account as filed." R. S., Chap. 81, Sec. 9.

And it is not contended that the Probate Court failed in its duty to notify the bureau and forward copies of accounts filed, as required by law.

If it be considered (a position which we do not take) that a deposit such as this guardian made is not an "investment," as the term is used in our statutes governing guardians, then it is noteworthy that between the parties to this suit correspondence had taken place relative to other investment of the funds in the trust company before the closing of the bank.

Exceptions were taken to the introduction of evidence regarding proposed investments.

The first exception arose during the direct examination of the guardian as here quoted:

"Q. Prior to the closing of the Van Buren Trust Company had you made plans to invest some of the money on deposit there?
A. Yes, sir.
Q. Tell the Court what plans you had made.
A. By putting in an application to loan money on real estate mortgages — first mortgages.
Q. Application to who?
A. To the Court, — to the Probate Court.
Q. Prior to making application to loan money on real estate mortgages had you had any other correspondence or conversations with the Veterans' Bureau in regard to investing?

Mr. Fitzgerald: I object.

The Court: State your objection.

Mr. Fitzgerald: I don't think it is material, your Honor, who he had correspondence with, or who he didn't.

The Court: You are charging this man with not using proper caution and good faith in investing the funds, and it seems to me if there is any correspondence he had with the party who now claims to be aggrieved, showing that whatever he did was at the time to their satisfaction, it would be proper.

Mr. Fitzgerald: The Veterans' Administration was not the—we maintain, they were not the guardian. This duty of investing was his entirely. If I had written to him and told him to steal the money and he come back and done it, he could not come into court and said I did that.

The Court: And you would not have very good standing if you came into court and found fault with his stealing, if you had advised him to.

Mr. Fitzgerald: That is true. This is the same situation now.

(Immediately preceding question read by stenographer.)

The Court: He may answer that.

(Exception reserved.)

Q. What conversation did you have, or correspondence?

A. I was advised by a Veterans' Officer that Mr. Fitzgerald would be out. He sent Mr. Malcom Stoddard in his place, and told me that the money would be left in the Van Buren Trust and after January, 1933, that we would put the money in first mortgages.

The Court: The Malcom Stoddard you speak of is administrator at the Home?

Mr. Fitzgerald: He is the manager.

The Court: Manager of the Veterans' Bureau Facility?

Mr. Fitzgerald: Yes.

Q. Have you finished the answer?

A. He said that later on Mr. Fitzgerald would be up and would attend to the matter. (Letter, marked Appellee's Exhibit A. offered and admitted. Exception reserved) . . .

Q. I show you Appellee's exhibit C, a letter marked, and ask you if that is a letter you received from Mr. Fitzgerald?
A. That is signed by him. . . . Yes, sir.
(Exhibit C. offered and admitted over objection. Exception reserved.)"

The exceptions are here treated as one.

The duties of the Federal Veterans' Bureau are numerous, the recipients of the bounty which it distributes are found in probably every county in the United States, and the authority of the Director of the Bureau is complete to include on his technical and administrative staff such officers, experts, inspectors and assistants as he shall prescribe.

He properly assumes the duty of scrutinizing the probate records in Maine, and his duty to enforce the provisions of the World War Veterans' Relief Act must be held to extend to counseling as to investment of the funds of a ward, under the act.

The appellant, as Administrator of the Veterans' Administration is apparently one of his regional assistants.

The testimony and exhibits objected to are clearly admissible, so far as pertinent to an examination of the good faith of the guardian. The letter, Exhibit A, addressed to and received by defendant, headed "Veterans' Administration, United States Veterans' Bureau," issued in Portland, Maine, on January 7, 1932, acknowledging guardian's letter of January 5, 1932, "relative to investing a portion of the funds of your ward in securities," closes as follows, "Before you actually invest this money, however, you should submit a list of the bonds to this office. If it is believed they are a safe investment, a petition will be prepared by this office for your signature requesting the Judge of Probate to authorize you to invest in the bonds.

It is, of course, considered a proper investment to leave money in the savings bank, provided the bank is considered safe and sound." and is signed "Harold F. Canning, Acting Regional Attorney."

Exhibit C, letter from the same office, under date of January 16, 1933 more than six weeks before the closing of the Van Buren Trust Company, reads:

"Mr. Edmund J. Ayotte
Van Buren, Maine

Ayotte, Walter
C-368, 341

DEAR SIR:

This has reference to your communication of January 12, 1933 and petition enclosed in the above captioned case.

In view of the fact that the Administration does not favor investment of trust funds in mortgages on real estate, approval of the petition cannot be granted.

The undersigned contemplates a visit to Van Buren and vicinity sometime during this month and will see you personally in the matter.

Very truly yours,"

and is signed "C. M. Fitzgerald, Chief Attorney," counsel for plaintiff at bar.

We must hold, nothing to the contrary appearing, that the writers who signed these exhibits were authorized to make the findings and suggestions which the exhibits contain. This renders the letters admissible, notably the statement made fourteen months before the bank was closed: "It is, of course, considered a proper investment to leave the money in the savings bank, provided the bank is considered safe and sound," and the report of Malcom Stoddard that Mr. Fitzgerald "would attend to the matter," of investing in mortgages.

Argument of appellant that loss from failure of the guardian to withdraw the trust company deposit and make other investment should be restored by the guardian, regardless of the advice and suggestions of the agents of the Veterans' Administration, merits attention in passing. It is the position of the appellee that supervision of the activities of an incompetent veteran's guardian is required of the director. This can not be denied. Section 450, part (2) of the Federal statute above cited provides, so far as applicable to this case: "Whenever it appears that any guardian . . . is not, in the opinion of the director, properly executing the duties of his trust . . . then and in that event the director is hereby empowered by his duly authorized attorney to appear in the court which has appointed such fiduciary and make proper presentation of such matters to the court." The same attorney, undoubtedly so author-

ized, appeared in the Probate Court, took and prosecuted the appeal and has presented the case before this Court.

He does not deny furnishing the guardian with the information written in Exhibit A, and we can not agree that the guardian was not justified in awaiting further instructions relative to "properly executing the duties of his trust." The final authority in the federal department, through its chosen agent and attorney, with notice of the situation, as provided by law, by advice of attorney and by tacit approval sanctioned delay for fourteen months, and the loss complained of was suffered.

The conclusion seems irresistible that defendant, under the circumstances of the case, is not to be held personally responsible for loss consequent on his inability to change investments before the bank was closed.

In considering the many cases cited in support of plaintiff's argument on the law governing the points at issue here we find that the statutes of the several states are widely different, and hence many of the cases are distinguishable from the case at bar.

In many states controlling directions as to the sort of investments available to a guardian materially restrict the field of investments.

In the case, *U. S. Veterans' Bureau* v. *Riddle*, 186 Ark., 1071, 57 S. W. (2nd), 826, the statute, therein quoted, restricts the guardian to investing only "under the direction of the court," ours as noted is otherwise.

In *Wood's Estate* (Cal. 1911), 114 Pac., 992, the deposit was "an ordinary savings bank deposit," but drafts thereon could be made only upon checks countersigned by the bonding company.

In *National Surety Company* v. *McNeill's Guardian*, 251 Ky., 509, 65 S. W. (2nd), 721, 723; "there is no showing that the guardian was seeking an investment."

In *Bane* v. *Nicholson*, 203, N. C., 104, 164, S. E., 750, the guardian deposited, "on permanent (savings account) in a commercial bank, without security" at six per cent interest. But the statute demanded sufficient security and compound interest.

So it may be that if the statutes prescribing conditions of investment, and the security set up for deposit in savings institutions in

cases where the findings of the courts differ from ours, were studied such different results were arrived at under the mandate of applicable statutes.

We find no error on the part of the court below.

Exceptions overruled.
Decree of the lower court affirmed.

STATE OF MAINE *vs.* OAKES THOMPSON.

Oxford. Opinion, February 17, 1937.

ORDINANCE.

Chap. 5, Sec. 136 of R. S. 1930, as amended by Chap. 247, P. L. of 1931, and by Chap. 158, P. L. of 1935, authorizes towns, cities and village corporations to make by-laws or ordinances not inconsistent with law, and enforce them by suitable penalties.

An ordinance imposing a license fee, to be valid and operative, must state the time of the duration and validity of the license to be issued.

On report on agreed statement of facts. Complaint against respondent charging violation of an ordinance of the Town of Rumford relative to the business of hawking and peddling goods, wares and merchandise within the limits of the town without having obtained a license therefor. Respondent waived reading and hearing in municipal court, was adjudged guilty, sentenced to pay a fine and costs. Appeal was filed. Judgment for respondent. Case fully appears in the opinion.

E. Walker Abbott, County Attorney for State.
George W. Weeks,
Edmund P. Mahoney, for respondent.

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

BARNES, J. The respondent was arraigned in the Rumford Falls Municipal Court on a complaint charging him with a violation of an ordinance of the Town of Rumford, enacted to regulate the business of hawking and peddling goods, wares and merchandise. On arraignment he pleaded not guilty, waived hearing, was adjudged guilty, sentenced and took an appeal.

At the next session of the Superior Court, and by leave of court, the case was reported to this Court on an agreed statement of facts for final determination, with the stipulation that if, upon the facts set forth, an offense has been committed the case is to be remanded to the Superior Court for trial; otherwise, respondent to be discharged.

The statute authorizing the enactment of the ordinance by the respondent attacked reads as follows:

> "Towns, cities, and village corporations may make by-laws or ordinances, not inconsistent with law, and enforce them by suitable penalties, for the purposes and with the limitations following:—XIV. For regulating and controlling the business of hawking and peddling of goods, wares, and merchandise at retail within their limits, for the issuing by their municipal officers of municipal licenses and the imposing of license fees therefor. This paragraph shall not apply to commercial agents or other persons selling by samples, lists, catalogues or otherwise, goods, wares or merchandise for future delivery, persons selling fish, or persons selling farm, dairy, or orchard products, of their own production, and persons selling bark, wood or forest products and persons selling newspapers or religious literature." R. S., Chap. 5, Sec. 136, as amended by Chap. 247, P. L. of 1931, and by Chap. 158, P. L. of 1935.

Under the authority of this statute the Town of Rumford set up as a municipal ordinance the following:

> "1. It shall be unlawful for any person to engage in the business of hawking and peddling goods, wares, and merchandise within the limits of the Town of Rumford excepting in the following classes: fish, farm, dairy or orchard products of their own production, bark, wood or forest products and news-

papers and religious literature, without first obtaining a license from the municipal officers of the Town of Rumford after paying of a license fee therefor in the sum of fifty dollars.

2. Any person offending against this provision shall be subject to a penalty not to exceed fifty ($50.) dollars fine and imprisonment in jail not to exceed thirty days."

The complainant charges that the respondent at said Rumford on the fifteenth day of May A. D. 1936, did then and there engage in the business of hawking and peddling goods other than such as he is by the statutes allowed to carry for sale and expose for sale without a license, without first obtaining a license, etc.

The complaint is not criticized as being invalid in form or substance; the sole defense being that the ordinance is invalid for uncertainty in that the duration of the license is not expressed.

In reason, it can not be held that a license to carry on a trade may be of indefinite duration, to run for a day, a month or for the lifetime of the applicant, at the whim of the municipal officers.

Text writers agree upon the principle:

"Where by the charter of a city, the power to license a particular occupation within its limits is given to the common council, such power involves the necessity of determining with reasonable certainty both the extent and duration of the license and the sum to be paid therefor;" Dillon's Mun. Corporations (4th ed.) Vol. 1, Sec. 357.

So far as we find decisions upon the point they are unanimous that an ordinance imposing a license fee, to be valid and operative, must state the time of the duration and validity of the license to be issued. *Bills* v. *Goshen*, 117 Ind., 221, 20 N. E., 115; *State* v. *Glavin*, 67 Conn., 29, 34 A., 708; *Darling* v. *St. Paul*, 19 Minn., 389; *Roche* v. *Jones*, 87 Va., 484, 12 S. E., 965; *State* v. *Ashbrook*, 154 Mo., 375, 55 S. W., 627.

We find no violation of a valid ordinance of the Town of Rumford to have been committed, and hence, in accordance with a stipulation of the report the case is remanded for the entry of

Judgment for respondent.
So ordered.

EDWIN A. ROGERS

vs.

LAWRENCE A. BROWN, JOHN O. RANDALL AND HERRICK T. NASON, SELECTMEN OF THE TOWN OF BRUNSWICK.

Cumberland. Opinion, March 6, 1937.

MANDAMUS. WORDS AND PHRASES.

The principal office of mandamus is to command and execute, rather than to inquire and investigate; mandamus requires action in obedience to law.

Mandamus applies to judicial as well as ministerial acts. The mandate will be to the officers to exercise official discretion or judgment, without any direction as to the manner in which it shall be done.

Ministerially the mandate will direct the specific act to be performed.

Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of mandamus cannot rightfully issue.

Mandamus will not lie, to compel performance, when the law requires the decision of a question of fact, or whether an act shall be done or not.

"Shall" is not necessarily mandatory, but ought to be construed as meaning "must," for the purpose of sustaining or enforcing an existing right; but it need not be for creating a new one.

Petition for mandamus against selectmen of the Town of Brunswick because of their refusal to grant petitioner license for the planting and cultivating of clams. Peremptory writ of mandamus ordered issued. Respondent excepted. Exceptions sustained. Writ quashed. Petition dismissed. Case fully appears in the opinion.

Joseph A. Aldred,

Verrill, Hale, Booth & Ives, for petitioner.

Clement F. Robinson, for respondents.

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

DUNN, C. J. Exception raises the question whether the decision of the selectmen of Brunswick, who heard, and denied, application, under P. L. 1933, Chap. 2, for a license to plant and cultivate clams, is subject to control by mandamus.

Petitioner alleged, and alternative writ recited, that the respondents refused him a license because they were not in sympathy with the policy of the law.

In their answer, or return, respondents stated, among other things, that having heard the applicant, and persons in opposition, their conclusion was that the best interests of the town required a refusal to grant the application. They submitted that their action in so refusing had been correct and legal.

The petitioner demurred to the return; by demurring, he must be deemed to admit all that is therein set forth, and to put his case on the issue that, taking the record as it stands, it furnishes no warrant in law for mandamus. *Randall, Pet'r*, 11 Allen, 473.

Peremptory writ was awarded. Respondents' exception was certified. R. S., Chap. 116, Sec. 17.

P. L. 1933, *supra*, commits to municipal officers, in towns affording opportunity for the propagation of clams, the duty of granting licenses.

It is for them, after previous notice, and public hearing, to determine whether the applicant has resided in the state, or been a taxpayer in the town, for not less than one year, and if a license, put into use, would materially obstruct navigation. A license shall be for not less than five years, but might be for not exceeding ten years, as the municipal officers may settle. No license may include more than one fourth of all the flats in the place. "Riparian" proprietors (littoral proprietors would seem more accurately to describe the condition,) are, on applying for locations on the foreshores adjacent their uplands, to have preferential consideration.

There is no grant to any such owner, either of license, or of absolute right to license. What the legislature has laid down comes to this: That on establishing the fact of ownership, holders of contiguous high lands shall have some advantage over other applicants.

"Shall" is not necessarily mandatory. 57 C. J., 552.

" 'Shall' ought . . . to be construed as meaning 'must,' for the purpose of sustaining or enforcing an existing right; but it need not be

for creating a new one." *West Wisconsin Railway Company* v. *Foley*, 94 U. S., 100, 103, 24 Law Ed., 71.

The statute contemplates, not that one in occupancy of land abutting the seashore may, himself, have the power of choosing, in exclusiveness, a clam fishery location, but that, as to his shore front, he should rate before any other applicant. Had legislative intent been an outright license, there would be no occasion for application, no need for notice, no reason for hearing.

Mandamus is an extraordinary remedy. *Baker* v. *Johnson*, 41 Me., 15. It has been styled the right arm of the law. *Townes* v. *Nichols*, 73 Me., 515. The principal office of mandamus is to command and execute, rather than to inquire and investigate; mandamus requires action in obedience to law. *Attorney General* v. *Newell*, 85 Me., 246, 249, 27 A., 110; *Rogers* v. *Brown*, 134 Me., 88, 181 A., 667.

The writ is one requiring the doing of some specific duty, imposed by law, which the applicant, otherwise without remedy, is entitled to have performed.

The process cannot be used to work an appeal. *Knight* v. *Thomas*, 93 Me., 494, 501, 45 A., 499. Neither can it be used to coerce or superintend duty, in the discharge of which, by law, officers are given discretion. *Attorney General* v. *Newell*, supra.

Mandamus applies to judicial as well as ministerial acts. If the duty be judicial, the mandate will be to the officers to exercise their official discretion or judgment, without any direction as to the manner in which it shall be done. If it be ministerial, then the mandamus will direct the specific act to be performed. *Carpenter* v. *County Commissioners*, 21 Pick., 258. The purpose of the writ, as directed to public officers, is to make them do something the law requires them to do; not to do differently what they have already done.

Public officers can be directed to act, but not how to act, in matters as to which they have the right to exercise discretion; where power is so vested, the court does not grant mandamus, to alter determination. *Troy* v. *Barnitt* (N. J.), 165 A., 576; *Webster* v. *Ballou*, 108 Me., 522, 81 A., 1009.

Where duty is purely ministerial, where the officer can do only the one thing, he may, if there is no other adequate remedy, be liable to compulsion by mandamus. *Work* v. *United States*, 267 U. S.,

175, 45 S. Ct., 252, 69 Law Ed., 561; *Nichols* v. *Dunton*, 113 Me., 282, 93 A., 746. On the other hand, discretion must be left free; it cannot be specifically controlled. *Freeman* v. *Selectmen of New Haven*, 34 Conn., 406; *Kennebec Toll Bridge, Pet'r*, 11 Me., 263. See, too, *Lawrence* v. *Richards*, 111 Me., 95, 88 A., 92.

In *State* v. *Board of Supervisors*, 2 Pinney (Wis.) 552, Jackson, J. says: "A writ of mandamus is the highest judicial writ known to our constitution and laws, and, according to the long approved and well established authorities, only issues in cases where there is a specific legal right to be enforced, or where there is a positive duty to be and which can be performed, and where there is no other specific legal remedy. Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of mandamus cannot rightfully issue."

When the law requires the decision of a question of fact, or whether an act shall be done or not, mandamus will not lie, to compel performance. *Nichols* v. *Dunton*, supra. This Court has no prerogative, in a mandamus proceeding, to say what the other tribunal shall decide; to point out what it should enter in lieu of its own best judgment. *Randall, Pet'r*, supra; *Bangor* v. *County Commissioners*, 87 Me., 294, 32 A., 903.

There are cases that, if, under the guise of discretion, manifest injustice is done, the court is not precluded from constraining that official action be honestly performed; that discretion, not its abuse, shall operate and have effect, and not be arbitrarily or capriciously refused. *Davis* v. *County Comissioners*, 63 Me., 396.

The present case does not fall in that category.

To be sure, there is, on the record, recital that the petitioner brought himself within the statute, and that the flats for which he asked a license are inclusive of less than one fourth part of all the flats in Brunswick. Granted, a case where the shore space might properly be assigned the applicant, there yet remains whether the license shall be for longer than five years, and whether the annual license fee be one dollar or not more than five dollars.

When a matter is left to discretionary power, which has been exercised, mandamus will not be granted. *Gray* v. *Bridge*, 11 Pick., 189; *Davis* v. *County Commissioners*, supra; *Bangor* v. *County Commissioners*, supra.

The respondents have not neglected or refused to act. On the contrary, having authority to decide the matter, they did so on its merits.

The case of *Rogers* v. *Brown*, supra, is clearly distinguishable upon its pleadings.

Exception sustained.
Writ quashed.
Petition dismissed.

STATE OF MAINE *vs.* FRED ROBBINS AND GERTRUDE ARLENE DEXTER.

Piscataquis. Opinion, March 6, 1937.

CRIMINAL LAW.

Confessions are presumed to be voluntary, and the burden is on the defendant to rebut that presumption.

On appeal from presiding Justice's denial of motion for new trial. Appeal dismissed. Case fully appears in the opinion.

John P. White, County Attorney for the State.

Arthur L. Thayer, for respondents.

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

MANSER, J. The defendants were jointly indicted for adultery. After a verdict of guilty a motion for a new trial presented to the presiding Justice was denied and the case comes forward on appeal from his decision. The real basis of the motion was that separate written confessions signed by each defendant were not voluntarily made. The confessions being admitted against objection by counsel for the respondents, exceptions to such admission were then noted, but such exceptions were not perfected and the case is before the Court only on appeal. The action of the presiding Justice in admit-

ting the confessions is not under review. The question is whether the jury should have rejected such confessions as made involuntarily, the contention being that the evidence otherwise was entirely insufficient to support conviction.

The procedure laid down in *State* v. *Grover*, 96 Me., 363, 52 A., 757, was scrupulously followed. In the first instance, testimony was introduced before the presiding Justice in the absence of the jury upon the question of the voluntary or involuntary nature of the confessions. He determined as a fact that they were voluntary. Then upon the return of the jury the evidence surrounding the taking of the confessions was reintroduced.

As stated in *State* v. *Grover*, supra, the defendants then had a right to appeal to the jury to exclude the confessions from consideration as improperly obtained and also show all circumstances tending to destroy or weaken their probative power. They could also require the presiding Justice to instruct the jury it should not give credit to the confessions if thus improperly obtained. So far as the evidence is concerned, it appears that the defendants exercised the rights and it must be assumed that the court so instructed the jury.

It is true that the evidence aside from the confessions would not be sufficient to convict, but examination discloses that it is strongly corroborative. The relations between the defendants led to disruption of family ties between the female defendant and her husband and the institution of divorce proceedings. Robbins frequently stayed over week-ends at the house where Mrs. Dexter lived with her mother, and took her out riding and to places of amusement. There was enough to show opportunity and disposition.

No claim was made that any coercion or threat was used in connection with the confessions. If they are to be regarded as involuntary, it must be solely upon the ground of a promise or inducement. Both defendants testified they were told that they would not need an attorney; that if they pleaded guilty there would not be a trial before a jury or a crowd, and it was likely there would be no sentence. The confessions were made in the presence of the county attorney and a deputy sheriff. The latter testified that before any statements were made the defendants were each informed by the county attorney in substance:

"All I can say to you is this, — it is the best for everyone to tell the truth; they will generally fare better if they tell the truth, tell things as they are; you have a perfect right to have an attorney, — everyone has that right."

The written confessions which were subsequently read and signed by the defendants, after recital of name and place of residence began,

"On oath depose and say that the following statements given by me are true and given freely and voluntarily, and I have been advised that the statements might be used against me in court."

It was within the province of the jury to determine which of the versions was correct. It appears they gave credence to the statement contained in the written confessions and the testimony of the officer.

Confessions are presumed to be voluntary and the burden is on the defendant to rebut that presumption. The Court is of opinion that the jury was warranted in finding that the confessions were not improperly obtained.

Appeal dismissed.

EARLE PRATT *vs.* PHILIP G. O'HARA.

Sagadahoc. Opinion, March 6, 1937.

NEGLIGENCE.

Theory that one who undertakes to see a drunken man home, becomes an insurer of his safety, is not the law.

On general motion for a new trial filed by defendant. Action to recover for personal injuries tried at June Term, 1936, of the Superior Court for the County of Sagadahoc. Verdict for plaintiff.

Motion sustained. New trial granted. Case fully appears in the opinion.

Edward W. Bridgham
Ralph O. Dale, for plaintiff.
John P. Carey, for defendant.

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

THAXTER, J. This action to recover for personal injuries, alleged by the plaintiff to have been caused by the defendant's negligence, was tried before a jury. After a verdict for the plaintiff, the defendant filed a general motion for a new trial.

The plaintiff in the afternoon of February 25, 1936, was in the Columbia Hotel in Bath, and bought there some drinks of the defendant, O'Hara, who was employed at the hotel. The plaintiff became intoxicated, and the defendant, assisted by one William A. Staples, undertook to drive the plaintiff to his home in an automobile. That the plaintiff finally arrived home with a broken leg is about the only circumstance which seems to be admitted by all.

The defendant's negligence is set forth in the writ in the following language: "the said defendant unmindful of his duty, as aforesaid, caused his said automobile to stop on said Valley Road, so that the said plaintiff could leave the same, and as the said plaintiff was alighting from the said automobile wherein he was riding, the defendant suddenly and abruptly, without any notice or warning to the said plaintiff, who was at all times in the exercise of due care, started his said automobile in motion, so that the wheels of the said automobile ran over the body of the said plaintiff, severely crushing the right leg of the plaintiff in two places, and fracturing the same at the ankle and between the ankle and knee." In another count there is substantially the same allegation with the further statement that the defendant suddenly and abruptly started the automobile, while the plaintiff was alighting and before he was entirely clear of the car.

The defendant introduced some evidence to the effect that the plaintiff suffered his injury during a scuffle with a man named Jones

at the hotel before he ever left to go home. The jury was, however, justified in finding that the plaintiff suffered his broken leg while getting out of the automobile at Valley Road.

The testimony of the plaintiff on the one hand and of Staples and of the defendant on the other, who were the only three present, when the plaintiff claims to have been hurt, is sharply conflicting; but neither the plaintiff's evidence nor the defendant's tends in the slightest degree to support the allegation in the writ, nor in fact to show that the defendant was negligent in any other particular.

Two separate times on direct examination the plaintiff stated that he opened the door, got out of the automobile while it was in motion, and slipped under the rear wheel. Perhaps it is advisable to give his version of the occurrence in his own words.

> "When we got down here (indicating), I said, 'I live on Dummer Street,' and O'Hara told Staples, 'Shove him out — put him out,' so when we got up here I opened up the door to get out, and they didn't stop at all, and I stepped off and had hold the side of the door and went down against the snowbank and underneath the car and they run over me."

It is true that subsequently the plaintiff was recalled, and in response to a leading question stated that he got out after the car had stopped; but even then he made no claim, as alleged in his declaration, that the car suddenly started as he was alighting.

The testimony of the defendant and of Staples is that they stopped the car, took the plaintiff out by the left rear door instead of by the right as claimed by him, and led him around the rear. Whatever may have happened, they left him in a snowbank in front of what they supposed was his house, and, apparently not wishing to encounter the ire of the members of his family, drove off. Not being altogether satisfied, however, that he could make the short distance to his front door, they drove around the square, and, on coming back and seeing him still resting in the snow, got out, and then learned that he was not in front of his own house after all. He was bundled into the car again, and finally was delivered at his own home, where he seems to have been welcomed none too sympathetically by his wife. Apparently Staples was also intoxicated, but there

is not the slightest evidence that the defendant was at all under the influence of liquor. It seems to have been that kind of an accident which sometimes overtakes one who has imbibed too freely.

Plaintiff's counsel have cited numerous cases relating to the duty which is owed under such circumstances to a man who is drunk. With these authorities we are in entire accord. But the verdict of the jury is only explainable on the theory that they felt that one, who undertakes to see a drunken man home, becomes an insurer of his safe arrival. Such is not the law. Some breach of the duty owed to the plaintiff should have been shown to justify a verdict in his favor.

Counsel call attention to the plaintiff's testimony to the effect that the defendant told Staples to shove the plaintiff out of the car; and it is claimed that thereby the plaintiff was put in fear and jumped out. Such conclusion is hardly warranted. In any event, according to the plaintiff's final version of the occurrence, this remark was made after the car had stopped.

The verdict of a jury must not be lightly set aside. There must, however, be some evidence to support it. Here there is none, and the entry must be

Motion sustained.
New trial granted.

HARRY M. VERRILL, CONSERVATOR

CASCO MERCANTILE TRUST COMPANY

vs.

JENNIE D. WEINSTEIN.

Cumberland. Opinion, March 6, 1937.

BILLS AND NOTES. STATUTE OF LIMITATIONS.

A promise to pay money to another gives a right of action to such third party against the promisor, if there is a breach of such undertaking.

In the case at bar the defendant's obligation is not on the note as agent of the mortgagor, but to pay a debt of his own, and the statute of limitations applies.

On report on agreed statement of facts. An action of debt to which the defendant pleads the statute of limitations. Judgment for the defendant. Case fully appears in the opinion.

Bernstein & Bernstein, for plaintiff.

Jacob H. Berman

Edward J. Berman, for defendant.

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

THAXTER, J. This case is before this Court on report on an agreed statement of facts. It is an action of debt to which the defendant has pleaded the statute of limitations.

The defendant on August 22nd, 1924, purchased of one Esther Katz certain real estate, and as part of the consideration gave to the vendor a note for $9000 secured by a mortgage on said property. This note was due in two years and bore interest payable quarterly at the rate of eight per cent per annum during said term and for such further time as the principal or any part thereof should remain unpaid. This note by endorsement, and the mortgage by various assignments, passed through several hands, and on September 30, 1930, the Casco Mercantile Trust Company, of which the plaintiff is now the conservator, became the holder of them as collateral for certain notes of Rosenberg Bros. On October 19, 1925, before the maturity of her note, the defendant conveyed to Meyer and Sarah Hecht her equity in the mortgaged property. Under the terms of the deed by which this transfer was made, the grantees assumed and agreed to pay the Katz mortgage. The defendant made no payments on the note after August 22, 1924, but numerous payments were made by the Hechts, the last on May 10, 1932.

The plaintiff has brought suit against the maker of the note, recovery against whom would, under ordinary circumstances, have been barred by the running of the statute of limitations. It is contended, however, that the payments made by the grantees under

their agreement to assume the mortgage interrupt the running of the statute against the liability of the grantor.

It is settled law in this jurisdiction that a promise to one person for a valuable consideration to pay money to another gives a right of action to such third party against the promisor, if there is a breach of such undertaking. *Hinkley* v. *Fowler*, 15 Me., 285 (overruled on another point); *Bohanan* v. *Pope*, 42 Me., 93; *Watson* v. *Perrigo*, 87 Me., 202, 32 A., 876; *Flint* v. *Winter Harbor Land Company, and West Shore Land Company*, 89 Me., 420, 36 A., 634; *Baldwin* v. *Emery*, 89 Me., 496, 36 A., 994; *Cumberland National Bank* v. *St. Clair*, 93 Me., 35, 44 A., 123. The agreement by the purchaser of an equity of redemption to pay the mortgage debt is a common example of such a contract .

The plaintiff contends that in making such payments the promisor is acting in effect as agent of the mortgagor, and that accordingly the effect of the payments is to interrupt the running of the statute of limitations in the same manner as if they had been made by the maker of the mortgage note. Such claim misconceives the theory on which the liability of the promisor is based. His obligation is not on the note, not as agent of the mortgagor, but to pay a debt of his own. *Watson* v. *Perrigo*, supra; *Flint* v. *Winter Harbor Land Company, and West Shore Land Company*, supra; *Baldwin* v. *Emery*, supra; Williston on Contracts, Rev. Ed., Sec. 399. The deed poll establishes his liability as grantee, the note is evidence of the amount due, but the action is not in covenant nor on the note. It is implied assumpsit to enforce the independent obligation of the promisor.

Under such circumstances, the payments to the holders of the mortgage note did not extend the time of the running of the statute of limitations with respect to this defendant. This conclusion is supported by the overwhelming weight of authority. *Trent* v. *Johnson*, 185 Ark., 288, 47 S. W. (2d), 12; *The Trustees of the Old Alms-House Farm of New Haven* v. *Smith*, 52 Conn., 434; *Regan* v. *Williams*, 185 Mo., 620, 84 S. W., 959; *Turner* v. *Powell*, 85 Mont., 241, 278 P., 512; *Boughton* v. *Van Valkenburgh*, 61 N. Y. S., 574; *Cottrell* v. *Shepherd*, 86 Wis., 649, 57 N. W., 983; 18 A. L. R., 1033, note; 80 A. L. R., 1436, note; 17 R. C. L., 944; See Williston on Contracts, Rev. Ed., Sec. 399.

Judgment for the defendant.

THOMAS A. COOPER, BANK COMMISSIONER

vs.

FIDELITY TRUST COMPANY

PETITION OF EDWARD K. LEIGHTON FOR PRIORITY.

Cumberland. Opinion, March 15, 1937.

BANKS AND BANKING.

A bank which makes collection for a customer is not required to keep the proceeds segregated as the customer's property, but may mingle the funds with its own and make itself debtor for the amount received, and when the proceeds become a part of the funds of the collecting bank, the customer's right to control it as specific property is gone, and he has instead the right to recover a corresponding sum of money.

In the matter of collection by a bank for a customer, the relationship of principal and agent continues to the moment of collection, and from then the relationship of debtor and creditor is established. Responsibility of bank commences when it receives notice of credit from correspondent bank.

On appeal. A petition to the Supreme Judicial Court in Equity in which the petitioner seeks to establish priority of claim for proceeds of sale of bonds which were placed with defendant bank for purposes of collection and which defendant bank collected but did not pay because of closing. Decree affirmed except as modification may be necessary for appropriate additional instructions to provide for the payment of dividends by the Conservator of the Fidelity Trust Company to the petitioner as a general creditor, accruing subsequent to December 11, 1936, the date of the original decree. So ordered. Case fully appears in the opinion.

James L. Boyle, for claimant.

Cook, Hutchinson, Pierce & Connell, for defendant.

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

MANSER, J. On appeal from decree of sitting Justice denying priority of claim. Briefly, the facts are that Edward K. Leighton, the petitioner, left for collection with the Peoples Ticonic National Bank of Waterville (hereafter called Ticonic Bank) two City of Omaha bonds, $1000 each, due March 1, 1933. No credit was given to the petitioner at the time of the deposit. In accordance with its established practice and usage, the Ticonic Bank forwarded the bonds to the New York Trust Company for collection with instructions to credit the proceeds to the Fidelity Trust Company for its account. The bonds were paid and the proceeds received by the New York Bank, which on March 2, 1933, credited the Fidelity Trust Company with the amount and mailed a notice of such credit to said Trust Company. This notice was received in due course of mail on March 3, 1933. The actual book entry crediting the Ticonic Bank with the sum was not, however, made that day because of insufficient time to take care of all of the clerical work which had accumulated. On March 4, all banks were closed by governmental proclamation and the Ticonic and Fidelity Trust never reopened. On March 11, instructions were received by the Fidelity Trust Company to adjust its books to conform with those of its correspondent banks, and the actual book entry crediting the Ticonic Bank with the proceeds of this collection was made on that day. The Ticonic Bank made no debit or credit entries on its books with respect to this item.

As found by the sitting Justice, it is unnecessary to determine the respective rights of the petitioner and the Ticonic Bank as between themselves. The petitioner elected to proceed against the Conservator of the Fidelity Trust Company and may recover either in his own right or as the beneficial owner of such claim as the Ticonic Bank may have to the proceeds of the collection. The proceedings show that the Ticonic Bank was given the right to intervene, and accordingly by settling the rights which the petitioner has, there is likewise determined any claim which the Ticonic Bank itself might set up.

The Court adopts the view of the sitting Justice that, as presented, the claim for priority is based on the following general propositions:

(1) The deposit of bonds being for collection, the only relation created between the petitioner on the one side and the Ticonic Bank and its correspondent banks on the other, was that of principal and agent and not of debtor and creditor.

(2) Each bank, receiving the money with knowledge that it was the proceeds of a collection item held it subject to a trust in favor of the petitioner.

(3) If the relation of debtor and creditor did exist between the various banks, and the petitioner was bound by such banking custom, both the Ticonic Bank and the Fidelity Trust Company were insolvent when the New York Trust Company collected the money, and under such circumstances they must hold it in trust for the true owner.

(4) The Fidelity Trust Company was, in fact, closed before it received the money and, therefore, it became its duty to hold the funds in trust for the petitioner.

Before modern banking methods and usages were adopted, it might well be claimed that when the petitioner deposited bonds for collection the relationship of principal and agent was created, which continued throughout the transaction. He retained title to the bonds and expected the bank to forward them to some correspondent bank conveniently located to make the collection, which bank would receive upon delivery of the bonds the value thereof in currency; the currency so received to be enclosed in a packet and shipped by express, registered mail or other safe means of conveyance.

In the multitudinous transactions of commercial life, banks came to be universally recognized as responsible and safe mediums for the exchange of credits which became available without the actual transfer of the funds themselves, and the method outlined above was discarded for convenience, expedition, and lessened expense. Such modern usages and customs are tacitly assented to by everyone who makes use of this system of collection unless there is express stipulation to the contrary, and are implicit in the contract to collect and remit. The bank which makes the collection is not required to keep the proceeds segregated as the claimant's property, but may mingle the funds with its own and make itself debtor for the amount re-

ceived. As soon as the proceeds become a part of the funds of the collecting bank under this arrangement, the claimant's right to control it as specific property is gone, and he has instead the right to recover a corresponding sum of money. *Manufacturers Bank* v. *Continental Bank*, 148 Mass., 553, 20 N. E., 193.

The record discloses that the situation as above stated obtained in the present case. While the relationship of principal and agent continued up to the moment of collection, the parties by a reasonable construction of their acts must be held to have contemplated from that time on the relationship of debtor and creditor. *Hecker etc., Milling Co.* v. *Trust Co.*, 242 Mass., 181, 136 N. E., 333; *Central Trust Company* v. *Hanover Trust Co.*, 242 Mass., 265, 136 N. E., 336; *Freeman's National Bank* v. *National Tube Works Co.*, 151 Mass., 413, 24 N. E., 779; *Dorchester & Milton Bank* v. *New England Bank*, 1 Cush., 177; *Lippitt* v. *Thames Loan & Trust Co.*, 88 Conn., 185 at 204, 90 A., 369.

Counsel for petitioner cites *Weed* v. *Railroad*, 124 Me., 336, 128 A., 696, 697; and *Lawrence* v. *Trust Co.*, 125 Me., 158, 131 A., 863; as authority for the view that the original intention of the parties, customer and bank, must control. Nothing contra thereto is herein decided, but, as pointed out in the opinion in the first case, after stating this rule, the court adds: "Of controlling consequence, however, is how the dealing was and not how it might have been" and again, "But the design and meaning of the parties must, in some measure, in every case as to the true purpose of the business, be determined on the circumstances."

This disposes of the first and second legal propositions advanced by the petitioner.

As to the third and fourth contentions:

It is true that there was implied in the contract under which the collection was made that the Ticonic and its correspondent banks should continue in business and if any one of them ceased to do a banking business it lost the power to perform its undertaking when its doors had been closed and it was in the custody of the law. *Manufacturers Bank* v. *Continental Bank*, 148 Mass., 553, 20 N. E., 193.

It is shown, however, that the Fidelity Trust Company received the credit the day before it closed and while it was still operating as a going concern. Nowhere in the record is it shown to have been hopelessly insolvent to the knowledge of its officers. The stipulation in the record states that:

> "For the purpose of this case, both the Peoples Ticonic National Bank of Waterville and the Fidelity Trust Company are deemed to have been insolvent on March 2, 1933, in the sense that neither closed bank on that day could have paid its depositors in full."

The Fidelity Trust Company was functioning in the ordinary course of business when it received the credit from the New York Bank. It was receiving deposits, paying checks and transacting a general banking business in the usual way. This particular collection was complete so far as the Fidelity Trust Company was concerned. The bookkeeping entry made on March 11, recorded only what actually took place on March 3. If technical insolvency existed on March 2, and if that is the criterion by which the transaction is to be governed, then all deposits and all transactions by which the Trust Company became indebted to others, not only on that day but as far back as such actual insolvency could be shown, would be entitled to priority.

Our Court has recently dealt with this question in *Annis* v. *Security Trust Company*, 133 Me., 223, 175 A., 661, 664; where upon abundant authority the Court held:

> "Known simple insolvency, that is, when there is a reasonable hope of a return to solvency at the time of the deposit, is not enough to justify and make equitable the creation of a preference, although the receipt of a deposit even then is reprehensible and most certainly is not to be condoned. But it is only when actual hopeless insolvency obtains, with knowledge thereof upon the part of the officers, that the wrong is so great that there is justification for the establishment of a preference at the expense of the general creditor."

The record in this case fails to charge or impute knowledge of even simple insolvency and much less hopeless, irretrievable insolvency. No fraud on the part of the officers of the Trust Company in receiving the credit can be predicated upon the record.

The petitioner is not entitled to priority. This result may appear to work a hardship in the present instance, but when compelled to the conclusion that the relationship of debtor and creditor was created upon the collection of the funds, then the petitioner finds himself in no worse situation than all other creditors who became losers by the practically unprecedented condition which caused the sudden closing of our banks and the failure of many.

The decree of the sitting Justice is affirmed except as modification may be necessary for appropriate additional instructions to provide for the payment of dividends by the Conservator of the Fidelity Trust Company to the petitioner as a general creditor, accruing subsequent to December 11, 1936, the date of the original decree.

So ordered.

CLYDE R. CHAPMAN, ATTORNEY GENERAL,

BY INFORMATION, PETITIONER FOR MANDAMUS

vs.

ROSCOE W. SNOW ET AL.

Penobscot. Opinion, March 18, 1937.

MANDAMUS.

A writ of mandamus commanding absolute performance of that which does not appear to be within the power of the respondents, is not proper.

Ballots, after having been deposited in the office of Secretary of State, are not available to election officers on request.

On exceptions. Writ of mandamus to command respondents, as election officers, to reconvene for the purpose of redetermining the voting on a liquor question submitted at the state election, 1936. Exceptions overruled. Case fully appears in the opinion.

Ross St. Germain, for petitioner.

Fellows & Fellows,

Mayo & Snare, for respondents.

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

DUNN, C. J. This petition for mandamus was by the Attorney General, upon relation of two individuals, to a Justice of the Superior Court, who granted the alternative writ. See, pertaining to procedure, *Hamlin, Attorney General* v. *Higgins*, 102 Me., 510, 67 A., 625; *Libby* v. *Water Company*, 125 Me., 144, 131 A., 862.

Then came, in this order, return, answer, issue, hearing, decree, exceptions, and their certifications. R. S., Chap. 116, Sec. 18; *Lawrence* v. *Richards*, 111 Me., 95, 88 A., 92.

In the bill of exceptions, the first is rested definitely that refusal to award peremptory writ was a clear abuse of judicial discretion. *Day* v. *Booth*, 122 Me., 91, 118 A., 899; *Libby* v. *Water Company*, supra. To this, two other exceptions are, as counsel concedes, subordinate.

On December 24, 1936, the relators were residents of, taxpayers, and licensed liquor dealers in Hermon.

The eight respondents are all of Hermon. Three are selectmen, one town clerk, and the remaining four election clerks. They, on September 14, 1936, exercised public authority, as election officers, in reference to the state election, at the one polling place in the town.

The vote on the question, optional biennially with towns: Shall licenses be granted for the sale of malt liquor? was, — the votes having been sorted and counted, — declared and recorded, in open town meeting: Yes, 165; No, 166. P. L. of 1933, Chap. 300, Sec. 17, as amended by P. L. of 1935, Chap. 157, are relevant statute provisions.

A return of the votes cast, and the ballots, were sent to the Secretary of State. That official guards and accounts for ballots, as a public record. P. L. 1933, *supra.*

The alternative writ commanded the respondents to reconvene, and, for reasons assigned, on taking from the ballots four, of particular identity, which had been counted "No" votes, and including, as a "Yes" vote, a certain ballot which had been rejected, redetermine the voting on the liquor question.

The casting aside of even two votes would affect the election; the result would then be favorable to licensing the sale of malt liquors.

The Judge, after hearing the whole case, ruled, in proceeding to final adjudication, that the authoritative custodian of the ballots was the Secretary of State; more entirely, that the Governor and Council, having examined the ballots, at the instance of the relators, and determined the vote a tie, such finding was, in bearing, decisive. The remedy sought was denied.

A bare suggestion is all that is required to dispose of this case; it need only state that, while the election affects the public, and is in such sense public business, yet a writ of mandamus commanding absolute performance of that which does not appear to be within the power of the respondents, would not be proper.

Ballots, or votes themselves, are evidence of the number of votes cast.

The legislature has enacted that, following elections, ballots shall be promptly delivered to the Secretary of State. It is true, the statutes require the Secretary to produce ballots before courts or magistrates.

There is, on this record, no showing of the ballots being in evidence; for aught to the contrary, they remain in the office of the Secretary of State, where they had been put for preservation, as memorial of something written or done.

Legislative purpose, in safeguarding votes, might be defeated, and voters disfranchised, if ballots, of public record, were available to election officers, on mere request, to alter determination.

It is plain that respondents could not obey peremptory writ, were it issued.

Exceptions overruled.

CYRUS E. SAWYER

vs.

THE FEDERAL LAND BANK OF SPRINGFIELD.

Cumberland. Opinion, March 18, 1937.

CONTRACTS.

Chapter 123, *Section* 12 *of the Revised Statutes, relative to a contract of agency to sell real estate, makes contract void after one year, unless time for determination is definitely stated, and is inclusive of contracts both written and oral.*

To be entitled to commission, agent must procure customer able to purchase in accordance with the agency contract.

Bad faith and dishonesty are not to be presumed.

On exceptions. Plaintiff seeks to recover, as agent, commission for sale of real estate. Trial was had at the November Term, 1936, of the Superior Court for the County of Cumberland. Directed verdict for the defendant. Exceptions filed by the plaintiff. Exceptions overruled. The case fully appears in the opinion.

Sherman I. Gould,
Charles H. Shackley, for plaintiff.
Frank I. Cowan, for defendant.

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

DUNN, C. J. This action was brought to recover commission on the sale of a farm. By direction, the jury returned a verdict for defendant; plaintiff took an exception.

The first question here is the application of a statute, invoked by defendant, providing, in brief, that where a contract making one an agent to sell real estate fails to fix the duration of the agency, the

contract shall, after one year, be deemed void. R. S., Chap. 123, Sec. 12.

Purpose of the statute has been said to be the protection of owners against continuing contracts. *Odlin* v. *McAllaster*, 112 Me., 89, 92, 90 A., 1086. The statute is inclusive of contracts both written and oral. See, in relation, *Hoskins* v. *Wolverton*, 123 Me., 33, 35, 121 A., 170.

His sole source of authority, plaintiff testified, was the listing of the property with him, on February 9, 1933, by spoken words merely, for no definite period, at $12,000.

A would-be purchaser, whom plaintiff contacted, was lacking money to pay the first instalment on account of purchase price.

There is evidence that local banks being, through public control and regulation, during a then existing economic depression, closed to the general transaction of business, funds were not available to depositors.

Never having procured a customer able to purchase in accordance with the agency contract, plaintiff was not entitled to recompense for his services. *Garcelon* v. *Tibbetts*, 84 Me., 148, 24 A., 797; *Smith* v. *Lawrence*, 98 Me., 92, 56 A., 455; *Hartford* v. *McGillicuddy*, 103 Me., 224, 229, 68 A., 860; *Damers* v. *Fisheries Company*, 119 Me., 343, 111 A., 418; *Grant* v. *Dalton*, 120 Me., 350, 114 A., 304; *Jutras* v. *Boisvert*, 121 Me., 32, 115 A., 517.

Plaintiff contends, however, that his persistence effected, on March 24, 1936, the sale of the farm, for $9,000, to tenants in common, of whom the original prospective purchaser was one. It is on this sale that he seeks to recover.

Testimony tended to prove that, two years after statute invalidation of the selling agreement, the identical property was conveyed, for the reduced consideration, to the same person, who acquired a moiety rather than the whole.

Plaintiff, witnessing, limited himself to the 1933 contract; of that, there was want of performance.

There was no basis for recovery.

Suggestion of bad faith on the part of the seller, there is none; there is absence of special circumstances; there is no room for a promise to be inferred from conduct, or to be implied in law. Bad faith and dishonesty are not to be presumed. *Hill* v. *Hatch*, 11 Me.,

450, 454. The present case is distinguishable, upon its facts, from *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853.

The ruling of a directed verdict is sustainable. *Heath* v. *Jaquith*, 68 Me., 433; *Weed* v. *Clark*, 118 Me., 466, 109 A., 8; *Johnson* v. *Terminal Company*, 131 Me., 311, 162 A., 518. The exception must be overruled.

Exception overruled.

IDA M. GREGWARE *vs.* ARMAND POLIQUIN.

MARGERY J. SCOTT *vs.* ARMAND POLIQUIN.

ORRA GREGWARE *vs.* ARMAND POLIQUIN.

Androscoggin. Opinion, March 19, 1937.

NEGLIGENCE.

Negligence of driver is not imputable to passengers or husband of passenger who seeks to recover expenses and losses incident to care and treatment of injured passenger.

Proceedings may be had against joint tort feasors severally or jointly.

Right of way rule applies when a motor vehicle on the right will enter the intersection before a car approaching from the left.

Reasonable care requires, in case of doubt, that driver coming in from left must stop, and nothing else appearing, a breach of this rule creates a presumption of negligence on part of offending driver.

If failure of operator of motor vehicle to see that which by the exercise of reasonable care he should see is proximate cause of injury, he is liable.

Failure to deny in specifications of defense, by the defendant, admits plaintiffs' affirmative allegations of due care, according to Superior Court Rule IX.

On motion for new trial. Actions for negligence tried at June Term, 1936, of Superior Court for County of Androscoggin, before a jury. Verdicts for defendant. Plaintiffs file general motions for new trials. Motions sustained. Verdicts set aside. New trials granted. Case fully appears in the opinion.

E. W. Bridgham,
Benjamin L. Berman,
David V. Berman, for plaintiffs.
Fred H. Lancaster, for defendant.

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

STURGIS, J. Just before twelve o'clock noon of Sunday, November 24, 1935, Paul A. Gregware, an osteopathic physician of Bath, Maine, drove his Hudson sedan up Canal Street in Lewiston on his way to Barre, Vermont, and in passing through the intersection formed by Chestnut Street, which crosses Canal Street at right angles, he collided with a LaSalle automobile owned and driven by Armand Poliquin, the defendant. The cars were badly damaged. Two passengers, Ida M. Gregware and Margery J. Scott, who were riding with Doctor Gregware as his guests, were seriously injured. They here sue only the defendant Armand Poliquin, and seek a judgment against him for the damages which they suffered. The action of Orra Gregware is for losses and expenses incurred as a result of the injuries received by Ida M. Gregware, who is his wife.

In the Trial Court, the jury returned a verdict for the defendant in each case and the plaintiffs severally filed motions for new trials. Contributory negligence is not in issue. By failing to deny in his specifications of defense, the defendant admitted the plaintiffs' affirmative allegations of due care. *Superior Court Rule IX.* On the pleadings, the defendant's negligence was the only issue before the jury.

The collision occurred on a fair day on a hard-surfaced and dry street intersection, clear of other traffic. The record discloses the usual conflict of testimony as to the speed of the cars. The results of the collision and the marks upon the ways indicate, however, that both automobiles were moving rapidly when they came together.

The evidence leaves no doubt that, although Doctor Gregware may have, as he claims, glanced to the left before he reached this intersection, just before and as he entered it he was looking only to the right and did not observe the approach of the Poliquin car until one of his passengers screamed and called his attention to it. It was then too late to avoid an accident. He applied his brakes sharply, burning the surface of the way with his dragging tires, but hit the defendant's car broadside as it came across in front of him. Clearly, this driver failed to exercise due care. No reasonable excuse for his failure to see the defendant's car coming towards him in time to avoid the collision appears in the record of the cases. The negligence of this driver, however, is not imputable to his passengers or the husband of the one who seeks to recover expenses and losses incident to her care and the treatment of her injuries. *Barnes* v. *Bailey*, 134 Me., 503, 187 A., 758; *Kimball* v. *Bauckman*, 131 Me., 14, 20, 158 A., 694; *Mitchell* v. *B. & A. Railroad Company*, 123 Me., 176, 122 A., 415; *Cobb* v. *Power & Light Company*, 117 Me., 455, 104 A., 844; *Denis* v. *Street Railway Company*, 104 Me., 39, 70 A., 1047.

The negligence of Doctor Gregware, however, does not of itself discharge the defendant from liability. It is not necessary to find that the defendant's negligence was the sole cause of this collision. He must be held liable for the damages which accrued to these plaintiffs as a result of it if his negligence was a contributing proximate cause. When two or more participate in the commission of a wrong, the injured party may proceed against them severally as well as jointly and prosecute his action to final judgment, but obtaining complete indemnity, must be content. *Cleveland* v. *Bangor*, 87 Me., 259, 32 A., 892; *Hutchins* v. *Emery*, 134 Me., 205, 183 A., 754; *Barnes* v. *Bailey*, supra.

It is an established rule of the road directly applicable in this case that "All vehicles shall have the right of way over other vehicles approaching at intersecting public ways from the left, and shall give the right of way to those approaching from the right;" *R. S., Chap.* 29, *Sec.* 7. The car in which the plaintiff passengers rode was travelling north on Canal Street, while the defendant's automobile came in from the left and the west on Chestnut Street.

The statute required the defendant to "give the right of way" to the other car which was "approaching from the right." When a motor vehicle approaching on the right will enter the intersection before the driver of a car coming from the left can cross, and a collision may result if the latter does not stop or slow down, the rule applies. If there is doubt that a safe crossing may be made, reasonable care requires the driver coming in from the left to stop. *Petersen* v. *Flaherty*, 128 Me., 261, 147 A., 39. Nothing else appearing, a breach of this rule creates a presumption of negligence on the part of the offending driver. *Dansky* v. *Kotimaki*, 125 Me., 72, 130 A., 871; *Fitts* v. *Marquis*, 127 Me., 76, 140 A., 909.

We are of opinion that the defendant, upon his own testimony and that of his supporting witnesses, violated this rule of the road and the presumption of negligence thus created is confirmed. One of his witnesses, apparently disinterested and entirely credible, says that the two cars entered the intersection at about the same time. The defendant states that as he came up Chestnut Street he was driving about eighteen or twenty miles an hour, slowed down a little as he reached the curb line of Canal Street, looked once to the right and then to the left for approaching traffic and, seeing none, started straight ahead through the intersection at but a slightly reduced rate of speed. He is positive in his assertion that he never saw the other automobile until it struck his car, and asked whether there was anything which obstructed his view down Canal Street for a long distance when he looked to the right, replied there was "nothing I could see."

Canal Street at this intersection and southerly for a long distance is level, forty-two and one-half feet wide, and the view along it is unobstructed. As already stated, it is conceded that there was no other traffic on the street when these cars came along. The fastest rate of speed charged against the Gregware car is forty miles an hour. The defendant admits he was driving at least fifteen miles per hour. The cars came together very near the middle of the intersection. Accepting the defendant's own estimate of the speed of his car, he drove from the curb line of Canal Street, where he says he looked to the right for approaching traffic, to the point of collision in approximately a second of time. Comparative computation places the other car less than fifty feet from the intersection when the defendant

says he looked down the street. If he looked with any degree of care, he saw the approaching car. It is difficult to believe that he looked at all.

This Court has repeatedly called attention to the settled and salutary rule that an automobile driver is bound to use his eyes and to see seasonably that which is open and apparent and govern himself suitably. Whenever it is the duty of a person to look for danger, mere looking will not suffice. One is bound to see what is obviously apparent. If the failure of a motor vehicle operator to see that which by the exercise of reasonable care he should have seen is the proximate cause of an injury to another, he is liable in damages for his negligence. *Clancey* v. *Cumberland County Power & Light Co.*, 128 Me., 274, 147 A., 157; *Callahan* v. *Bridges*, 128 Me., 346, 147 A., 423; *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872.

The defendant in the case at bar, failing to use reasonable care to watch for and see traffic approaching and about to enter the intersection, denied the car in which the plaintiffs rode the right of way which the law gave it, and he persisted in his wrong to the moment of the collision which produced the damage. Had he slowed down or stopped, the cars would not have come together. The defendant's negligence is clearly established and no serious doubt can arise as to the causal connection between his tortious acts and the injuries which resulted.

We can not believe that the jury in these cases based their verdicts upon findings that the defendant exercised due care. Error so apparent can not be easily attributed to the intelligent men and women of honest intent and purpose, who sit as jurors in our courts. We are convinced that the error lies elsewhere.

As already pointed out, Doctor Gregware, who drove the car in which his mother and guests rode, was clearly guilty of negligence and a joint tort feasor whose wrong contributed to the accident. His negligence, however, is not imputed to these plaintiffs, and their own due care is admitted. The law in this regard is well settled and we must assume that it was stated and fully explained to the jury. It is within the range of possibility, if not probability, however, that the jury, failing to grasp the controlling import and effect of the rules given them, found the plaintiffs negligent or chargeable with their driver's lack of due care. Confusion may have grown out of an

attempt to apply the law of the cases to the proven facts. We prefer to ascribe the erroneous verdicts below to this cause. The result is the same. The verdicts must be set aside.

Motions sustained.
Verdicts set aside.
New trials granted.

JOHN DUBE *vs.* ARTHUR L. SHERMAN.

ESTHER DUBE *vs.* ARTHUR L. SHERMAN.

CATHERINE FECTEAU *vs.* ARTHUR L. SHERMAN.

Kennebec. Opinion, March 29, 1937.

NEW TRIAL.

Burden of showing adverse verdict to be clearly and manifestly wrong rests on movant.

On exceptions and motions for new trial by plaintiffs. Actions of negligence tried at April Term, 1936, of the Superior Court for the County of Kennebec before a jury. Verdict for defendant. Exceptions and motions overruled. Case fully appears in the opinion.

F. Harold Dubord, for plaintiffs.
William B. Mahoney,
John B. Thomes,
Perkins & Weeks, for defendant.

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

DUNN, C. J. Three actions, sounding in tort, one by John Dube, the second by his wife, Esther, and still another by their niece, Catherine Fecteau, against Arthur L. Sherman. The litiga-

tion arose out of an automobile accident that occurred not far from the Winslow-Vassalboro town line, on the Waterville-Augusta highway, in the early afternoon of August 30, 1935. The day was fair, sky clear, sun shining, road dry.

John Dube, who drove the vehicle in which the other plaintiffs were guest passengers, declares, in separate counts, of which more presently, for damage to his car, to his clothes, to a watch he was wearing; for bodily hurt; and for expenses incurred on account of his injured wife.

Each of the other plaintiffs alleges that actual physical pain occasioned her loss or damage.

Plaintiffs allege, for foundation of civil liability at common law, that the negligence of defendant, in attempting to drive his automobile between their car and a truck, gave rise to the respective rights of action. Evidence insisted to support such allegation was introduced.

A motion was made in the court below, that, because of some defect on the part of a juror in failing to return immediately with his fellows from the conference room, to report the answer of the jury concerning the matters of fact committed to their trial and examination, the panel be discharged without a verdict.

The motion was refused.

At the bar of this Court, exceptions to such refusal are not seriously pressed. The exceptions are regarded as abandoned.

Plaintiffs rely on motions grounded, in gist, that the verdicts for defendant, being against the evidence, and therefore contrary to law, ought not to stand.

The road in question runs generally north and south. At the point of the accident, macadam surfacing, eighteen feet in width, is divided by a white line into two lanes; the lane in which plaintiffs were riding was nine and one half feet wide. Next the macadam, and of the same level, was a gravelled shoulder, suitable for vehicular use, three and one half feet in width.

Patrolmen were repairing the road. Testimony describes the work done by them as "patches"; again, as "new construction."

Defendant is a chauffeur; he had, over the period of twenty-two years, received compensation for his services in operating motor vehicles. On this day, he was going southerly, i.e., in the direction of

Augusta, on a five per cent grade, on his right side of the public way. The patrolmen, or, if not they themselves, the "patches," had been within defendant's view since he was one fourth of a mile away. The lane in which his car was proceeding was narrower by a foot than the adjoining one.

The jury could find, from the evidence, that directly ahead of defendant, when near the patrolmen, was new construction, and the aforesaid truck. The truck, one for hauling gravel, but then parked, blocked the lane. The automobile was slowed almost to a stop; then, defendant desiring to go on, the machine was started, in second gear, toward and onto the opposite lane, or left roadway. The plaintiff car, which defendant had first seen when it was at the brow of the hill, three hundred and fifty feet off, was, the jury apparently found, now observed to be oncoming, at a rapid rate of speed.

Defendant, there is testimony, immediately bore his machine to the right; pulled, at an angle, back to his own side of the road; thence forward to where the front bumper was close to a patrolman; thereupon, the automobile was brought to a stop. Except for its left rear wheel, which still projected a matter of some eighteen inches, the car was on its side of the traffic line.

With the truck as a bench mark, the vehicle defendant had in charge was now twenty feet to the northward; that in which plaintiffs were riding was fifty feet southward, the latter car in motion.

So is the evidence.

The car Mr. Dube was driving had a width of five feet, seven inches. The space available for its use in passing is variously estimated on the record, from seven to ten feet. Yet, the Dube vehicle struck against the other one.

Impact of collision dented the left rear mudguard of the latter, and knocked its rear bumper off; nothing more.

On went the moving car, thirty feet; it left the road, plunged down an embankment, overturned, and was demolished. Its occupants were hurt.

Upon each movant rests the burden of showing adverse verdict to be clearly, manifestly wrong. *Gregor* v. *Cady*, 82 Me., 131, 19 A., 108; *Hubbard* v. *Marine, etc., Co.*, 105 Me., 384, 74 A., 924; *Cobb* v. *Cogswell*, 111 Me., 336, 338, 89 A., 137; *Sterns* v. *Hudson*, 113 Me., 154, 155, 93 A., 58; *Dickey* v. *Bartlett*, 114 Me., 435, 96 A.,

738; *Bradbury* v. *Insurance Co.*, 120 Me., 1, 112 A., 714; *Winchester* v. *Perry*, 122 Me., 1, 118 A., 515; *Mizula* v. *Sawyer*, 130 Me., 428, 157 A., 239; *Young* v. *Potter*, 133 Me., 104, 174 A., 387. No motion here survives such test.

Upon the evidence in the case, the verdicts are final and conclusive.

Exceptions overruled.
Motions overruled.

DORIS H. WOODBURY *vs.* FRANK T. YEATON.

Cumberland. Opinion, April 12, 1937.

BASTARDY. EVIDENCE.

R. S., Chap. 111, *in bastardy action, requires complaint in writing under oath, accusation during travail, and constancy in such accusation.*

Accusation during travail is a condition precedent to maintenance of action.

Established rules of pleading require that allegations and proof must correspond.

On exceptions to refusal to direct a verdict for defendant. Action of bastardy tried at November Term, 1936, of the Superior Court for the County of Cumberland. Verdict for complainant. Exceptions sustained. Case fully appears in the opinion.

Frank P. Preti, for plaintiff.

John E. Bates,
Wilfred A. Hay, for defendant.

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

MANSER, J. Action in bastardy, heard with jury. On exception to refusal of presiding Justice to direct a verdict for defendant be-

cause of variance between allegations and proof, and upon the further ground that complainant failed to show compliance with condition precedent to the maintenance of her action. The declaration alleged that "being put upon the discovery of the truth during the time of her travail, she accused said Frank T. Yeaton, the respondent, of being the father of said child." The child was delivered by Caesarean operation while the complainant was under anesthetics, and no accusation was then made.

The proceedings are entirely statutory. There was no remedy at common law. Statutes of this character have been in force for many years in practically all jurisdictions.

When first enacted and for a long period thereafter, in ordinary civil actions, the parties were not permitted to testify because of their interest in the result. From the very nature of bastardy acions, however, it was apparent that ofttimes evidence could not be presented of the paternity of a child unless its mother could testify, because the facts were exclusively within her own knowledge. The law as originally passed in Maine, provided that the mother might make her accusation in writing under oath, respecting the man accused, and it was further provided that,

> "If she being put upon the discovery of the truth respecting the same accusation in the time of her travail, shall thereupon accuse the same person of being the father of the child, of which she is about to be delivered, and shall continue constant in such accusation, and shall prosecute him as the father of such child (in which prosecution she shall be admitted as a competent witness, and her credibility be left to the jury) and such examination shall be given in evidence on the trial of the issue . . . he shall be adjudged the reputed father of such child." Laws of Maine, 1821, Chap. 52.

These requirements have been retained in our law without change from the institution of the state to the present time. There have been some slight alterations in phraseology, but none in import. R. S., Chap. 111, now requires complaint in writing under oath, accusation during travail, and constancy in such accusation.

Some states have made important statutory modifications. In Massachusetts, as pointed out in *Hawes* v. *Gustin*, 84 Mass., 402,

an act passed in 1859 removed the necessity of proof of accusation during travail. Such accusation is still competent evidence, but other evidence can be introduced to make out a prima facie case.

During the middle of the last century, legislation was enacted in many states permitting the parties to civil actions to be witnesses in their own behalf. The effect of these statutes was considered by various courts in connection with the requirements under bastardy statutes with reference to the testimony of the complainant. In *Booth* v. *Hart*, 43 Conn., 480, the court discussed the situation thus:

> "Undoubtedly it was originally essential to the admission of the mother as a witness in her own behalf that she should have been put to the discovery in the time of her travail. But in 1848 a statute was passed allowing all parties to suits to testify in their own behalf. This statute applies to the defendant in cases of maintenance, and the simple question is, does it apply to the plaintiff in such cases, if the action is brought by the mother? If it does, it removes what was before an essential element in her qualification as a witness, and leaves it optional with her whether or not to disclose in the time of her travail the name of the father of her child."

The court decided that accusation during travail was no longer necessary.

In New Hampshire, at an early period it was held that the liability of the respondent could be proved by evidence other than that of the complainant, and it was not essential that she should have made accusation in the time of her travail. In *R. R.* v. *J. M.*, 3 N. H., 135, the court, referring to the construction then placed upon an identical statute by the Massachusetts court commented that, "their court, following the letter of the statute, have held, that the respondent was not chargeable within the intent of the statute, unless the mother of the child charged him in the time of her travail with being the father, and continued constant in her declaration. But in this state, a much more liberal construction has been always given to the statute."

It is probably true that in most jurisdictions, either by virtue of a particular statutory change in the bastardy acts, or by judi-

cial interpretation of general legislative enactments permitting interested parties to testify, the rule has been abrogated which required the mother to accuse the father of his paternity during the time of her travail. 7 C. J., 988.

In Maine this is not the fact. Prior to the passage of the legislation of 1864 allowing parties to be witnesses in their own behalf, it was uniformly held that accusation of the complainant at the time of her travail and her constancy in such accusation, were prerequisites to the admission of the complainant as a witness. *Foster* v. *Beaty*, 1 Greenl., 304; *Dennett* v. *Kneeland*, 6 Me., 460; *Loring* v. *O'Donnell*, 12 Me., 27; *Bradford* v. *Paul*, 18 Me., 30; *Blake* v. *Junkins*, 34 Me., 237; same case 35 Me., 433 and *Beals* v. *Furbish*, 39 Me., 469.

The Court in 1868 in *Totman* v. *Forsaith*, 55 Me., 360, did not refer to the legislation of 1864, but reiterated the requirements of accusation during travail and constancy in such accusation.

In *Payne* v. *Gray*, 56 Me., 317, the effect of P. L. 1864, Chap. 272, removing restrictions on testimony, was under consideration in a bastardy action, and it was held that the complainant could be offered as a witness without first showing that she had made accusation at travail, but the Court ruled that "by the very terms of the statute, such an accusation is necessary. . . . If it turns out, as a matter of fact, that she did not make the accusations, she must fail in her suit."

In 1898 the subject was considered in *Palmer* v. *McDonald*, 92 Me., 125, 42 A., 315, 316 and Whitehouse, J. said:

> "It has also been settled law in this state, both before and since the enactment of 1864 allowing parties to be witnesses, that proof of the accusation by the complainant at the time of her travail was indispensable to the success of her prosecution. Prior to the enactment of 1864, it was prerequisite to the admission of the complainant as a witness, as well as a condition precedent to her right of prosecution. *Loring* v. *O'Donnell*, 12 Me., 27. The effect of that general enactment was to make the complainant in such a case a competent witness without preliminary proof of an accusation by her at the time of her travail, but such proof was still essential to the success of her prosecution."

It will thus be seen that this feature of the bastardy law in Maine has received judicial interpretation in a series of decisions which have been uniform and unmistakable. The ruling has been accepted and followed as prescribing an essential requirement under our statute. The legislature has made no change. It is within its province to do so. The cogency of the argument in support of a more liberal rule may well be directed to the law-making power, but can not justify overturning established precedents, uniform in character and extending back to the formation of the state.

Under the law as it exists in Maine, therefore, accusation during travail is a condition precedent to the maintenance of an action.

The present case presents the further question as to whether compliance with this requirement may be excused when it is shown that it was impossible of performance. The record discloses that it was deemed essential, upon competent medical advice, to deliver the child by Caesarean operation. Anesthetics were administered and there was complete loss of sensation. There was no travail and no pains of parturition in the ordinary sense of the terms. It is contended that being deprived of the opportunity of making accusation as provided by the terms of the act, evidence of such accusation made to the attending surgeon and with knowledge that the operation was to be performed, should be sufficient substitute for the statutory requirements.

A somewhat similar situation existed in the case of *Harty* v. *Malloy*, 67 Conn., 339, 35 A., 259, but as accusation during travail is not essential in that state, the discussion in that case is not relevant.

The defendant had no notice from the pleadings that such evidence would be offered. The declaration alleged accusation during travail. The proof offered was a variance from this allegation. The evidence contradicted the averment. It is a well-established rule of pleading that the allegations and proof must correspond. *Porter's Adm'r* v. *Porter*, 31 Me., 169 at 172. In *Eveleth* v. *Gill*, 97 Me., 315, 54 A., 756, 757, the Court in passing upon a statutory proceeding said:

> "We think it clear that in resorting to the legal process authorized only by the statute, she must state, as well as prove,

a case within the terms of the statute, and this she has not done."

In a criminal action for libel, the Court held in *State* v. *Singer*, 101 Me., 299, 64 A., 586, 587:

> "It is elemental knowledge that all essential matters must be alleged with such certainty that the defendant may be apprised of the precise nature of the charge against him, and this, that he may be able to prepare to meet the charge by pleading or proof, and that the final judgment may protect him against future charges for the same offense."

This rule was affirmed in the civil action of *Macurda* v. *Lewiston Journal Company*, 104 Me., 554, 72 A., 490. A declaration which fails to advise a defendant with reasonable certainty of the facts upon which complainant proposes to rely, and will seek to prove, is insufficient. *Sessions* v. *Foster*, 123 Me., 466, 123 A., 898; *Ferguson* v. *National Shoemakers*, 108 Me., 189, 79 A., 469.

Payne v. *Gray*, supra, says:

> "It is one of the averments in her declaration, and like every other material averment, it must be proved."

The Court is not called upon in the present case to deliberately determine whether, under apt averment of special circumstances, an excuse might be pleaded for lack of accusation during travail. Such excuse was not alleged. Without such pleading any opinion upon the point would be dictum.

For the reasons as stated above, the entry must be

Exceptions sustained.

ALVIN R. BOOBER *vs.* WALTER J. BICKNELL.

Penobscot. Opinion, April 13, 1937.

MASTER AND SERVANT.

It is the duty of the master to use reasonable care to furnish his servants reasonably safe appliances with which to work, and to use reasonable care to inspect such appliances in order to discover and remedy defects.

The servant is not required to examine appliances to discover defects which are not obvious, and he may rely on the presumption that his employer has performed his duty with reference to such inspection.

On general motion for new trial. An action to recover for personal injuries alleged to have been caused by the negligence of the defendant. Motion overruled. Case fully appears in the opinion.

F. B. Dodd,
Folsom Merrill, for plaintiff.
B. W. Blanchard,
A. C. Blanchard, for defendant.

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

THAXTER, J. This is an action to recover for personal injuries alleged to have been caused by the negligence of the defendant. After a verdict for the plaintiff, the case is brought to this Court on a general motion for a new trial.

The plaintiff was employed by the defendant to help in taking in the hay on the defendant's farm. A load had been driven to the door of the barn and had been partly discharged when the accident occurred. The hay was unloaded by means of a double harpoon hay fork, attached to a long rope, which ran through a block and was pulled by a horse. When the load on the fork had reached the proper point inside the barn, it was discharged by the man in the hayrack pulling on a trip rope attached to the fork; and then the fork was

pulled back by means of this rope. The plaintiff was operating this trip rope; and the accident was caused by the rope breaking, when he pulled on it. He fell backwards from the hayrack to the ground and was severely injured. The negligence charged against the defendant is that he allowed this rope to become in a rotten condition and out of repair, and that he knew, while the plaintiff was operating it, that it was in this condition.

We are not concerned here with the Workmen's Compensation Act. This is a common law action and the defenses of contributory negligence and of assumption of risk are available to the defendant.

The defendant does not seriously contend, nor could he, that the question of his negligence in failing to supply the plaintiff with a suitable appliance was not for the jury. What he does claim is that the defect in the rope was an obvious one, and that the plaintiff was as a matter of law guilty of contributory negligence in his method of using it, or at any rate assumed a risk, which must have been either perfectly apparent, or could have been readily discovered.

It is the duty of the master to use reasonable care to furnish his servants reasonably safe appliances with which to work, and to use reasonable care to inspect such appliances in order to discover and remedy defects. The servant, though he is bound to use his senses to see defects which are obvious, is not required to examine appliances to discover those not obvious; and he may rely on the presumption that his employer has performed his duty with reference to such inspection. *Caven, Admx.* v. *The Bodwell Granite Company,* 99 Me., 278, 59 A., 285. Whether this plaintiff saw, or ought in the exercise of reasonable care to have seen, that this rope was defective, seems clearly to have been a question for the jury in this case.

Motion overruled.

FRANK E. AUSTIN

vs.

HERBERT P. AUSTIN AND JEANETTE P. AUSTIN.

Cumberland. Opinion, April 13, 1937.

EQUITY. TRUSTS.

Where real estate is conveyed upon the faith of the promise of a grantee to make a will devising it to the grantor and failure to do so would be a fraud, equity raises a constructive trust and declares that the grantee holds the property so impressed.

Such trust follows the real estate into the hands of any subsequent holder who is not a bona fide purchaser thereof without notice.

Parol trusts of this character must be established by clear and indubitable evidence.

On appeal in equity. A bill in equity brought for the establishment of a constructive trust. Hearing was had before a single Justice who impressed a trust upon certain real estate in Portland and ordered the defendants to convey it to the plaintiff. Defendants appealed. Appeal dismissed. Case remanded for entry of decree in accordance with this opinion. Case fully appears in the opinion.

Wilfred A. Hay,
Abraham Breitbard,
Joseph P. Connellan, for plaintiff.
Sherman I. Gould,
Charles H. Shackley, for defendants.

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

HUDSON, J. On appeal in equity from a decree by a single Justice, impressing a trust upon certain real estate in the City of Portland and ordering the defendants to convey it to the plaintiff. That the decree is warranted in law (the necessary facts being

clearly and indubitably proven) there is no question, for it is well settled in this state that (1) where real estate is conveyed upon the faith of the promise of a grantee to make a will devising it to the grantor and failure to do so would be a fraud, equity raises a constructive trust and declares that the grantee holds the property so impressed. *Androscoggin County Savings Bank* v. *Tracy et al.*, 115 Me., 433, 99 A., 257; *Gilpatrick et al.* v. *Glidden, admr. et al.*, 81 Me., 137, 16 A., 464; *Grant* v. *Bradstreet et al.*, 87 Me., 583, 33 A., 165; also see *Whitehouse* v. *Bolster, Trustee, et al.*, 95 Me., 458, 50 A., 240, 242; and (2) the trust thus impressed follows the real estate into the hands of any subsequent holder who is not a bona fide purchaser thereof without notice. *Bailey* v. *Coffin et al.*, 115 Me., 495, 99 A., 447; *Gilpatrick* v. *Glidden*, supra; *Androscoggin County Savings Bank* v. *Tracy et al.*, supra; R. S. 1930, Chap. 87, Sec. 18.

But where it is sought in effect to destroy a muniment of title by the establishment of an oral contract, proof of such contract must be "full, clear and convincing." *Fall* v. *Fall et al.*, 107 Me., 539, 81 A., 865, 866; *Liberty* v. *Haines, Admr.*, 103 Me., 182, 68 A., 738; *Viele et al.* v. *Curtis*, 116 Me., 328, 101 A., 966. Parol trusts of this character must be established by "clear and indubitable evidence." *Whitehouse* v. *Bolster*, supra. And yet that does not mean, necessarily, "that the party seeking to show such a trust must introduce a larger body of evidence, or a larger number of witnesses, than may be introduced by the adverse party. The proof may be full, clear and convincing, though there be only one witness against one, or one against several." *Tuttle* v. *Merrow*, 109 Me., 347, 349, 84 A., 463, 464. Such proof does not require the certainty of mathematical demonstration but it does call for the production of evidence that satisfies the conscience of the court that the truth is established clearly and indubitably.

The plaintiff and the defendant, Herbert P. Austin, are brothers; Jeanette, the other defendant, being the wife of Herbert. Susan Austin died intestate on November 24, 1899, owning the real estate in question, her homestead. Besides her two sons just mentioned, she left an unmarried daughter, Alida, then forty-one years of age. Upon the death of their mother, this property was inherited in equal shares by Frank, Herbert and Alida. On December 1, 1899,

the two brothers conveyed their interest to their sister by quitclaim deed, which in terms was absolute and unqualified. On April 14, 1934, Alida deeded the homestead, with full covenants of warranty, to the defendants. She died intestate August 8, 1934.

The plaintiff's contention is that when she took this deed, she agreed with the grantors that she would "leave a will, willing it back" to them. This the defendants deny in toto. The Justice below found "that there was an agreement by her" (meaning Alida) "at the time she received the conveyance of the property from her brothers to return it to them in equal shares, that this agreement was known to both defendants, and that to permit them to retain the whole title would constitute a fraud on the plaintiff" and impressed a trust upon the property.

In order to determine wherein lay the truth, the court was called upon to pass upon the veracity of the parties. Both brothers could not have testified truthfully. Which did? Furthermore, most of the witnesses were interested and no doubt biased, as were the parties. Which witnesses, if any, the plaintiff's or the defendants', either related that which was not true, or innocently, led on by undue interest in the litigation, colored the situation and presented it differently from its actuality? These were questions for the presiding Justice. He saw and heard the parties and witnesses as they gave their testimony. "The appearance of the witness upon the stand counts for much." *Tuttle* v. *Merrow*, supra. What the court saw in the appearance of the parties and their witnesses is not in the record. What he heard is, but perhaps not as he heard it, for the way a thing is said many times stamps it true or false. In *Young* v. *Witham*, 75 Me., 536, Chief Justice Peters said:

> "When the testimony is conflicting, the Judge has an opportunity to form an opinion of the credibility of witnesses, not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record." Also see *Sposedo* v. *Merriman et al.*, 111 Me., 530, 90 A., 387.

The immediate testimony with relation to the making of the alleged contract came only from the parties themselves. Other evidence claimed to have a tendency to corroborate their contentions

came principally from interested witnesses. It was peculiarly a case in which the decision necessarily had to depend upon the determination of which party and his witnesses were telling the truth. We have read the testimony carefully and think no particularly useful purpose would be served by a detailed analysis of it. It is sufficient to say that the record discloses adequate support for the findings of fact and the raising of a constructive trust in the given situation.

It is necessary, however, to mention an erroneous provision in the decree and indicate its correction. The Justice ordered that the defendants should "make, execute, acknowledge and deliver to the said plaintiff, Frank E. Austin, . . . a deed of quit claim . . . of *an undivided one half interest* in and to the premises described in the bill of complaint. . . ." He also decreed that the plaintiff "is entitled *to one half* of the net rents and profits of said premises since August 8th, 1934 . . . ," the date of Alida's death. We think the plaintiff is entitled to receive by deed only a *third* in common and undivided instead of a *half interest* as decreed, for the reason that it was only the third owned and deeded by him, which became impressed with the trust in his behalf. It follows that the plaintiff is entitled to receive only a third (not half) of the net rents and profits since August 8, 1934.

The Justice below found that the plaintiff established his complaint by full, clear and convincing evidence and it has not been demonstrated that he clearly erred in reaching that decision. Quite the contrary is true.

Appeal dismissed. Case remanded for entry of decree in accordance with this opinion.

THOMAS ILLINGWORTH *vs.* CLARENCE E. MADDEN, JR.

ROY ILLINGWORTH, PRO AMI *vs.* CLARENCE E. MADDEN, JR.

Kennebec. Opinion, May 21, 1937.

NEGLIGENCE. MOTOR VEHICLES. HUSBAND AND WIFE.

Riding upon a toboggan drawn by an automobile over a public highway is not negligent as a matter of law.

In order to establish a joint enterprise within the meaning of the law of imputed negligence, there must be proof of a community of interest in, and the joint prosecution of, a common purpose under such circumstances that each participant has authority to act for all in directing and controlling the means or agency employed.

The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle or had an equal right to do so.

It is not error to refuse to allow the jury to consider an impossible and impracticable theory which has no support in the evidence.

Motor Vehicle Law, R. S., Chap. 29, *Secs.* 82, 83 *and* 84, *does not express or imply that coasting sleds of any type are required to have lights, and in the absence of a clear statutory mandate, it is not generally held that sleds are vehicles within the meaning of that term as used in regulatory statutes.*

A wife in exercising her right to the care and custody of her child in her husband's absence and free from his control, does so without authority delegated by him.

Husband and wife not jointly and mutually assuming and exercising the responsibility of care in a particular situation, are not subjects of the doctrine of imputed negligence, as the independent responsibility of each spouse has been recognized and the contributory negligence of the one held not to be imputable to the other.

Statutes conferring equal powers, rights and duties upon the father and mother in the care and custody of their children, negative the idea that the mere existence of the marital relation ipso facto *constitutes each parent the representative of the other as regards the rearing of their minor children.*

On exceptions and general motions for new trials by defendant. Actions of negligence brought by a minor and his father. Trial was had at the October Term, 1936, of the Superior Court for the County of Kennebec. Jury verdict for the plaintiffs. Defendant filed general motions for new trials and exceptions. Motions overruled, exceptions overruled. Case fully appears in the opinion.

Carl A. Blackington,

Ernest L. Goodspeed, for plaintiffs.

Joly & Marden, for defendant.

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

STURGIS, J. In these actions of negligence brought by a minor and his father, the plaintiffs have the verdicts. The defendant reserved numerous exceptions to rulings made and instructions given or refused by the trial Judge and filed general motions for new trials.

MOTIONS.

There is no serious dispute as to the material facts proven in these cases. The evidence clearly shows that just before six o'clock in the evening of December 28, 1935, Edward F. Savage, eighteen years old and living in Waterville, Maine, borrowed his father's automobile and drove over to Boutelle Avenue to call on Roy Illingworth, a friend of about the same age. When he arrived there someone suggested a toboggan party, arrangements were made over the telephone to borrow one from James Illingworth who lived in another part of the city, and the party, including young Savage and Roy Illingworth, the latter's younger brother and a cousin and his mother, went over to get the toboggan. It was fastened to the right rear bumperette of the automobile and Roy Illingworth, although his mother requested him to ride inside the car, sat down on it holding the rope in his hands. James Illingworth, joining the party, got into the front seat of the car beside Savage who drove, and they started back through the city dragging the toboggan and its rider behind the automobile.

It had been arranged, it seems, that Mrs. Illingworth should leave the car down town in the shopping district and walk home at her own convenience. Having this in mind but without specific direction from anyone, Savage drove up Elm Street on the right-hand side and across the intersection which it made with Temple Street and stopped his car near the sidewalk for Mrs. Illingworth to alight. The back of the automobile was then five or six feet from the corner and the rear end of the toboggan was just clear of the Temple Street curb line.

As the automobile and the toboggan behind it came to a stop and the minor, Roy Illingworth, was rising up to his feet, the defendant, Clarence E. Madden, Jr., came up Temple Street in his automobile and turning right around the corner of Elm Street ran over the toboggan, struck young Illingworth, threw him under the car and, his coat catching on the front axle, dragged him several hundred feet up Elm Street where the boy's coat tore loose, the running gear and rear axle cleared him, and the car went on leaving him behind. The defendant stopped by some of the occupants of the Savage car who had followed him up the street, came back and took the boy, who had arisen, to the office of his family physician where examination disclosed that while his clothing was torn and he had received numerous abrasions and cuts upon his face and left lower arm, the boy's left hand only was seriously injured. His left little finger was badly jammed, the ring finger on the same hand was disjointed and crushed, and the middle finger was split its entire length with both sides broken open and the tissues mangled.

While the defendant's negligence is not conceded, it is clearly established by the overwhelming weight of the evidence. Driving a 1931 Dodge coupe, he came up Temple Street, slowed his car down at a stop sign, and with his windshield frosted or misted so that he could only see out through the space cleared by the defroster, started ahead in low gear and drove around the corner and up Elm Street without seeing the Savage car or the toboggan until he was stopped and found the boy and his mother standing some little distance behind his car. He admits that he had seen the Savage car cross the intersection ahead of him as he was at or near the stop sign, but states that he did not notice the toboggan dragging behind it. The seat of his automobile was so low, he says, that he

could not see anything down on the street level within fifty feet ahead of his car. He testifies that his engine was cold and missing fire so that as he started up at the stop sign he was obliged to continually operate the choke on the dash and continued so to do until he got out on Elm Street. His statement is: "I was looking dead ahead and fooling with the choke." Upon this evidence, we are of opinion the jury were fully warranted in finding that the defendant centered his attention upon the operation of his choke and drove around the corner of Elm Street without due thought or regard for who or what might be in the street in front of him. This spelled negligence. *Hill* v. *Finnemore*, 132 Me., 459, 464, 172 A., 826; *Callahan* v. *Bridges Sons, Inc.*, 128 Me., 346, 349, 147 A., 423.

In his brief statement of special matters of defense, the defendant set forth numerous grounds upon which he alleged the plaintiffs were guilty of contributory negligence barring their recovery in these actions. On this issue, the jury were allowed to consider only the degree of care exercised by the minor, Roy Illingworth. The trial Judge ruled that negligent acts or omissions, if any, of the driver of the car and of the minor's mother were not imputable to either plaintiff.

The verdicts indicate that the jury, under the instructions given them by the court, found that Roy Illingworth was not guilty of contributory negligence. In this, we find no manifest error. It cannot be said as a matter of law that it is negligent to ride upon a toboggan drawn by an automobile over a public highway. No more controlling is the fact that the toboggan did not carry a light. The evidence shows that the street where the accident occurred was well lighted and the toboggan and its rider were in plain view of the defendant as he turned the corner. No reason appears for assuming that the accident would have been avoided if the toboggan had carried a light.

No claim is made that the damages awarded the plaintiff, Roy Illingworth were excessive. He was a freshman in Colby College and an accomplished musician. He also worked part of the time in a textile mill and since the accident that has apparently been his regular employment. There is convincing evidence that the injuries he received in this accident permanently impaired his ability to play either the piano or the clarinet, which were the instruments he

was studying, barred his chance of becoming a music teacher and interfered with his work as a textile operative.

Careful examination of the record fails to disclose that the damages awarded Thomas Illingworth were clearly excessive. His enumeration from memory of the amount of disbursements made and losses suffered as a result of his son's injuries falls just short of the aggregate of the award. Items of loss named but not valued may account for the variance. We find no clear warrant for granting a new trial on this ground.

EXCEPTIONS.

Exceptions reserved during the trial to the admission of testimony are not pressed here and need not be considered. Counsel apparently recognize, as the record shows, that the defendant suffered no prejudice from the introduction of this evidence.

In the course of his charge, the trial judge instructed the jury that "It is not negligence in itself for a person to ride upon a toboggan towed by an automobile." We find no merit in the exception reserved to this instruction. This brief general statement of the law was correct in principle and in nowise misleading. The jury were carefully instructed in direct connection therewith that the minor plaintiff's act in riding the toboggan was to be considered in the light of the circumstances and conditions existing at the time and place of the accident and his due care measured accordingly. The language used was clear, plain and free from technicalities and from ambiguity. We are confident that no member of the panel was confused by it or misdirected in his deliberations.

The defendant in his specifications of defense pleaded, and on the brief argues, that the minor plaintiff, Roy Illingworth, and Edward F. Savage who drove the automobile which hauled the toboggan, as all other members of the party, were engaged in a joint enterprise, young Savage was negligent both in failing to have the toboggan lighted in accordance with the statute governing the operation of motor vehicles and trailers and in stopping it in close proximity to the street intersection in violation of a local city ordinance, and that his negligence is imputed to his companions including the plaintiffs in these actions. The Justice presiding refused to

give requested instructions submitting this issue to the jury and directed them to exclude it from their considerations.

It is undoubtedly true that each and all of the young people in this party, as they drove over after the toboggan and started back towards the outskirts of the city where they planned to slide, had a common interest in the "object and purposes of the undertaking," but proof that they had equal rights in the control and management of the automobile in which they rode is entirely lacking in the record. Without prearrangement or even knowledge on the part of the others, young Savage borrowed his father's car presumably for his own personal use, and started out merely to make a call. It nowhere appears that he in any way or at any time surrendered his personal control over the automobile to any of his companions, or by evidence of probative value that Roy Illingworth or any of the others interfered with or assumed any responsibility for or control over its operation. The testimony is to the contrary and conjecture only refutes it.

The law on this point is well settled. In order to establish a joint enterprise within the meaning of the law of imputed negligence, there must be proof of a community of interest in and the joint prosecution of a common purpose under such circumstances that each participant has authority to act for all in directing and controlling the means or agency employed. The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle or had an equal right to do so. 5 American Jurisprudence, Section 500 *et seq*; 4 Blashfield Cyc. of Automobile Law and Practice, Section 2372 *et seq.* The absence of this essential element of joint control in the cases at bar brings them within the rule of *Trumpfeller* v. *Crandall*, 130 Me., 279, 155 A., 646. We find no error in the refusal of the court to submit the defendant's theory or claim of joint enterprise. Lacking evidence even tending to establish such a relation, that issue was not in the cases. Exceptions reserved to the charge and refusal to instruct on that point can not be sustained.

The defendant complains because the jury were not allowed to determine whether the plaintiff, Roy Illingworth, was negligent in stopping the toboggan. Suffice it to say that he did not stop it, but

as the trial Judge pointed out its progress was controlled by the operation of the automobile to which it was attached. It is not error to refuse to allow the jury to consider an impossible and impracticable theory which has no support in the evidence. *Tower* v. *Haslam*, 84 Me., 86, 24 A., 587; *Pillsbury* v. *Sweet*, 80 Me., 392, 14 A., 742; *Brackett* v. *Brewer*, 71 Me., 478.

The ruling that the local municipal ordinance prohibiting vehicles from stopping or standing within ten feet of a street corner or hydrant was not involved in these cases was also correct. The driver of the automobile violated the ordinance. There is no basis in this record for imputing the proof of negligence which attaches to his disregard of the law to these plaintiffs. As already stated, the toboggan party was not a joint enterprise.

Nor are we of opinion that the learned trial Judge was in error in instructing the jury that the provisions of the Motor Vehicle Law relating to lights, which appears as R. S., Chap. 29, Secs. 82, 83 and 84, had no application to the minor's failure to light his toboggan at the time he was injured. The toboggan, of common knowledge, was nothing more than a long flat-bottomed sled, of different construction of course, but properly classed with sleds for coasting known to young and old wherever the snow covers the ground. We find no legislative intent, expressed or implied, which warrants the conclusion that coasting sleds of any type are governed by the statute as to lights. An examination of the authorities indicates that, in the absence of a clear statutory mandate, it is not generally held that sleds are vehicles within the meaning of that term as used in regulatory statutes. *Idell* v. *Day*, 273 Pa., 34, 116 A., 506; 2 Blashfield Cyc. Auto. Law & Pr., Sec. 853. The case of *Long* v. *Hicks*, 173 Wash. 17, 21 P. (2d), 281, relied on by the dedendant, is based on the provisions of a statute in force in that jurisdiction. It is not a controlling precedent here.

The remaining exception to be considered is based on the defendant's contention that the plaintiff, Thomas Illingworth, is barred from recovering the losses and expenses he suffered as a result of his minor son's injuries because his wife was negligent in not preventing the boy from riding on the toboggan. It is not clear in just what particulars she failed to exercise due care. She testifies without contradiction that she requested him to come inside the car

with the other occupants and protested against his riding on the toboggan but he refused to obey. By what means a mother could compel unwilling obedience from a son of that age does not appear. Assuming, however, that she was negligent in not preventing the boy's misadventure, we are not of opinion that her dereliction of duty is imputed to her husband. He was not present, took no part in the proceeding and had no control over it. In his absence, his wife was charged with the custody and care of their son in her own right under the statute which gives the father and mother joint right to the care, custody, control, services and earnings of their children and denies to either parent any paramount right over the other with reference to any matter affecting such children. R. S., Chap. 72, Sec. 43. Under the Married Women's Act, a husband has no direct interest in or right of control over actions brought by the wife for the preservation and protection of her property and personal rights or for the redress of her personal injuries, but she may sue in her own right at law or in equity as if unmarried. R. S., Chap. 74, Sec. 5. And a husband is not liable for his wife's torts in which he takes no part, but she is liable therefor as if she were sole. R. S., Chap. 74, Sec. 4; *Marcus* v. *Rovinsky*, 95 Me., 106, 49 A., 420. The independence of married women under the laws of this state leaves no room for indulgence in the theory that a wife, in exercising her right to the care and custody of her child in her husband's absence and free from his control, acts under and by virtue of authority delegated by him, or that damages recovered by either parent for losses incident to injuries to their child belong beneficially to both. Husband and wife do not constitute in this state a legal community known to the laws of some jurisdictions.

Furthermore, as between husband and wife not jointly and mutually assuming and exercising the responsibility of care in a particular situation, the doctrine of imputed negligence has not been accepted in this jurisdiction. In a long line of cases where husband or wife or both were suing a third person in negligence to recover for their own personal injuries or losses, the independent responsibility of each spouse has been recognized and the contributory negligence of the one held not to be imputable to the other. *State* v. *B. & M. Railroad Co.*, 80 Me., 430, 15 A., 36; *Whitman* v. *Fisher*, 98 Me., 577, 57 A., 895; *Cobb* v. *Cumberland County Power & Light Co.*,

117 Me., 455, 104 A., 844; *Kimball* v. *Bauckman*, 131 Me., 14, 158 A., 694; *Barnes* v. *Bailey*, 134 Me., 503, 187 A., 758. We find no reason or persuasive authority for departing from that principle in these cases. An examination of the decisions in other states indicates that this view is in accord with the weight of authority.

In *Atlanta, etc., Co.* v. *Gravitt*, 93 Ga., 369, 20 S. E., 550, 556, in a suit by a wife in her own right to recover for a wrong to her son, the contributory negligence of her husband, the father, was held not to be imputed to her merely because of the marital relation existing between them, and in the course of its opinion that court said:

> "Only upon the idea of identity of interest could the act of one be regarded as that of the other. We have already shown that the rule which once obtained, whereby, upon the theory of 'identity' or agency, the negligence of a father was imputed to his infant child, has been utterly repudiated in most jurisdictions, and no longer has any firm footing in the law of this country. The same reasons which have been urged against the injustice and harshness of that rule apply equally well to so indefensible a doctrine as that which would seek to charge a wife with the negligence of her husband, simply because of the marital relation existing between the two. Like the child, the wife has distinct, individual legal rights, which cannot be defeated simply by showing that another, to whom she was related by ties of wedlock, but over whom she exercised at the time no control, was guilty of negligence concurrent with that of the defendant."

In the comparatively recent case of *Herrell* v. *Railway Co.*, 324 Mo., 38, 23 S. W. (2d), 102, the authorities on this point are carefully and exhaustively reviewed and the doctrine of the case last cited adopted. That court there points out that statutes conferring equal powers, rights and duties upon the father and mother in the care and custody of their children, with no paramount right in either in respect thereto, negative the idea that the mere existence of the marital relation *ipso facto* constitutes each parent the representative of the other as regards the rearing of their minor children.

And in *MacDonald* v. *O'Reilly*, 45 Ore., 589, 78 P., 753, 754, we read:

> "The primary subject of inquiry in all personal injury actions is whether the negligence of the defendant was the proximate cause of the injury. When that fact is proven, and that the plaintiff was damaged thereby, the liability of the defendant is established. The plaintiff may not be entitled to recover, however, because of the concurring negligence of himself, or of some one standing in his place, contributing to the injury, for the reason that the law will not undertake to apportion the negligence. But the contributory negligence which will bar a recovery must be that of the person from whom the cause of action is derived, or the beneficiary, or some one standing in such a relation to the beneficiary that the maxim, *Qui facit per alium facit per se*, may be invoked. A wife does not, from the mere marital relation, however, occupy such a position in the care and custody of a minor child. Under our statute, the right and responsibility of the parents in that regard are equal, and the mother is as fully entitled to the custody and care of the children as the father. The doctrine to be found in some of the books, therefore, that because the father is the legal custodian of the children, or because of the identity of the parents, the law will assume that the mother is the agent of the father, for whose negligence he is responsible, can have no application. A mother is not the agent of the father in the care of the children, any more than the father is the agent of the mother. They are both equal before the law. The common interest or common duty of the parents toward the children will not of itself make one the agent of the other, or responsible for that other's negligence."

In accord with the rule of these cases are *Phillips* v. *Denver City Tr. Co.*, 53 Col., 458, 128 P., 460; *Louisville, etc., Co.* v. *Creek*, 130 Ind., 139, 29 N. E., 481; *Love* v. *Detroit*, 170 Mich., 1, 135 N. W., 963. See 8 Ruling Case Law 786, 23 A. L. R., 690, 32 Annotated Cases, 36.

Authorities cited by counsel for the defendant in support of the doctrine that negligence may be imputed between the spouses in

actions against third persons for torts to their minor children can not be followed here. They are based upon either the theory of a legal community of which the husband is the head, or a direct interest in the proceeds of the recovery, or a delegation of authority from one parent to another, each and all in direct conflict with the statutory rights of married women and parents of minor children in this state. *Keena* v. *United Railroads*, 57 Cal. App., 124, 132, 207 P., 35; *Toner's Admr.* v. *South Covington & C. St. R. Co.*, 109 Ky., 41, 58 S. W., 439; *Darbrinsky* v. *Pennsylvania Co.*, 248 Penna., 503, 94 A., 269. In refusing to instruct the jury that the negligence of the mother of the minor plaintiff was imputable to her husband, the plaintiff Thomas Illingworth, the trial Judge committed no error.

The entry in each case, therefore, must be

Motion overruled.
Exceptions overruled.

ARTHUR A. MCKUSICK *vs.* CHARLES MURRAY.

Penobscot. Opinion, June 10, 1937.

LANDLORD AND TENANT. LEASE.

Delivery of lease without written assignment creates no estate greater than a tenancy at will.

Continuance of possession by lessee without objection by lessor, and acceptance of rent by lessor after expiration of lease, nullifies provision in lease that lessee must remove buildings, during term of lease, and as a tenant at will he has a reasonable time to remove buildings following termination of tenancy.

Purchaser of buildings knowing them to be on land of another was chargeable with knowledge of character of tenancy.

In the case at bar defendant did not breach covenants to plaintiff warranting lawful ownership, freedom from incumbrances, right to sell, and to defend against lawful claims and demands of all persons because plaintiff lost title to buildings for failure to remove them within reasonable time after termination of tenancy.

On report. Action of covenant broken on covenants of warranty in a bill of sale. Judgment for defendant. Case fully appears in the opinion.

A. C. Blanchard, for plaintiff.

Fellows & Fellows, for defendant.

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

HUDSON, J. On report. Action of covenant broken on covenants of warranty in a bill of sale dated May 1, 1933. The property warranted comprised "an office building, three gasoline pumps and tanks and one kerosene tank and pump, used as a gasoline filling station and located on land now or formerly belonging to Luman C. Shepherd of Dexter." The defendant pled the general issue and by way of brief statement that if the plaintiff's title failed it was due solely to his own subsequent fault.

On August 9, 1924, Shepherd leased a vacant lot of land in Dexter for a term of five years to one Prescott at a yearly rental of $75, payable semi-annually. As intended, an office building was built, pumps and tanks were installed, and the leased premises were used as a gasoline filling station. The lease provided that if the lessor wished "to terminate the lease at the termination of the term stated," and both parties did not agree "on the value of the buildings erected," that arbiters should fix the amount not exceeding $2000 to be paid by the lessor. It was also stipulated that if the lessee did "not desire to sell the buildings" that he should "have the right to remove the same during the term of the lease."

Some time before the lease expired, the lessee sold the buildings, tanks and pumps to the defendant and delivered the lease to him. The purchaser went into possession, and paid rent directly to Shepherd. Without written assignment, he obtained no estate greater than a tenancy at will. R. S. 1930, Chap. 87, Sec. 16.

Although the written lease, expiring on August 9, 1929, provided for removal only during its term, we find a factual waiver of that provision. The lessor testified that he "made a new deal" with the tenant. While the evidence is not clear as to all of its provisions, these facts do appear: The tenant remained in possession; his rent was

not increased; without objection, he used the property as his own as he had done before the expiration of the lease, and he continued to pay only ground rental. At one point in his testimony, the lessor declared unequivocally that while the defendant had the building he did not claim it. The tenant's "continued possession" and "other circumstances" as mentioned "prove a waiver of the land owner's rights." *Henderson* v. *Robbins*, 126 Me., 284, 286, 138 A., 68, 69.

So we hold that when the written lease expired the defendant held the title to the building, the tanks and pumps, and thereafter as tenant at will had the legal right to remove the same within a reasonable time following the termination of his tenancy. *Sullivan et ux.* v. *Carberry et al.*, 67 Me., 531; *Franklin Land, Mill & Water Co.* v. *Card*, 84 Me., 528, 24 A., 960; *Bodwell Water Power Co.* v. *Old Town Electric Co.*, 96 Me., 117, 51 A., 802; *Henderson* v. *Robbins*, supra; *North* v. *Augusta Real Estate Assn.*, 130 Me., 254, 155 A., 36.

The defendant continued to pay ground rent to Shepherd until June 1, 1931, when he vacated the premises, having sold and delivered this property to the plaintiff. The latter took immediate possession and was accepted by Shepherd as his tenant at will at the same rental. He knew that the property he bought was on Shepherd's land, whom he told of his purchase from the defendant. He was chargeable with knowledge of the character of his tenancy and that as tenant at will he could remove his property from Shepherd's land only within the time as limited by law. Such was his knowledge when on May 1, 1933, having paid his purchase price notes, he received the bill of sale containing the covenants.

Has the defendant breached his covenants, warranting lawful ownership, freedom from incumbrances, right to sell and to defend against the lawful claims and demands of all persons? We think not.

By notice to quit dated April 12, 1935, the tenancy terminated on May 16, 1935. Thereafter for a reasonable length of time the plaintiff could have removed this property, but he did not. As a consequence, he lost his title, for which result the defendant is not chargeable, for he did not covenant that he would be responsible if the covenantee failed to exercise his lawful right of removal and thus protect his purchase. That bought, the plaintiff got, viz., good

title to the property at the time, with a limited right of removal. His failure to exercise that right timely is his own fault.

Not having breached his covenants, the defendant upon avouchment was neither bound to defend Shepherd's real action later brought against the plaintiff nor concluded by its judgment.

Liability not having been established, the entry, according to the stipulation in the report, must be,

Judgment for defendant.

ANDERSON A. ABBOTT ET AL. *vs.* EDWARD F. DANFORTH ET AL.

Androscoggin. Opinion, June 11, 1937.

WILLS. REMAINDERS.

It is an elementary rule of construction that estates legal or equitable, given by will, should always be regarded as vested unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.

A remainder which is otherwise vested is not rendered contingent by the conferring of a power of sale upon either the life tenant or the executor.

Rules of construction are designed to ascertain and give effect to the intention of the testator, and the intention of the testator must prevail, provided it be consistent with rules of law.

In the case at bar the Court held that the terms of the will created a vested remainder in the heirs of the testator, as of the time of his death, and excluded the life tenant as an heir.

On report. Bill in equity for construction of the will of Joseph Thompson. Decree in accordance with opinion. Case fully appears in the opinion.

Edward R. Parent,
Harold L. Redding, for plaintiffs.
Butler & Butler,
Edward F. Danforth,
Gower & Eames, for defendants.

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

DUNN, C. J., dissenting in part.

MANSER, J. On report. Bill in equity for construction of the will of Joseph Thompson, which except for the nomination of an executor, and not including formal parts, reads as follows:

> "I give, bequeath and devise to my mother, Lucy J. Thompson and my brother, Charles Thompson, or the survivor of them, the use and income of all my property, real, personal and mixed; and if after they use their own property, the income of my property should not be sufficient for their comfortable support then, I give, bequeath and devise to them or the survivor of them, such a part, or the whole, of the principal thereof as may be necessary for their comfortable care and support and funeral expenses.
>
> "After the decease of both my mother, Lucy J. Thompson and my brother, Charles Thompson, the balance of my property, if any, I hereby give, bequeath and devise to my legal heirs according to their legal rights."

This will was dated August 2, 1897. The testator died April 18, 1917. Lucy J. Thompson, the mother, died October 2, 1898, a little more than a year after the execution of the will, but the will remained unchanged during the eighteen years intervening before the death of the testator.

In the agreed statement of facts submitted by the parties, it is stipulated that the financial condition of Charles Thompson was such that it was unnecessary to expend the income or principal or any part thereof in his lifetime, or any part of the principal or income for his funeral expenses.

At the time of the death of Joseph Thompson, his brother, Charles Thompson, was his only heir at law.

If he is excluded as remainderman, the legal heirs of Joseph Thompson at the time of his death, aside from Charles, were Tilson D. Salley, Ashmun T. Salley, Helen Salley Merrill, Delbert B. Ho-

bart, Marshall Abbott, Marcia Ellis Hodges and Ellen Abbott Ludwick.

All of these, except Delbert B. Hobart died between the date of the death of Joseph Thompson and the date of the death of Charles Thompson. Their successors in interest, either by descent or devise are the present plaintiffs. They claim the estate should descend to them and said Hobart *per stirpes*.

Delbert B. Hobart claims the entire estate as the next of kin and only heir at law of Joseph, who was living at the death of Charles.

Charles Thompson died testate and left to Martha M. Berry, one of the defendants, all his property, real and personal, "for her to have and to hold forever."

Martha M. Berry was not related to Joseph or Charles Thompson. She claims the entire estate of Joseph Thompson as forming a part of the estate of Charles, of which she was sole beneficiary.

Thus are presented the conflicting claims which are to be determined by an interpretation of the will of Joseph Thompson.

The plaintiffs further contend that as it never became necessary for Charles to use any of the income of the estate of Joseph, he never became entitled thereto, and it accumulated as a part of the estate of Joseph.

Stated with greater exactness and in legal terminology, the plaintiffs claim:

(1) That Charles took a life estate in the property of Joseph, modified and limited, however, to use of both income and principal only in event his own property was insufficient for his comfortable support.
(2) That it was the intention of the testator to exclude the life tenant as a remainderman.
(3) That upon the death of Joseph the remainder of his property, subject to the life estate, vested in the heirs of Joseph, exclusive of Charles, and as of the date of the testator's death.

The defendant, Hobart, agrees with the first two contentions, but asserts that the remainder was contingent and did not vest until the death of Charles, the life tenant, at which time he was the sole next of kin.

The defendant, Martha M. Berry, contends:

(1) That the gift of income to Charles was absolute.

(2) That the remainder, although subject to a life estate in him, vested in Charles as the sole heir at law of his brother, Joseph, upon the death of the latter, and being devisable, passed to her as sole beneficiary under the will of Charles.

(1) Was there an outright or a qualified gift of income?

There is no actual ambiguity in the provisions of the will in this respect. The right to the income is definite and certain. It is granted without restriction. Following the absolute bequest of income is found the provision permitting under certain prescribed conditions the use of a portion or the whole of the principal. As precedent to this permitted right, the beneficiary must first have exhausted his own property as well as the income from his brother's estate.

The construction contended for, that the will made no devise or bequest of a life estate whatsoever unless the beneficiary should have first consumed his own estate, finds no rational basis of interpretative support. The income became the property of the legatee. The principal was to remain intact during the lifetime of the beneficiary except in event of a definitely stated contingency. Such appears to be the plain intent of the testator.

(2) Was the remainder created by the will vested or contingent?

Our Court, in consonance with the great trend of authority, has enunciated the principle well expressed in *Blaine* v. *Dow*, 111 Me., 480, 89 A., 1126, 1129.

> "So strong is the presumption that testators intend the vesting of estates that it is an elementary rule of construction that estates legal or equitable, given by will, should always be regarded as vesting unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. And so clear must be his expression that it is held that in cases of doubt or ambiguity as to the time when it was intended the estate should vest, the remainder will be regarded as vested rather than contingent."

This rule is reiterated in *Carver* v. *Wright*, 119 Me., 185, 109 A., 896, and *Belding* v. *Coward*, 125 Me., 305, 133 A., 689, and emphasis may well be enforced by repetition.

By the will under consideration upon the death of the testator, there was granted to his legal heirs the present right to future possession. No trustees are appointed. The life tenant is entitled to the management, possession and control of the estate. The only uncertainty is as to the quantum of the estate remaining upon the termination of the life estate.

> "A remainder which is otherwise vested is not rendered contingent by the conferring of a power of sale upon either the life tenant or the executor. If the power is so exercised as to dispose of all the estate, nothing may be left to the remainderman, but the remainder is not made contingent because it is uncertain whether the power will be exercised as to part or all of the estate. The remainder may vest subject to the power." 23 R. C. L., Remainders, 511. See also *Merrill* v. *Wooster*, 99 Me., 460, 59 A., 596.

The corpus of the estate might be diminished but the right to the balance remained unaffected.

Adapting the expression of Whitehouse, C. J., in *Danforth* v. *Reed*, 109 Me., 93, 82 A., 699, to the present case, the well-recognized and familiar principles of law respecting life estates with a qualified or unqualified power of disposal, and the doctrine of vested and contingent remainders lead irresistibly to the conclusion that the estate vested in the remaindermen at the death of the testator, but liable to be devested by execution of the power of disposal during the lifetime of the beneficiary, the actual possession and enjoyment of it being postponed in any event until the death of the life tenant.

(3) The remaining question is not without difficulty.

Confining consideration solely to the one provision, "After the decease of both my mother, Lucy J. Thompson, and my brother, Charles Thompson, the balance of my property, if any, I hereby give, bequeath and devise to my legal heirs according to their legal

rights" we are confronted with a situation where, in fact, Charles Thompson was the only legal heir of the testator at his death.

Argument in behalf of the devisee of Charles, presents bluntly that the testator by the use of the words "my legal heirs" could not have intended to include his cousins who were not his heirs and exclude his brother who was his only heir; that the use of the word "heirs" is presumed to be in its legal sense unless the terms of the will show a contrary intention; that there is no legal inconsistency in a remainder to take effect at his death, and the fact that the first taker is also the sole heir does not alter the rule.

In support of these contentions are cited *Carver* v. *Wright*, 119 Me., 185, 109 A., 896; *Himmel* v. *Himmel*, 294 Ill., 557, 128 N. E., 641; *Re Estate John Stoler*, 293 Pa., 433, 143 A., 121; *Tatham's Estate*, 250 Pa., 269, 95 A., 520; *Merrill* v. *Wooster*, 99 Me., 460, 59 A., 596; *Abbott* v. *Bradstreet*, 3 Allen, 587 (85 Mass.); *Torrey* v. *Peabody*, 97 Me., 104, 53 A., 988; *Houghton* v. *Hughes*, 108 Me., 233, 79 A., 909.

Such cases interpreting individual wills have been given careful consideration, but it must be borne in mind that eminent jurists and authors have long recognized that judicial decisions in the case of wills lack the authority properly accorded to precedents in the application of legal principles generally. The reason given is the intention of the testator under the particular instrument is what is sought, and all rules of construction are designed to ascertain and give effect to that intention. It must prevail, provided it be consistent with rules of law, and this rule is one to which all other rules must bend.

In our own state in *Bradbury* v. *Jackson*, 97 Me., 449, 54 A., 1068, 1070; Powers, J., observes:

> "It would be unprofitable to here undertake to distinguish or analyze the cases cited. Precedents and rules of testamentary instruction may afford valuable aid when the testator's intention is in doubt, but when that intention is clearly expressed in the will, and violates no rule of public policy, it must be given effect. It overrides precedents and technical rules of construction. This 'pole star', as it is sometimes termed, of testamentary construction 'leads into various courses, since every

will must be steered by its own luminary. Yet uniform justice is better than strict consistency.' Schouler's Exors. & Admrs. Par. 474. . . . No two wills are ever precisely alike. No two testators are situated precisely the same, and it is both unsafe and unjust to interpret the will of one man by the dubious light afforded by the will of another.

"*In re Morgan* (1893) L. R. 3, Ch. 222, Lindley, C. J. says, 'I should have thought that upon the will the matter was reasonably plain, but we are pressed with authorities. Now, I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases, or decisions in other cases. Of course there are principles of law which are to be applied to all wills, but if you once get at a man's intention, and there is no law to prevent you giving it effect, effect ought to be given to it.'"

Pertinent also are the comments of Miller, J., in *Clarke* v. *Boorman's Executors*, 18 Wall, 493 at 502:

"Very few classes of questions are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases, could meet and solve these difficulties, there would remain no cause of complaint on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. . . . Unfortunately, however, these authorities are often conflicting, or arise out of forms of expression so near alike, yet varying in such minute shades of meaning, and are decided on facts or circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled."

So we find the cases are not in accord in result where the person to whom the previous life interest is bequeathed by the will is the sole member of the class described as heirs, to whom the remainder is given. These differentiations, dependent upon the cardinal rule of intention, are illustrated in *Thomas* v. *Castle*, 76 Conn., 447, 56 A., 854; *Kenyon, Pet'r.* 17 R. I., 149, 20 A., 294; *Heard* v. *Read*, 169

Mass., 216, 47 N. E., 778; *Boston Safe Deposit Co.* v. *Blanchard*, 196 Mass., 35, 81 N. E., 654.

Nowhere is it declared that the mere fact the life tenant was the sole heir was sufficient to bar him as remainderman, nor does any rule of law or canon of construction arbitrarily fix his status as such remainderman.

> "In giving judicial construction to wills, the Court seeks only to discover and give effect to the testator's intention as disclosed by the language of the will itself in the light of any avowed or manifest object of the testator." *Mace* v. *Mace*, 95 Me., 284, 49 A., 1038.
>
> "If the language of the will is of doubtful meaning, it may be interpreted in the light of conditions existing at the time the will was made, and which may be supposed to have been in the mind of the testator." *Palmer* v. *Estate of Palmer*, 106 Me., 25, 75 A., 130, 131.

With these aids to interpretation in mind, we find that Joseph Thompson, the testator, and Charles Thompson were brothers; that both were unmarried; that each had approximately the same amount of assets, the income of which was sufficient for his needs; that for the last eighteen years of the life of the testator, Charles was his only heir presumptive; that there is no intimation that Charles was extravagant in living or a spendthrift.

The will, made twenty years before the testator's decease, his mother having died within two years of its execution, showed solicitude for the welfare of the brother, providing for his comfort and support while he lived to the full extent of his property, if necessary. Yet he hedged this provision with the requirement that the entire property of Charles should be used, inclusive of the income of his own estate, before recourse should be had to any part of the principal. This precluded any right to make a gift of any portion during his lifetime. The will contains no terms granting the life tenant the power of appointment, nor the right to devise or bequeath.

Having made these specific and limited provisions regarding the use of the property during life, the will then provides that at the death of Charles, "the balance of my property, if any, I hereby

give, bequeath and devise to my legal heirs according to their legal rights."

In the light of the language of the entire will, and of the surrounding circumstances of the parties, did the testator intend to give to his brother an estate in fee, subject only to his own life estate, and which fee or remainder, as a vested interest was descendible, devisable and alienable, as pointed out in *Belding* v. *Coward*, 125 Me., 305, 133 A., 689. In other words, does the will affirm or negative by language or implication the right of the brother to devise the testator's entire estate to a stranger? Did he intend to enlarge and extend his beneficence, to enable the life tenant, with limited right of use for his own comfort, to accomplish such result, or did he intend his estate for his own blood kin upon his brother's death?

Sometimes an item of apparently small consequence is of significance. He explicitly provided that, if necessary, out of the principal of his estate, his brother's funeral expenses should be paid.

Is this conditional bequest of amount sufficient to bury his brother out of his own estate, consistent with the purpose of vesting the entire estate in his brother?

If intention to vest the remainder in Charles existed, it was not, as in many cases, because of the happening of some contingency, or the failure of a limitation to others. He knew Charles was his only heir. If Charles predeceased him the will was then declaratory of the descent statute. If he outlived him, then without provision for any alternative limitation or contingency, it is urged that the Court should say that the testator solely and deliberately provided with meticulous care for the use by his brother of his property during his life only to give it to him upon his death, with the concomitant right to will it to another.

Similar considerations are given weight in *Close* v. *Benham*, 97 Conn., 102, 115 A., 626, where life use of part of the estate was given to Lizzie Benham, a daughter, and if she died without issue, then to the next of kin of the testator. The court said:

> "The language of the will discloses a plain purpose on the part of the testator, as we have observed before, to keep his estate in his own blood. If Lizzie be held to be one of the next of kin, she could at any time have transmitted it by will or de-

scent; but she could not herself enjoy it. And her power of transmission might be exercised in favor of strangers to the exclusion of the blood of the testator. The testator, as we hold, intended by the gift over to his next of kin, to exclude Lizzie from that class."

As well stated in 28 R. C. L., Wills, Par. 177:

"The intention of the testator need not be declared in express terms in the will, but it is sufficient if the intention can be clearly inferred from particular provisions of the will, and from its general scope and import. The courts will seize upon the slightest indications of that intention which can be found in the will to determine the real objects and subjects of the testator's bounty. The inference as to intent need not be irresistible or such as to exclude all doubts possible to be raised but must, nevertheless, be such as to leave no hesitation in the mind of the court and must not rest on mere conjecture."

It is therefore the opinion of the Court that under the will of Joseph Thompson

(1) The income from his estate, accruing during the life of his brother Charles, became the absolute property of the latter.
(2) That a life estate, with limited power of disposal, was given to Charles Thompson, and he not having exercised such power, the entire corpus of the estate was devised and bequeathed to the testator's heirs.
(3) That under the will, a vested remainder was created, subject to the life estate, in the heirs of Joseph Thompson, as of the time of his death, and excluding the life tenant, Charles Thompson.

Decree in accordance with this opinion.

DUNN, C. J. (dissenting in part).

After testator's own death, his mother having predeceased him, the frame of his last will, which the Probate Court took proof and allowed, gave his property to his brother, Charles, for life, with re-

stricted power of disposal. Testator does not provide a remainder, but merely disposes of one, should it exist, the devise being "to my legal heirs according to their legal rights," in fee simple.

There is a remainder. The question for decision is whether testator's intention, as expressed in his will, defines a limitation which, as it affects ascertainment of his "legal heirs," excludes his brother, before of mention, who was indeed his only heir at law.

No words in the devise over enlarge, restrain or modify the technical words "legal heirs." These words then are presumed to have been used in their judicially defined sense. *Jacobs* v. *Prescott*, 102 Me., 63, 65 A., 761; *Houghton* v. *Hughes*, 108 Me., 233, 79 A., 909; *Morse* v. *Ballou*, 112 Me., 124, 127, 90 A., 1091; *Hay* v. *Dole*, 119 Me., 421, 423, 111 A., 713; *Hiller* v. *Loring*, 126 Me., 78, 136 A., 350.

A testator's heirs — his will not plainly manifesting his different intent — are, by the general rules of construction, to be determined as of the day of his death. *Brown* v. *Spring*, 241 Mass., 565, 135 N. E., 701; *McCarthy* v. *Walsh*, 123 Me., 157, 161, 122 A., 406.

In case of a devise of a remainder, after a life estate, to the heirs of the testator, the life tenant may take, even though such remainder may never come into the possession of the remainderman. *Abbott* v. *Bradstreet*, 3 Allen, 587; *Minot* v. *Tappen*, 122 Mass., 535; *Chesman* v. *Cummings*, 142 Mass., 65, 70, 7 N. E., 13; *Rotch* v. *Rotch*, 173 Mass., 125, 130, 53 N. E., 268; *Cushman* v. *Arnold*, 185 Mass., 165, 169, 70 N. E., 43; *Gardner* v. *Skinner*, 195 Mass., 164, 166, 80 N. E., 825; *Brown* v. *Spring*, supra; *Forbes* v. *Snow*, 245 Mass., 85, 91, 140 N. E., 418; *Ball* v. *Hopkins*, 254 Mass., 347, 150 N. E., 434; *Carver* v. *Wright*, 119 Me., 185, 189, 109 A., 896. The life tenant would, in such an instance, have, besides his estate for life, a vested equitable remainder. In this, there would, in law, be nothing inconsistent or repugnant. *Cushman* v. *Arnold*, supra.

There was, to recur to the will here presented, a present gift. The gift over may well be held to have been to the brother, who, when testator died, became his sole heir, rather than to testator's cousins, who, had his brother not survived him, would have been his heirs. *Merrill* v. *Wooster*, 99 Me., 460, 59 A., 596; *Danforth* v. *Reed*, 109 Me., 93, 96, 97, 82 A., 699.

FRANCIS EDDY ET AL. *vs.* PHILIP D. STARBIRD, ADMR.

Cumberland. Opinion, June 28, 1937.

EXECUTORS AND ADMINISTRATORS.

Claims against decedents shall be either presented, in writing, to the executor or administrator, or filed in the registry of probate, and failure to do so, within the period allowed by law, is, with regard to the estate, perpetual bar.

On report on an agreed statement of facts. Plaintiffs sue the administrator of the estate of a deceased person for the commission by the latter in his lifetime of a continued trespass on real property. Case returned to the Superior Court for the entry of: Judgment for defendant. Case fully appears in the opinion.

Harry E. Nixon,
David E. Knapp, for plaintiffs.
Frederick J. Laughlin,
Lauren M. Sanborn, for defendant.

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

DUNN, C. J. Plaintiffs sue the administrator of the estate of a deceased person for the commission by the latter in his lifetime of a continuing trespass on real property. The case is forward, on a report of the evidence, for final decision.

The statute respecting the collection of claims subsisting against decedents at their death, fixes a time limit within which, and before suit, there shall be either presentation in writing of the claim to the executor or administrator, or, supported by affidavit, filing in the registry of probate. R. S., Chap. 101, Sec. 14; *Howe* v. *Gray, Admx.*, 119 Me., 465, 111 A., 756; *Bernstein* v. *Kehoe, Admr.*, 122 Me., 144, 119 A., 198. The primary object of the legislation is to apprise the administrator of the nature, as well as the extent, of the

claim, that, after opportunity for investigation, he may arrange to pay, or to contest it. *Marshall* v. *Perkins, Exec.*, 72 Me., 343, 345; *Hurley* v. *Farnsworth, Admx.*, 107 Me., 306, 308, 78 A., 291.

Failure to present or file claims within the period allowed by law is, when insisted, a matter of fatal consequence. The penalty, except in instances not now relevant, is, with regard to the estate, perpetual bar. R. S., *supra.*

The transcript of the evidence does not show the claim in controversy to have been presented to the defendant administrator, or filed in the probate registry, though the declaration in plaintiff's writ avers both presentation and filing. There is allegation, but want of proof.

Nor did defendant waive compliance with statute requirements, as perhaps he might have done. *Rawson* v. *Knight, Admx.*, 71 Me., 99; *Littlefield* v. *Cook, Admr.*, 112 Me., 551, 92 A., 787. On the contrary, the brief of defendant's counsel makes the very point; there was stress thereon, on oral argument at the bar; this without eliciting comment or reply from opposing counsel.

There remains only to return the case to the Superior Court, from whence it came, for the entry of: Judgment for defendant.

It is so ordered.

INHABITANTS OF DOVER-FOXCROFT

vs.

INHABITANTS OF LINCOLN.

Piscataquis. Opinion, June 28, 1937.

PLEADING AND PRACTICE.

Want of proper return day should be taken advantage of by special appearance, as appearing generally waives objection to the process.

Sufficient notice, and adequate opportunity to defend, are fundamental rights,

and a writ, to be good, must specify the court to which it summons appearance, and the place where, and the time when, the sitting of the court is to be.

There is lack of due process, and the party is not within the jurisdiction of the court, until served as the statute prescribes.

On exceptions to refusal of presiding Justice to grant motion to dismiss on the part of the defendant, and of the granting of a motion to amend the writ on the part of the plaintiff. Exceptions sustained. Case fully appears in the opinion.

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

Ernest A. Atherton,

Cornelius J. O'Leary, for defendants.

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

DUNN, C. J. Counsel, on appearing below, made his appearance special. *Larrabee* v. *Larrabee*, 33 Me., 100; *Thomas* v. *Thomas*, 98 Me., 184, 56 A., 651. He seasonably moved to dismiss the action. Rules of Court, 129 Me., 505; *McAlpine* v. *Smith*, 68 Me., 423; *Kehail* v. *Tarbox*, 112 Me., 327, 92 A., 182. The ground of the motion was that, for want of a proper return day, the summons of the writ (a copy of the writ had been left in service), was insufficient to bring the defendant town within the jurisdiction of the court.

Issuance of the writ was from the Superior Court, in Piscataquis, on November 25, 1935; the sheriff was commanded to summon defendant to come and appear, on the second Tuesday of March, 1935, a day already past. In no other way or manner was the writ indicative of the time of the sitting of the court.

The motion for dismissal was denied, subject to exception.

The court consented, on motion by plaintiffs, to the striking from the writ of the numerals 1935, and to the inserting, instead thereof, of 1936, thereby making the precept read to the March Term in the latter year. This, it may well be, accords with original intention, the March Term having been, in reference to the day the writ was sued out, the one next thereafter to be held in the county. R. S., Chap. 91, Sec. 21.

The ruling was excepted.

When, despite circumstantial errors, the person and the case may be rightly understood, no process shall be abated. R. S., Chap. 96, Sec. 11.

Not unlikely, in the case in hand, mistake crept in through thoughtlessness, but the test to be applied is, not sheer error from want of care, but blunder going to substance. In the absence of statutory sanction, that kind of mistake is not amendable.

True, erroneous return day dates have been amended. *Barker* v. *Norton*, 17 Me., 416; *Lawrence* v. *Chase*, 54 Me., 196; *Guptill* v. *Horne*, 63 Me., 405. True, again, that syllabusses, and digests, and general phrases in judicial opinions, state the investiture, in such connection, in the judiciary, of amendatory power. In each of the cases cited, however, there had been the entry by the defendant of a general appearance. *Bunker, Appellant*, 129 Me., 317, 319, 151 A., 669. It is commonly understood that appearing generally waives objections to the process. Whether, over specific objection, making substantial defect known, there might be correction, was not of decision.

Here, the point of the right of the court to adjudicate concerning the particular case, was duly made.

Sufficient notice, and adequate opportunity to defend, are fundamental rights; they are immunities indispensable to a free government. A writ, to be good, must specify the court to which it summons appearance, and the place where, and the time when, the sitting of the court is to be. *Lyon* v. *Vanatta*, 35 Iowa, 521.

To name an impossible day is tantamount to naming no day at all; an omission like that renders the summons not simply defective, but no summons.

In deciding a case where the question now present was raised, Shaw, C. J., in the course of his opinion, said that the writ is the foundation of all further proceedings. *Bell* v. *Austin*, 13 Pick., 90. As the writ, to recur to the case, and summarizing, is the only mode of notice to the defendant that he is impleaded, it seems reasonable, to save his rights, he should be distinctly informed of the time, as well as the place, at which his appearance is required. *Bell* v. *Austin*, supra.

The law of Massachusetts now is that if defendant does appear, though only to move to quash, the writ may be amended. *Hamilton*

v. *Ingraham*, 121 Mass., 562. "The Massachusetts statutes permitting amendments are broader than our own." Cornish, J., in *Surace* v. *Pio*, 112 Me., 496, 500, 92 A., 621.

No judgment might have been rendered on default of appearance. *Wood* v. *Hill*, 5 N. H., 229; *Winslow* v. *Troy*, 97 Me., 130, 133, 53 A., 1008. Appropriately informing the court of defect, and saving the point, should not militate against the defendant, where the proceedings could, with impunity, have been utterly ignored. *Penobscot Railroad Company* v. *Weeks*, 52 Me., 456; *Perry* v. *Griefen*, 99 Me., 420, 424, 59 A., 601.

When the parties are in court, latitude of discretion in allowing amendments is wide. But, until served, as the statute prescribes, initially, a party is not, either in contemplation of general principle, or the authority of legislatively conferred control, within the jurisdiction of the court; there is lack of due process. *Denison* v. *Crafts*, 74 Conn., 38, 49 A., 851; *Brainard* v. *Mitchell*, 5 R. I., 111. See, also, *Cummings* v. *Landes* (Iowa) 117 N. W., 22.

Let the exceptions be sustained.

Exceptions sustained.

STATE OF MAINE *vs.* HAROLD BARON.

Penobscot. Opinion, July 1, 1937.

CRIMINAL LAW.

Circumstance that respondent was riding with another who was guiding a stolen car, and that respondent paid for fuel for the car, has some weight, but, standing alone, it is not sufficient to prove the guilt of respondent beyond a reasonable doubt.

Respondent tried for larceny of an automobile at the September Term, 1936, of the Superior Court for the County of Penobscot. Jury verdict of guilty. Respondent requested directed verdict, which was overruled. Exceptions taken. Motion for new trial was

made and overruled. Appeal filed. Appeal sustained. Case fully appears in the opinion.

John Quinn, County Attorney, for State.

Artemus Weatherbee,

James D. Maxwell, for respondent.

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

BARNES, J. The respondent was tried at the September Term of the Superior Court, 1936, for larceny of a Chevrolet automobile.

After conclusion of evidence for the State, respondent moved for a directed verdict of not guilty; motion was overruled and exceptions were taken.

No evidence was offered by respondent; a verdict of "guilty" was returned; motion for new trial was made and overruled, and appeal taken.

The respondent was indicted with Stanley Korbut, Edward Shaboski and Linwood Saba.

The record shows that the Chevrolet was stolen on Fountain Street in Bangor, at some time before half-past three on the morning of Saturday, October 26, 1935, and that it was next seen at the garage of Felix Martin, five miles north of Caribou Village, some two hundred miles from Bangor, before half-past eight o'clock on the same morning.

Mr. Martin testified that Saba, known to him, drove to his garage, accompanied by the respondent, to purchase gasoline and oil for the car in which they were riding, and that the respondent paid for the same.

After the purchase, as Mr. Martin told of the event, Saba said, "'I got two cars.' He says, 'two fellows with me,' he says: 'can those two fellows go in your garage and have a sleep?' I says, 'I am working in the garage and there is lot of noise.' He says, 'Those two fellows are tired, they would like to have a chance to go to sleep.' He says, 'What about those sheds in the back?' I says, 'They can drive there if they want,' so he says, 'all right.' I looked and I saw two cars (the stolen Chevrolet and a Pontiac)."

After "two or three minutes" the car containing Saba and the respondent was driven away.

Later that morning, officers came, arrested Korbut and Shaboski, and took the cars they had driven. Both these cars had been stolen in Bangor.

Mr. Sanford Martin, also of Caribou, a truckman, testified that he knew Saba and Baron; that at about one o'clock P. M., of the day when the arrests were made, he was in Caribou Village at Bean's garage, adjacent to the Vaughn House yard, when Saba drove to the hotel. They had some conversation, and while they were talking Baron came from the hotel, joined Saba, and they drove away "toward Bangor."

He said he knew both Saba and Baron.

The above is all that we find in the record which tends to prove guilt on the part of the respondent.

The circumstance that Baron was riding with Saba while the latter was guiding the stolen car toward the Canadian boundary, and that he paid for fuel for the car in which he was riding, has some weight, but, standing alone it is not sufficient to prove the guilt of respondent beyond a reasonable doubt, and we can find in the record nothing to support or add weight to this evidence.

Such being the facts, the appeal must be sustained and the exceptions need not be considered.

Appeal sustained.

EASTERN MAINE GENERAL HOSPITAL ET AL.,
IN EQUITY

vs.

WILLIAM STODDER HARRISON ET AL.

Penobscot. Opinion, July 13, 1937.

TRUSTS. EQUITY. PROBATE COURTS.

The rule which limits courts of equity to cases where there is no adequate remedy at law, does not, speaking generally, apply to trusts.

Judicial tribunals with full equity powers comprehend trusts in the most general sense of the word, whether they are express or implied, direct or constructive, created by the parties or resulting by operation of law.

The Superior Court in equity may appoint a successor testamentary trustee, where the will of the testator neither confers authority, nor provides a method to be pursued to fill a vacancy even though the Probate Court had previously appointed one successor trustee.

On report. Bill in equity brought before the Superior Court in equity for appointment of a successor testamentary trustee. Case to be remitted if Superior Court has jurisdiction. Case remitted. The case fully appears in the opinion.

George F. Eaton, for plaintiffs.

Harold H. Murchie,

James E. Mitchell, for defendants.

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

DUNN, C. J. The only problem the report presents is the determination whether the Superior Court in equity may appoint a successor testamentary trustee, where the will of the testator neither confers authority, nor provides a method to be pursued to fill a vacancy. If that court has such power, the propriety of its exercise is not here involved.

James C. Stodder, late of Bangor, Maine, died March 6, 1917, testate. The probate court of original jurisdiction over the subject matter of the settlement of the estate of the decedent took proof, and allowed his last will. The will created a trust which attached; testator's widow, who is still living, is beneficiary for life; there is gift over. The property of the trust is worth around $1,000,000.

The three trustees the will named, the Probate Court duly confirmed. They accepted the trust, and in May, 1917, on letters issuing, entered upon the discharge of their duties.

Seven years later, one of the trustees (testator's brother) died. On petition of the testator's widow, as beneficiary, and of the surviving trustees, she being one, the Probate Court, after notice by publication, and hearing, appointed the Eastern Trust & Banking Company a trustee in succession. That company has since acted in such capacity.

Hugh R. Chaplin, Esquire, another of the trustees nominated in the will, is now deceased; his death occurred on September 22, 1935.

Mrs. Stodder, as beneficiary and as trustee, and all other persons and institutions having any vested rights in the trust estate, have joined as plaintiffs in the present bill. They ask that, to maintain the number of trustees the will prescribes, Edgar M. Simpson, Esquire, be of that personnel, in the place of Mr. Chaplin.

Children of some of the plaintiffs are made defendants. They, being minors, are represented by a guardian *ad litem.*

The Eastern Trust & Banking Company, trustee, is the only other defendant.

The report stipulates, in sum, that if, "on this record," the Superior Court may not take cognizance of the bill and appoint a trustee, the bill shall be dismissed; otherwise, the case is to be sent back for further proceedings.

The record comprises the bill, answer, decree appointing and admitting the guardian *ad litem,* replication, report of the guardian, sundry exhibits, and transcript of the oral evidence.

Testimony goes to reinforce allegations in the bill, that, (a) the objects of the trust are not yet accomplished; (b) there is desirability of selection, by the Superior Court, under statutory provision, of a new trustee.

Ordinarily, courts of probate take jurisprudence in these matters. *Huston* v. *Dodge*, 111 Me., 246, 255, 88 A., 888. Authority so to do was first conferred by Public Laws of 1821, Chapter 51, Section 61.

The provision was carried forward, as of the body of the law, in the 1840 revision of the statutes, and that of 1857. R. S. 1840, Chap. 111, Sec. 7; R. S. 1857, Chap. 68, Sec. 5. Likewise, in R. S. 1871, Chap. 68, Sec. 5.

In the revision of 1883, Chapter 68, Section 5, the 1871 section just cited, is replaced by Public Laws of 1878, Chapter 8.

Section 1 of that chapter reads as follows:

> "When a trustee under a written instrument, declines, resigns, dies, or is removed, before the objects thereof are accomplished, if no adequate provision is made therein for supplying the vacancy, the probate court or supreme judicial court shall, after notice to all persons interested, appoint a new trustee to act alone or jointly with the others, as the case may be. Such new trustee, upon giving bonds and security required, shall have and exercise the same powers, rights and duties, whether as a sole or joint trustee, as if he had been originally appointed, and the trust estate shall vest in him in like manner as it had or would have vested in the trustee in whose place he is substituted."

Such legislation has been re-enacted, without essential change, in the revisions of 1903 and 1916. R. S. 1903, Chap. 70, Sec. 17; R. S. 1916, Chap. 73, Sec. 18. In 1930, "Superior Court" was substituted for "Supreme Judicial Court." R. S. 1930, Chap. 82, Sec. 18.

Jurisdictional rights, specifically provided by statute to the probate court, as a distinct tribunal for the administration of the estates of men dying either with or without wills, are not of relation to the instant question.

A will is, within the meaning of the 1878 statute (now in R. S. 1930, Chapter 82, Section 18,) extended above, a written instrument. *Huston* v. *Dodge*, supra.

Legislation in Massachusetts (Massachusetts General Laws, 1860, Chapter 100, Section 9,) from which our own was taken, has,

in supplying testamentary trustees, on information in equity, been regarded as the foundation of proceedings. *Attorney General* v. *Barbour*, 121 Mass., 568.

The Maine court, as a court of equity, has appointed trustees. In *Pillsbury* v. *European & North American Railway Company*, 69 Maine, 394, vacancy under a deed of trust was filled. Judge Appleton, delivering the opinion, said that "the cumberous proceedings of a bill are rendered unnecessary by the provisions of our statute."

Inhabitants of Anson et al., Petrs., 85 Me., 79, 26 A., 996, which mentions the very statute, had to do with choosing a new trustee under a railroad mortgage.

In *Huston* v. *Dodge*, supra, the Law Court, that is, the Supreme Judicial Court, *in banco*, construing the statute, after pointing the empowerment of the Probate Court, states explicitly that, in proper cases, the Supreme Judicial Court will appoint testamentary trustees. The Superior Court now occupies the statutory space wherein the Supreme Judicial Court had been designated. R. S. 1930, *supra*.

Statutes have conferred upon the Superior Court a general jurisdiction in equity, coextensive with that of the Supreme Judicial Court. Original powers are concurrently exercised by justices of these common-law courts, according to the usage and practice in chancery. R. S. 1930, Chap. 91, Sec. 35, 36. Concurrent jurisdiction means joint and equal jurisdiction. *State* v. *Sinnott*, 89 Me., 41, 35 A., 1007. In cases of trusts, authority is specifically given. R. S., *supra*, (Sec. 36, sub-paragraph IV); *Brackenbury* v. *Hodgkin*, 116 Me., 399, 102 A., 106; *Caverly* v. *Small*, 119 Me., 291, 111 A., 300.

The rule which limits courts of equity to cases where there is no adequate remedy at law, does not, speaking generally, apply to trusts, as there equity has a natural and primary office, superadded to any legal rights. *McCampbell* v. *Brown*, 48 Fed., 795; *First Congregational Society* v. *Trustees*, 23 Pick., 148.

Equitable jurisdiction, a succinctly worded headnote says, does not depend upon the want of a common-law remedy, for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties. The granting of relief must often depend upon the

sound discretion of the court. *Appeal of Brush Electric Co.*, 114 Pa., 574, 7 A., 794.

Judicial tribunals clothed with full equity powers comprehend trusts in the largest and most general sense of the word, whether they are express or implied, direct or constructive, created by the parties or resulting by operation of law. Story, Commentaries, (13th ed.,) Secs. 75, 960.

The enforcement of trusts, their execution, the appointment and removal of trustees, is inherent to courts of equity. *Herrick* v. *Snow*, 94 Me., 310, 313, 47 A., 540.

The leading texts, practice books, the manuals, such as Corpus Juris, all concur the law is well settled that a court of equity may, on application of persons interested, adjudicate questions relative to trusts. Bispham's Principles of Equity (8th ed.) 214; Whitehouse, Equity Practice, (1900), 105; 65 C. J., 1011.

Matters of trusts or confidences are peculiarly cognizable. One example will suffice to explain. The common law could not perceive a trustee, in the possession of trust property, in any other than the light of personal benefit; but equity, as a branch of remedial justice, seeing purpose and regarding it, and insisting fiduciary obligation, compels performance of trusts.

Jurisdiction is exclusive, except in so far as a court of law may, by statute, be empowered. 65 C. J., 1012.

A court may, under its broad equity panoply, appoint trustees to administer any lawful trust, absent statute, and though the trust instrument itself is, in such connection, silent. In re Eastern Railroad, 120 Mass., 412.

The Maine equity court has, at need, employed this department of the State's jurisprudential system.

"We have jurisdiction as a court of equity, of all cases of trusts." *Tappan* v. *Deblois*, 45 Me., 122, 131.

A bequest, to charitable uses, to an unincorporated society, named the society as trustee. The question raised was if the association, which, after the death of the testator, had been formed into a corporation, might execute the trust. The court constituted the corporate body trustee. *Preachers' Aid Society* v. *Rich*, 45 Me., 552.

A testator made a bequest to aid in the erection of a house of re-

ligious worship. The will was construed as creating a trust; effectuation was ordered by a trustee whose appointment should be, not in the probate court where the will had been allowed, but by a justice, sitting singly. *Nason* v. *First Church*, 66 Me., 100.

A trustee, although he was appointed by the Probate Court, and gave bond to that court, was allowed to make settlement of his account in the Supreme Judicial Court, in equity. *Page. Trustee* v. *Marston*, 94 Me., 342, 47 A., 529. See, also, R. S., (1930), Chap. 82, Sec. 11.

Without expressly naming a trustee, a will created an express trust of real and personal property. The case was remanded, for the appointment of a trustee, to the equitable forum of its origin. *Herrick* v. *Low*, 103 Me., 353, 69 A., 314.

"We find no insurmountable impediment in the way of designating . . . joint trustees . . . ." *Dupont* v. *Pelletier*, 120 Me., 114, 119, 113 A., 11, 13.

Cases elsewhere support the right of general equity courts to name a successor trustee, and to vest him with title and authority to execute the trust. *Ex Parte O'Brien*, 11 R. I., 419; *Griswold* v. *Sackett*, 21 R. I., 206, 42 A., 868; *Montpelier* v. *East Montpelier*, 29 Vt., 12; *Weiland* v. *Townsend*, 33 N. J. E., 393; *French* v. *Northern Trust Co.*, 197 Ill., 30, 64 N. E., 105; *Estate of Upham*, 127 Cal., 90, 59 P., 315; *Griffith* v. *State*, 2 Del. Ch., 421.

It is no sufficient answer to say that, because the statute has vested in the probate court jurisdiction to appoint trustees, equity courts of the same sovereignty are, as a consequence, shorn of ancient function. *Bowditch* v. *Banuelos*, 1 Gray, 220, 229. In the words of an old rhyme, the best hint that could be given as to the extent of the equity court's inclusion was "fraud, accident and breach of confidence." Maitland, Equity: Chafee and Simpson, Cases on Equity, Vol. 1, Page 6.

In New York, the surrogate's court seems to have concurrent right in such cases. *Royce* v. *Adams*, 123 N. Y., 402, 25 N. E., 386. In Maryland, the orphans' court also has authority to fill such vacancies. *Noble* v. *Birnie*, 105 Md., 73, 65 A., 823. And see *Zabriskie's Exrs.* v. *Wetmore*, 26 N. J. E., 18.

That the probate judge might, subject to review on appeal, have determined whether, a legatee having died, his heirs took, by substi-

tution, did not preclude construction, in another court, of the will of the testator. "The remedies," said Deasy, J., "are to a certain degree concurrent." *Strout* v. *Chesley*, 125 Me., 171, 178, 132 A., 211, 214.

The Probate Court, in virtue of having, relative to Mr. Stodder's trust estate, appointed one successor trustee, and examined and allowed accounts, did not acquire exclusive jurisdiction to make all future trustee appointments. In re Llado's Estate, 100 N. Y. S., 495; *Bowditch* v. *Banuelos*, supra; *Attorney General* v. *Barbour*, supra; *Preachers' Aid Society* v. *Rich*, supra; *Nason* v. *First Church*, supra; *Herrick* v. *Low*, supra.

It will be convenient in this place to recite that, in *Attorney General* v. *Barbour*, supra, the opinion notes, among other things, that the magnitude and importance of the trust affords reason for relief.

That the equity court, to carry out testamentary intent, may name a trustee, is of recent authoritative decision. *Stevens* v. *Smith*, 134 Me., 175, 178, 183 A., 344.

Any person having an interest in the trust estate or the proceeds thereof, may move the appointment of a successor trustee. *Allen* v. *Baskerville*, 123 N. C., 126, 31 S. E., 383; *Haines* v. *Hall*, 209 Pa. St., 104, 58 A., 125; In re Brady's Estate, 110 N. Y. S., 755,

The court of appropriate competency first assuming jurisdiction to appoint a trustee is entitled to retain the same. *Herrick* v. *Low*, supra; *Speer* v. *Colbert*, 200 U. S., 130, 26 S. Ct., 201, 50 Law Ed., 403.

Concerning trustees, power may attain to higher dignity than detached naked precept. It may blend with the trust to which it attaches. *Sells* v. *Delgado*, 186 Mass., 25, 28, 70 N. E., 1036; *Elder* v. *Elder*, 50 Me., 535; *Mann* v. *Mann*, 122 Me., 468, 120 A., 541.

It is not, in the report of this case, for this court to send a mandate to the Superior Court that it must do this, or must not do that; the independence of that tribunal is, subject of course to appeal, secured.

This court gives judgment that the Superior Court may take cognizance of the plaintiffs' bill.

The court below will decide, not according to an unbounded discretion, but with respect to principles as fixed and certain as those

on which the courts of common law proceed. *Savings Institution* v. *Makin*, 23 Me., 360.

Conformably to stipulation, the cause is remitted.

Let there be mandate accordingly.

ANNA E. BARTON, EXECUTRIX *vs.* GEORGE C. MCKAY.

ANNA E. BARTON, EXECUTRIX *vs.* ETHEL L. MCKAY.

Hancock. Opinion, July 16, 1937.

BILLS AND NOTES. EXECUTORS AND ADMINISTRATORS. PAYMENT.

Liability of an indorser is contingent, secondary to that of the maker and dependent upon substantially different conditions and contingencies. It is a several obligation and, in the absence of statute, a joint action can not be maintained against the indorser and the maker; and the severalty of the rights and liabilities of the defendants as maker and indorser are not affected by trial of the cases together.

A demand against a deceased person may be set off in an action prosecuted by his executor.

When one person pays money to another or gives him his written obligation for the payment of money, it will be presumed that any pre-existing indebtedness of the latter to the former has been paid.

On exceptions and general motions for new trials by plaintiff. Actions of assumpsit against the maker and indorser of a promissory note given to the plaintiff's testator. Jury verdict for plaintiff in each case. Plaintiff seasonably filed exceptions to admission of evidence and motions for new trials.

Barton, Executrix v. *George C. McKay*: Exception overruled. Motion granted. New trial ordered.

Barton, Executrix v. *Ethel L. McKay*: Exception overruled. Motion overruled.

The cases fully appear in the opinion.

Percy T. Clarke, for plaintiff.

Herbert L. Graham, for defendants.

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

STURGIS, J. These are actions of assumpsit against the maker and indorser of a promissory note given to the plaintiff's testator. In each action, the plaintiff declares against the defendant severally and in accordance with his or her apparent liability on the face of the instrument, and the defendant pleads the general issue with a brief statement alleging a partial payment made upon account of the principal and interest of the note. The maker, in the suit against him, filed a claim of set-off for rent. The cases, tried together by agreement, after verdicts for the plaintiff come forward on her exceptions and general motions for new trials.

EXCEPTIONS

In objecting to the admission of evidence in support of the set-off claimed by the maker of the note, the plaintiff invoked the rule that at law in actions against several defendants neither is entitled to set off his separate debt against the plaintiff. *Banks* v. *Pike*, 15 Me., 268; *McGuinness* v. *Kyle*, 208 Mass., 443, 94 N. E., 700; *Brooks* v. *Stackpole*, 168 Mass., 537, 47 N. E., 419. See 57 Corpus Juris 457 n. 96 and cases cited. The rule is embodied in the statutory provision in force in this state that the right of set-off is limited to demands due from all the plaintiffs to all the defendants jointly. R. S., Chap. 96, Sec. 78. If there are several plaintiffs, the demands must be due from all jointly and, if several defendants, to all jointly. Mutuality is implied in the word set-off, not the nominal mutuality indicated by the record but the real mutuality shown by the evidence. *Collins* v. *Campbell*, 97 Me., 23, 25, 27, 53 A., 837.

The rule, however, has no application in these cases. The note declared upon, which is one and the same in each action, is not joint upon its face but several, and the indorser is not a co-maker or joint promisor under the Uniform Negotiable Instruments Act. R. S., Chap. 164, Secs. 63, 64. Indicating no intention to be bound in any other capacity, she is an indorser with all that term implies. *Ingalls* v. *Marston*, 121 Me., 182, 184, 116 A., 216. The liability of an in-

dorser is contingent, secondary to that of the maker and dependent upon substantially different conditions and contingencies. It is a several obligation and, in the absence of statute, a joint action can not be maintained against the indorser and the maker. *Scarbrough* v. *City Nat. Bank*, 157 Ala., 577, 48 So., 62; *Hough* v. *New Smyrna State Bank*, 61 Fla., 290, 55 So., 462; *Harvard Pub. Co.* v. *Benjamin*, 84 Md., 333, 35 A., 930; *Fawcett* v. *Fell*, 77 Pa. St., 308; 3 Ruling Case Law, 1135; 8 Corpus Juris, 853; Ann. Cas., 1912 D, 1201.

The severalty of the rights and liabilities of the defendants as maker and indorser of the note in suit are not affected by the trial of the cases together. This was done by agreement of the parties and undoubtedly by order of the court as an expedient to save costs and delay. The actions were not consolidated but ordered on trial together, leaving each case otherwise subject to the same procedure as if tried separately. They continued separate so far as concerns the docket entries, verdicts, judgments, and all aspects save only the one of joint trial. The parties in one suit did not become parties in the other and their rights and obligations remained unchanged. *Field* v. *Lang*, 89 Me., 454, 36 A., 984; *Lumiansky* v. *Tessier*, 213 Mass., 182, 99 N. E., 1051; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S., 285, 293, 12 S. Ct., 909; *Railroad* v. *Continental Trust Co.*, 95 Fed. Rep., 497, 506. The rule of set-off invoked is not made applicable to these cases by the trial procedure adopted. The maker of the note was entitled to a set-off of the debt or demand due him severally from the plaintiff's testator. A demand against a deceased person may be set off in an action prosecuted by his executor. *Adams, Adm'r.* v. *Ware*, 33 Me., 228; R. S., Chap. 96, Sec. 83. A charge for rent, based upon a contract, for a sum liquidated or one which may be ascertained by calculation may be presented in set-off. *Lamson* v. *Fish Company*, 128 Me., 364, 147 A., 655.

No other objection to the admission of the evidence offered in support of the plea of set-off having been raised at the trial or on the briefs, for the reasons stated the exception reserved in the action against the maker of the note must be overruled. So, too, with the exception in the suit against the indorser. When proof of set-off, offered by the maker, was admitted, the plaintiff reserved exceptions in both of the actions on trial. The indorser had not pleaded

and did not claim a set-off. It is to be assumed that the evidence was received solely in support of the issue framed in the action against the maker of the note and the jury instructed to disregard it in the other case. Their verdict indicates that they did so and the plaintiff suffered no prejudice.

MOTIONS

On October 4, 1934, George C. McKay of Bar Harbor made and delivered to Arthur L. Graves, otherwise known as Arthur Graves, a resident of the same town, his promissory note for $7,000 payable one year after date, with interest at six per cent. It seems to be conceded that on the same day the note was indorsed on the back by Ethel L. McKay and her indorsement was unqualified. There is convincing evidence in the record that on October 10, 1935, a few days after the note became due, the maker paid the payee $4,000 on account of principal, and a year's accrued interest. On November 12, 1935, the payee died and the plaintiff, having been duly appointed executrix under his will, promptly demanded payment and commenced these actions against the maker and indorser. The cases being tried together, the jury in their verdicts properly gave each of the defendants credit for the partial payment made on the note by the maker. The plaintiff shows no warrant in law or in fact for disturbing the verdicts on this ground.

The set-off claimed by the maker of the note presents a more serious question. Even if the plea filed is viewed as sufficient in form and substance, the case having gone to verdict without objection thereto, the claim is supported by little evidence of probative value and is contrary to the natural presumptions which arise. The record shows that the defendant, George C. McKay, owned a seven-room house on Rodick Street in Bar Harbor known as the Etter place, which on or about April 30, 1932 he let to the plaintiff's testator, Arthur L. Graves, at a rental of $40 per month. The decedent occupied the house until on November 12, 1935 he died. There is no direct proof that he did or did not pay his rent as it came due, except that on October 10, 1935, when his landlord paid $4,000 and accrued interest on account of the note in suit, which he had given the tenant the year before, witnesses testify that the lat-

ter on receiving the money said, "The first of the year we'll fix up the note and *the rent.*" On the strength of this assurance, with no evidence whatsoever as to the amount or time of accrual of the rent referred to, supplemented only by proof of the decedent's occupation of the premises and the monthly rental reserved, the jury allowed the maker of the note a set-off of the full amount of rent accrued during the entire occupation of his house by the decedent in his lifetime and until January 1, 1936 thereafter, an aggregate sum of $1760 which in their verdict, with the partial payment on account already referred to, was deducted from his liability on his note.

It is true that the plaintiff exhibited no receipts for the rent nor other direct proof that any part of the rent had been paid. But even though it is proved that at one time there was an indebtedness from one person to another, it is held that subsequent acts of the persons concerned inconsistent with the continued existence of such indebtedness may raise a rebuttable presumption that the debt has been paid. Thus where one person pays money to another or gives him his written obligation for the payment of money, it will be presumed that any pre-existing indebtedness of the latter to the former has been paid. *McIntrye* v. *Meldrim*, 63 Ga., 59; *Lodge* v. *Ainscow*, 17 Del., 327, 41 A., 187; *French* v. *French*, 84 Iowa, 655, 662, 51 N. W., 145; *Read* v. *Smith*, 1 Hun. (N. Y.), 263; *Steitz* v. *Priddis*, 30 N. Y. S., 762; *In re Wood's Will*, 201, N. Y. S., 716; *Lindsay* v. *McCormick*, 82 Va., 479, 5 S. E., 534; 48 Corpus Juris 689 notes. This doctrine is applicable here. When the defendant, George C. McKay, gave his note for $7,000 to the decedent Graves, the latter had been his tenant for two years and five months and at the rental agreed upon, if no payments had been made, owed him $1160. It is difficult to believe that accrued and unpaid rentals to this amount were not included in making up the account for which the note was given. Equally improbable is the maker's claim as indicated by his demand in set-off, that rent due for the use and occupation of the premises during the entire term, never having been paid or credited in prior transactions, was again left outstanding when so substantial a payment in money on October 10, 1935, was made on the note. "Is it to be supposed that a prudent man would pay money on his note, without having a settlement of his open accounts against the holder of it? When men hold cross-demands

against each other, prudence suggests that neither should pay money to the other, except as the result of a balancing." *Baldwin* v. *Walden*, 30 Ga., 829, 831. We are of opinion that the plaintiff was entitled to the benefit of the presumption of payment of her decedent's indebtedness for rent arising out of his taking the note and receiving payment on account from the maker.

The plaintiff's verdict against the maker of her decedent's note, however, is manifestly wrong on another ground. The set-off allowed the defendant, George C. McKay, included three months rent accrued after his tenant, the payee of the note, died. There is no authority for allowing this item of the set-off. So far as the record shows, the decedent was a mere tenant at will of the house which he occupied and his death, by implication of law, terminated the tenancy. The landlord's right to rent, so far as he or his estate was concerned, ended with this determination of the term. *Robie* v. *Smith*, 21 Me., 114; *Rising* v. *Stannard*, 17 Mass., 282; 68 A. L. R., 595 n. Whether the tenant's executrix or some other person occupied the premises thereafter is here of no concern. Demands against a person belonging to a defendant at the time of the death of such person only may be set off against claims prosecuted by his executor or administrator. R. S., Chap. 96, Sec. 83. See *Rich* v. *Hayes*, 101 Me., 324, 64 A., 656; 24 Corpus Juris 756. The erroneous inclusion of items of rent accruing after the payee's death in the set-off allowed compels a revision of the verdict in the action against the maker of the note.

In the action of *Anna E. Barton, Executrix* v. *George C. McKay*, No. 2714 on the docket of the Trial Court, the entry is

Exception overruled.
Motion granted.
New trial ordered.

In *Anna E. Barton, Executrix* v. *Ethel L. McKay*, No. 2715 on the same docket, the entry is

Exception overruled.
Motion overruled.

THE HINCKS COAL COMPANY

vs.

CHARLES H. MILAN AND FRANK H. TOOLE.

Penobscot. Opinion, July 23, 1937.

EVIDENCE. REFERENCE AND REFEREES. TORT FEASORS.

A party who claims compensation for a wrong suffered must establish the amount of his damages with reasonable certainty, but absolute certainty is not required. Damages are not uncertain for the reason that the amount of the loss sustained is incapable of exact mathematical proof.

All facts and circumstances tending to show the probable amount of damage are properly received and the triers of fact are allowed to make the most intelligent and probable estimate which the nature of the case will permit, and it is not a sufficient reason for disallowing damages that a party can state the amount only approximately.

It is well settled, as a general rule, that in the absence of a statute an assessment of damages against those sued jointly for a wrong should be for one sum and against all found guilty.

Joint tort feasors are each liable for the entire damage resulting from the wrong done, and neither is entitled to contribution from the other, and it is held that a several assessment of damages in an action against joint wrong doers is at most an irregularity which may be cured by the judgment taken and entered.

In cases referred under Rule of Court under Rule XLII of the Superior and Supreme Courts, questions of fact once settled by Referees, if their findings are supported by any evidence of probative value, are finally decided and exceptions do not lie.

On exceptions by defendant Milan to the acceptance of the Referee's report. An action on the case for conspiracy, the defendants jointly charged with defrauding the plaintiff Company. The Referee found defendant Milan guilty (defendant Toole defaulted) and assessed damages in the sum of $13,552.55 against him and reported accordingly. Defendant Milan filed written objections to the

acceptance of the Referee's report, and on its confirmation excepted. Exceptions overruled. Case fully appears in the opinion.

William S. Cole, for plaintiff.
Artemus Weatherbee,
Michael Pilot,
E. Donald Finnegan,
James D. Maxwell, for defendant.

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

STURGIS, J. In this action on the case for conspiracy, the defendants are jointly charged with defrauding the Hincks Coal Company, which is engaged in the coal and wood business in Bangor, Maine. At the return term, a default was entered against the defendant Frank H. Toole, but his co-defendant Charles H. Milan pleaded to the issue and joined in a stipulation for hearing by the Court with jury waived. The finding there was for the plaintiff Company but only for nominal damages. Exceptions to the inadequacy of that award were sustained in the Law Court.

At the next term of the Trial Court, the action against Charles H. Milan, by consent of counsel, was referred under Rule of Court with right of exceptions reserved, and thereafter having been tried anew on all issues raised by the pleadings, the Referee found that the defendant Milan was guilty of the conspiracy charged in the writ, assessed damages in the sum of $13,552.55 against him and reported accordingly. The Referee reserved the assessment of damages against the defendant Frank H. Toole for the Court. The defendant Milan filed written objections and now brings forward his exception to the acceptance of the report.

The evidence taken out before the Referee as also that of the former trial introduced as an exhibit and all made a part of the bill of exceptions tends to prove the allegations of the writ that during the period between the early months of 1920 and November, 1934, the defendant Frank H. Toole, employed by the plaintiff Hincks Coal Company and in charge of its coal deliveries, entered into a conspiracy with the defendant Charles H. Milan to defraud his employer, and pursuant thereto, at divers times, without the

knowledge or consent of the Coal Company, delivered large quantities of coal to his co-conspirator who, without paying or being charged therefor, received it and used it in heating buildings which he owned. The facts proved and the inferences to be drawn therefrom warrant the finding that this conspiracy began, continued and terminated substantially as alleged and the fraudulent deliveries of coal for which the defendant is charged were made pursuant to it. It was the opinion of this Court on the exceptions reserved in the former trial that the existence of the conspiracy alleged, the consequent overt acts and the defendant Milan's guilt were established beyond question. *Coal Company* v. *Milan and Toole,* 134 Me., 208, 183 A., 756. His guilt is as clearly proven on this record. In so far as the exception is based on the Referee's finding on this issue, it is without merit.

The defendant objects to the Referee's report on damages on the ground that the action was brought jointly against both defendants named in the writ and the assessment of damages was several and only against the defendant Charles H. Milan. We are not of opinion that the acceptance of the Referee's report should be set aside on this ground. It is well settled as a general rule that in the absence of a statute an assessment of damages against those sued jointly for a wrong should be for one sum and against all found guilty. *Currier* v. *Swan,* 63 Me., 323; *Kennebec Purchase* v. *Boulton,* 4 Mass., 419; 17 Corpus Juris, 1084. See Note, 30 A. L. R., 790 *et seq.* But joint tort feasors are each liable for the entire damage resulting from the wrong done and neither is entitled to contribution from the other, and it is held that a several assessment of damages in an action against joint wrongdoers is at most an irregularity which may be cured by the judgment taken and entered. *Holley* v. *Mix,* 3 Wend. (N. Y.), 351; *Brooks v. Davis* (Mass. 1936), 1, 2nd N. E. Rep., 17; 1 Saunders Report, 207 Note 2. See also *Halsey* v. *Woodruff,* 9 Pick. (Mass.), 555. There is also authority for the view that, even if a several judgment is rendered on the verdict in a joint tort action, it is not ground for reversal even as to the defendant against whom it is entered. *Davis* v. *Taylor,* 41 Ill., 405, 408; *Loomis* v. *Besse,* 148 Wis., 647, 652, 135 N. W., 123; 33 Corpus Juris, 1128.

The remaining objections are to the quantum and value of the

evidence upon which the assessment of damages is based. The only question open under this objection is whether there was any evidence of probative value to support the assessment. In cases referred under Rule of Court under Rule XLII of the Superior and Supreme Courts, questions of fact once settled by Referees, if their findings are supported by any evidence of probative value, are finally decided and exceptions do not lie. They and they alone are the sole judges of the credibility of witnesses and the weight to be given their testimony, and their decision upon conflicting testimony is final. This Court on review is not called upon to determine on which side the evidence preponderates or what testimony is most entitled to credence. *United Co.* v. *Canning Co.*, 134 Me., 118, 182 A., 415; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171; *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853.

The Coal Company called six men as witnesses who testified that they delivered coal from its yards to the defendant Charles H. Milan during the period from 1920 to and including 1934. Unaided by records and speaking from memory, they stated the approximate quantity of coal delivered and fixed the times by reference to the happening of certain events. The report of the Referee shows that this evidence was carefully weighed and considered in the light of testimony given at the former trial of this case and such inconsistencies as there arose were not overlooked. The defendant Milan did not appear at the trial and deny the receipt of the coal which the evidence showed was delivered to his several buildings. The testimony of the witnesses presented in his defense was not disregarded, but deemed of insufficient weight to overcome the evidence produced on the other side. The prevailing prices for coal during the period covered by the conspiracy appear in schedules filed in the case and were accepted by counsel as correct, and it appearing that the defendant Milan bought and paid for some coal during the years in which he and his co-conspirator were defrauding the Coal Company, the amount thereof was properly deducted from the gross delivery proved. Possible duplication in reported deliveries was also scrupulously avoided. As the extended report filed by the Referee shows, from a study and analysis of all the evidence the amount of coal fraudulently taken was carefully estimated, its value computed and damages assessed accordingly.

It is an accepted rule of law that a party who claims compensation for a wrong suffered must establish the amount of his damages with reasonable certainty. But absolute certainty is not required. Damages are not uncertain for the reason that the amount of the loss sustained is incapable of exact proof by mathematical demonstration. Juries are allowed to act upon probable and inferential as well as direct and positive proof. Any and all facts and circumstances having a tendency to show the probable amount of damages suffered are properly received and the triers of fact allowed to make the most intelligible and probable estimate which the nature of the case will permit. 1 Sedgwick on Damages (8th Ed.), Sec. 170; *Satchwell* v. *Williams*, 40 Conn., 371; *Allison* v. *Chandler*, 11 Mich., 542, 555. It is not a sufficient reason for disallowing damages claimed that a party can state the amount only approximately. It is enough if from the approximate estimates of witnesses a specific conclusion can be reached. *Richner* v. *Plateau L. S. Co.*, 44 Col., 302, 306, 98 P., 178; *Satchwell* v. *Williams*, supra; 17 C. J., 761. An assessment of damages under this rule was recently approved in *Summit Thread Co.* v. *Corthell*, 132 Me., 336, 341, 171 A., 254.

The Referee cited and followed these rules in assessing damages. We are of opinion that the evidence before him was of probative value and sufficiently certain to warrant the assessment. His finding on that issue of fact is final.

Exceptions overruled.

STATE OF MAINE *vs.* REUBEN S. BREWER.

Lincoln. Opinion, July 31, 1937.

CRIMINAL LAW.

Statutory appeal presents the question whether, in view of all the evidence in the case, the jury was warranted in believing beyond a reasonable doubt, and therefore in finding, that the defendant was guilty of the crime charged against him.

In a prosecution for murder, motive need not be proved.

On appeal. Respondent tried for murder at May Term, 1936, of Superior Court of Lincoln County. After verdict of guilty, and before judgment, respondent presented motion to set aside verdict and grant new trial. Motion denied. Appeal. Appeal denied. Judgment on the verdict. Case fully appears in the opinion.

Clyde R. Chapman, Attorney General,
Weston M. Hilton, County Attorney for State.
Burleigh Martin,
Frank A. Tirrell, Jr., for respondent.

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

BARNES, J. At the May Term, 1936, of Lincoln County, the respondent was indicted for murder, tried and convicted of that crime.

After verdict and before judgment he presented to the Justice presiding a motion to set aside the verdict and grant a new trial.

On denial of the motion, he took an appeal to the Law Court, as provided by R. S., Chap. 146, Sec. 27.

On such appeal the question is whether, in view of all the evidence in the case, the jury was warranted in believing beyond a reasonable doubt, and therefore in finding, that the defendant was guilty of

the crime charged against him. *State* v. *Lambert*, 97 Me., 51, 53 A., 879.

Reuben S. Brewer, forty-five years of age, by occupation a lobster fisherman, had lived with his wife, Dolda M. Brewer, on the shore, at Ocean Point, in Boothbay, except for some times in the winter, for six or eight years, until her death on April 18, or 19, 1936. They had no children.

Property which he occupied at Ocean Point, consisted of a four-room house on one of the main roads leading to the shore, a garage nearby, and a wharf, upon which, at the shore end, stood a covered fish shed and a store. There were several cottages on the Point, two between the Brewer house and wharf, but none were occupied at the time of Mrs. Brewer's death, except two, and these were 600 and 1000 feet distant respectively, and neither could be seen from house or wharf.

It appears that the last person who saw Mrs. Brewer alive, other than her husband, was Mr. Risser, a life insurance agent. He fixes the time as about half past eleven in the forenoon of Saturday, April 18, 1936, when he and Brewer were drinking, at the Brewer home. He says further that he stayed there not over five minutes. Thus it appears that Mrs. Brewer was alive, with "nothing unusual" in her appearance, twenty-four hours before Dr. George A. Gregory, the medical examiner, took charge of her dead body.

Sheriff Greenleaf testified that next morning, at about eight o'clock, at his home in Boothbay Harbor, four and one-half to five miles distant, he was "called up" by Brewer and asked to "come over"; that after breakfast he drove to the Brewer place and found Brewer near his garage, at about a quarter past nine.

Up to this time the sheriff states that he did not know for what reason Brewer had called him.

He testified that Brewer told him his wife had disappeared again, and said, "come down here I want to show you something"; that he followed Brewer into the store, and there saw a woman's coat, which Brewer told him was his wife's coat, found by him on the rail of the fish shed and placed in the store, and that Brewer said he "thought it was funny"; that he, the sheriff, walked out toward the end of the wharf, searching sea and shore and seeing nothing of interest, and then followed Brewer, at his request, to his house.

In the front room, on the ground floor, there was a stairway leading to the upper floor, at the foot of the stairs a couch, on which Brewer told the sheriff that he slept.

The two men went up the stairs and into Mrs. Brewer's room in the rear end, where they found a bed, a "stand" next the bed and a commode by the stand.

The sheriff continued — "he pointed to a night dress, brand new, I should say it never had been used, laying on the foot of the bed. He called my attention to that. I says, 'is there any note or anything around?' He says, 'I haven't seen any.' I had no more than got the words out of my mouth when I discovered the note under the alarm clock next to the head of the bed. I picked it up, and read some of it; and handed it to Reuben. He says, 'that answers the story.'"

They went down on the wharf again and looked around the shore, and the sheriff drove home to get grapples, but as he drove into his yard he learned that Brewer had called again, and he immediately returned to a point in the road near the store, from which he could see the body of Mrs. Brewer, some thirty feet or more northerly of the wharf or fish shed.

He took charge of the situation, calling the medical examiner, and an undertaker. The doctor arrived at about eleven o'clock, went directly to the body as it lay some thirty or more feet north of the wharf, perhaps ten feet from high-water mark. It lay, face down, with head toward the south and the shore, "as in a sort of cradle" between two rocks.

The shore at this point was a great ledge, almost smooth of surface, but sloping gently into the bay, and strewn with rocks and stones at the location of the body.

When first discovered the body lay eight or nine feet above the reach of the tide, and in plain view from the road along shore continuously for several rods back toward the Brewer house, and directly opposite the end of a path leading thence through bushes and small trees to the rear end of the Brewer house.

The doctor testified; — "her hair was over the front of her head, it was bobbed, and it was hanging down over the front of her head. That hair was pretty wet, but apparently near the scalp it didn't seem to be as wet." She was fully clothed, with a dark coat, sweater

and scarf, slacks, bloomers, overshoes, shoes, stockings, and gloves, the last not buttoned.

When the body was turned over, the doctor found "a very noticeable and marked discolored area around the eye on the left side . . . and an incised wound over the outer angle of the right eye (a cut in the tissue)." Rigor mortis was then breaking down.

It was the doctor's opinion that the woman had been dead from twelve to eighteen hours before he first saw her body.

He had the body taken to undertaking rooms and there performed an autopsy.

He found no marks of violence other than on the face. There were lacerations — "the lower lip on the right was cut on the inside of the mucous surface, swollen and discolored and also on the other side, but not cut. The upper lip was swollen, not cut, bruised and swollen. The nose was swollen, but not discolored. On the left upper eye-lid, extending from the nose out, it was very dark, ordinarily called a black eye. There was a cut on this left side, beginning at the brow, and going up over the forehead of about four and a half inches by probably I think three and a half inches . . . there was a swollen and a very contused wound."

The autopsy revealed no water in the lungs or bronchial tubes.

The doctor concluded that death was caused by blows on the head, and "very likely" the body was erect when the blow was received.

He found "very congested tissue" in the brain, evidence of concussion of the brain.

About a month later a second autopsy was performed by a pathologist, of this state, who was assisted by Dr. Gregory and by an eminent expert in criminal investigation, called as a witness by the defense.

These three agree that the blows that left the bruises on the head were received before death; that the death was due to the stopping of breathing before the heart had stopped its action, a result of blows on the head, and was not caused by drowning.

A not less important fact is agreed upon by the medical witnesses. It is that lividity, a discoloration of the tissues beneath the skin, was most noticeable on the back of the body, and was caused by the settling of blood in the back of the victim while the body lay on its

back for a time, after death. Thus it would appear that the body, for a time long enough to establish lividity, lay in the house or in some hiding place, and was later placed in the water or on the ledge.

Two men, Pinkham, a fisherman who beached his boat south of the wharf, sold respondent a keg of lobsters, was told that the wife was missing, and Woodward, driving up the road for a load of sea weed, were on the Brewer premises, Sunday morning, before the sheriff arrived. These men were served with drinks, but neither was inside the Brewer house.

Neither saw the body.

It is in evidence, and uncontradicted, that in September, 1935, Mrs. Brewer left her home and remained away from it for a time, securing a deputy sheriff to accompany her from the Burnham hotel to her home that she might get needed clothing.

Cottagers and their guests testified that in the summer and in September of 1935, upon different occasions, and in the presence of Mrs. Brewer's friends, her husband called her the vilest and most repulsive names; that in one instance he pushed her downward on a stairway, when a man caught her and saved her from falling; that once he threw a pair of shears at her.

The State charges that Brewer killed his wife, and at some time before the body was found he threw it into the bay or on the shore where the sheriff found it.

The testimony is, in the main, circumstantial.

The defense is suicide by drowning.

The coat, described as a light coat with fur collar, and the hanger still in it, found in the fish shed, probably did not seem to have been carried there by a woman bent on drowning herself, since the body was found clothed in a heavy coat, called chinchilla.

The testimony of respondent as to what he did on Saturday afternoon is suggestive of his guilt. He testified that after working in his garage till half past five or six o'clock that afternoon he went to the house; that his wife was not in the lower rooms; that he went upstairs, to the door of her room and saw her lying on her bed, fully clothed, with no covering over her, "but her face nearly covered"; that he did not speak to her, though she "had been complaining for two or three days."

Thereupon he went to the Grey store, where for perhaps two

hours of Saturday afternoon he remained, purchased a can of coffee and four lamb chops, and returned home.

Mr. Grey testified — "Mr. Brewer came in and bought a pound of coffee of my clerk, we asked Mr. Brewer if we should call Dolda. And he says, 'has she called?' And I told him, 'no.' He says, if she had not called 'I guess there is not anything she wants.' And a little later, personally, I said to him, 'You better let us call Dolda, or you'll be out of luck, for it is a double holiday.' He said, 'if she has not called, why I guess there is nothing she wants.'"

After remaining at the store until about seven P.M. respondent testified that he returned home, did not see his wife, did not speak to her nor go upstairs, but ate a lunch and lay down on the couch, dressed, except for coat or sweater, shoes or rubbers.

He said he was partly wakened "around one o'clock" by a noise that he thought next day sounded like a scream; that he slept again, until roused by the car of a party who came and purchased liquor; that he slept again until five, when he rose, got his breakfast and went to his garage, without seeing his wife or speaking to her.

He said that when Mr. Pinkham landed by the wharf, he went down, at Pinkham's request returned to the store, and, when standing with Pinkham, saw a truck stop at the house; that he went up and treated Woodward, and returned to Pinkham. He stated it was at this time he found the coat in the fish shed and talked of it and his wife's disappearance, that he next went to the house, to his wife's room, searched for her through the house, garage, the Holway cottage, of which he had the keys, the Hussey log cabin, returned and called the sheriff.

He said that it was "at least half an hour" before the sheriff came; that together they inspected wharf, store, and shore, and while the sheriff was away he stayed in the house, "about a minute"; went to the store, "out to the door, and went about half by the door and looked over the north rail; and I was looking at her body right head to me."

Then he testified that he went back to the house, "called the sheriff and told him to come over and bring the undertaker"; that the sheriff was gone only fifteen or twenty minutes, and that during that time "a car drove up there, and I was going to stay up to the house and wait for him (the sheriff); but I went down, I didn't

know but those people in the car might go down and see the body, you know, and I went down and watched the body until they left."

It seems there is sufficient evidence to convince a jury that Reuben Brewer killed his wife, before visiting the Grey store on Saturday evening, and afterward threw her body into the water or placed it about where it was found.

They heard a particular description of the path, leading through "green growth" from the rear of the Brewer house, behind unoccupied cottages to the road, just opposite the spot where the body was found. If they decided that respondent alone had opportunity to commit the murder, there seems abundant proof to justify such conclusion.

The respondent contends that he has no knowledge of how or when his wife came to her death; that the note found by the sheriff was written by her, and proves her intent to commit suicide.

The note is State's Exhibit One, claimed by the State to be a forgery, written by Brewer, and placed by him on the stand where it would be promptly discovered, upon investigation.

There is testimony of experts in handwriting that the note is in Brewer's writing, and that it is the writing of his wife. The jury had standards of the writing of each, a copy of the questioned note, written by Mr. Brewer, at the sheriff's request, a letter in Mrs. Brewer's hand, whereon, between the original lines, copies of words she had written appear, which the State suggests were written by Mr. Brewer in preparation for imitation of her hand.

The various exhibits have been studied with great care; and if the jury came beyond reasonable doubt to the conclusion that the note was forged by the respondent, we can not say their finding is wrong. In fact the note seems to the Court the work of Brewer's brain and hand.

Although motive does not have to be proved, the jury may have found in the testimony of the respondent, who seems to have withdrawn from natural domestic life, a complete aversion for his wife.

They heard testimony of insurance on her life, Reuben Brewer beneficiary, and of his statement on Sunday afternoon, April 19, that he had employed a lawyer to probate her estate. They heard the respondent testify that although he was not arrested for at least three weeks after the finding of the body, yet he thought when

testifying that it was on Monday the twentieth that he called counsel and was advised not to talk with "anyone unless with the officers." They also heard the sheriff testify that on the afternoon of the nineteenth, on Sunday, Mr. Brewer told him, in the presence of Dr. Gregory and the County Attorney, that he had been advised by his attorney not to talk.

The jury may well have concluded that, after her death, Mrs. Brewer's body was secluded somewhere about the premises, reclining face upward, as they might well believe from Dr. Gregory's testimony that when he inspected the body, on the ledge, her arms were "upward like that (indicating), the hands were partly closed and about that position, outward flexed on the arms."

As to all questions of fact it is the province of jurors to decide.

All of the evidence was theirs to study, and we can not say they should not have been satisfied beyond reasonable doubt that murder was committed, and by Reuben S. Brewer.

Appeal denied.
Judgment on the verdict.

MAUD HAM NADEAU *vs.* PAUL PERKINS.

Penobscot. Opinion, August 21, 1937.

MOTOR VEHICLES. NEGLIGENCE.

Proof of a violation of a statute regulating traffic, raises a presumption of negligence which may be rebutted.

Testimony that another car, proceeding in same direction as plaintiff's car, collided with defendant's parked truck, and a third car narrowly avoided accident by running into a snowbank, is admissible as tending to corroborate plaintiff's witnesses that the parked truck was not clearly discernible to travellers on the highway.

A passenger in an automobile has the duty of keeping a lookout and warning the driver of apparent danger, although this duty does not require or empower an assumption of control; and if, in the exercise of reasonable care, passenger could have done nothing to avert the accident, she is not barred from recovery.

On motion for new trial by defendant. An action of negligence to recover damages for personal injuries sustained by plaintiff. Trial had before jury at September Term, A. D., 1936, of the Superior Court for the County of Penobscot. Jury verdict of $6108.40 for plaintiff. Defendant filed motion for new trial. Motion overruled. The case fully appears in the opinion.

Artemus Weatherbee,
E. A. Weatherbee, for plaintiff.
Alton C. Wheeler,
Arthur Thayer, for defendant.

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

MANSER, J. On February 17, 1935, a truck with van body, painted dark green, was left in the night-time, without lights, and unattended, on State Highway Number Two, in the Town of Winn, outside of the business or residential district. An automobile in which the plaintiff was riding as a guest passenger came into collision with the rear left corner of the truck, and as a consequence, the plaintiff received severe personal injuries. After verdict for the plaintiff for $6108.40, the case comes forward on motion for new trial. The issues presented are:

Was the jury justified in finding that the defendant was negligent, that the plaintiff was not guilty of contributory negligence; and if so, were the damages awarded excessive?

Upon the question of negligence, the plaintiff contends that the defendant violated certain provisions of the traffic statutes found in R. S., Chap. 29, Secs. 75 and 83, these laws having to do with the parking or leaving of standing vehicles on the travelled way, when practicable not to do so, and in no event unless a clear view of the vehicle may be obtained for a distance of three hundred feet in each direction on the way; and also providing that every vehicle shall have lights so displayed at night as to be visible from the front and rear.

The legislature, through the enactment of statutes, prescribes rules designed to safeguard travellers, and provides penalties for violation of such rules. If such violation is admitted, or proven by the evidence, it is prima facie evidence of negligence, as it is some-

times said, and as otherwise expressed, raises a presumption of negligence. While not conclusive, the defendant must overcome the presumption against him. *Bolduc* v. *Garcelon*, 127 Me., 482, 144 A., 395; *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872; *Dansky* v. *Kotimaki*, 125 Me., 72, 130 A., 871; *Tibbetts* v. *Dunton*, 133 Me., 131, 174 A., 453.

That the truck was left unattended and without lights is not disputed, but the defendant asserts in argument that it was impracticable to do otherwise, and that on the night in question the truck was clearly visible. He, therefore, claims there was no actual violation of either statute, and that he was not guilty of actionable negligence.

The record would justify a finding by the jury that the defendant was engaged in trucking potatoes from Aroostook County to the coast. He travelled at times by night, and on the particular occasion he was unaccompanied and unprovided with lantern, flashlight or other means of producing artificial light. He had been bothered with the operation of the truck, and finally discovered it had a dead battery. He walked to a garage about a mile away for assistance, leaving the truck on the right hand side of the highway. He was unable, on account of the condition of the battery, to display the lights on the truck.

The record is silent as to whether for the half hour that he was trying to ascertain and remedy the cause of the trouble any travellers had passed, whose assistance in procuring aid he might have requested. Neither does it show whether he could have stopped the truck in some other place off the highway.

The visibility of the truck was in issue. There was evidence that it was a moonlight night and the garageman, who went to the scene sometime after the accident was able to see the truck for a considerable distance. On the other hand, it is in testimony that it had been raining during the daytime and had then grown much colder during the night. As a result, a low lying fog was more or less prevalent, which somewhat obscured vision. Another car arriving at the scene from the same direction as the plaintiff's car had proceeded, also came into collision with the truck, and a third car narrowly avoided accident by running into a snowbank. This evidence, received without objection, was admissible as tending to corrobo-

rate the version of the plaintiff's witnesses that the truck was not clearly discernible to travellers on the highway.

The application of the statute depends upon the finding of fact as to the exigency of the occasion. The defendant's failure to comply with the literal terms of the statute can not be ruled negligence as a matter of law, and there are doubtless many situations which would relieve a defendant of the imputation of negligence. Illustrations are referred to and discussed in *Tibbetts* v. *Dunton*, supra.

> "Disobedience of the rule of the road is always material, and often important evidence, tending, though not conclusively, to show negligence between which and injury there might, or might not be, on the proof, causal connection. The violation of a traffic statute is an item calling for consideration. Negligence and causal connection are ordinarily questions of fact." *Field* v. *Webber*, 132 Me., 236, 240, 169 A., 732.

In the final analysis, the question is whether under all the circumstances the defendant was guilty of negligence, of a want of ordinary care, as these terms have been frequently defined.

The Court can not say that the jury manifestly erred in its finding of negligence on the part of the defendant.

As to contributory negligence on the part of the plaintiff. She was a passenger. It is unnecessary to analyse the evidence to determine whether the driver himself was in the exercise of due care. Assuming his negligence, it is not imputable to her. However, as tersely stated in *Dansky* v. *Kotimaki*, supra, and repeated in *Peasley* v. *White*, 129 Me., 450, 152 A., 530, she could not wholly escape the duty of keeping a lookout and warning the driver of apparent danger. This duty did not require or empower her to assume control of the car; and if, in the exercise of reasonable care, she could have done nothing to avert the accident, she is not barred from recovery. The plaintiff testified to low visibility, describing the condition as a hazy mist; that the windshield was frosty and she kept wiping it in front of her with the palm of her hand. At the same instant that the driver called a warning to "duck" she noticed a sudden blur, but distinguished no object. It is not apparent that in the exercise of ordinary care she should have observed the truck in the pathway of the approaching car, or if she had, that it would have been in season

to give the driver sufficient warning to enable him to pass in safety.

The verdict as to liability can not be disturbed.

Was the verdict unwarranted as to damages? The physical injuries were serious. The plaintiff received extensive lacerations on the forehead, requiring thirty-six stitches, and leaving permanent scars. Her thigh bone, involving the right knee, was broken in many pieces. The work of repair was difficult and required much time. For nine months her leg and part of her body was encased in a heavy, cumbersome cast. The knee joint now has but one-eighth of its normal flexion and will remain permanently stiff, although there may be some improvement. The plaintiff suffered greatly, both physically and mentally for a long period. The testimony is that she was unable to work from February, 1935, to the time of the trial in September, 1936, and the inference may fairly be drawn that her disability would continue for an indefinite time. Though married, she was living apart from her husband and had been charged with and contracted liability for her personal expenses. The items introduced, without objection, amounted to over $1100.00 beside her own lost wages. She was twenty-two years old at the time of the accident. Taking into account her expenses, her lost wages, her pain and suffering, her permanent disfigurement and bodily impairment and her future lessened capacity for work, affected, in consideration, by her age and probable expectancy of life, the Court can not say that the amount awarded by the jury was excessive.

Motion overruled.

ANNEBELLE BOISVERT, COMPLAINANT *vs.* LEO CHAREST.

York. Opinion, August 23, 1937.

BASTARDY. NEW TRIAL. PERJURY.

Where a party, himself a witness, commits wilful perjury or makes use of false testimony which he knows to be false and thereby obtains a verdict, the court in its discretion may and perhaps should set aside the verdict returned.

A party against whom perjured evidence is given can not sit by and do nothing, if something can be done to protect himself.

Evidence discoverable by due diligence before trial will not upon discovery following the trial justify an order for a new trial.

Exception to this rule is when on all the evidence it is apparent that an injustice has been done.

On general and special motions for a new trial by respondent. An action in bastardy, and on trial, jury found for complainant. Respondent attacks the verdict both by general and special motions, the latter based on alleged newly discovered evidence. General motion overruled. Special motion overruled. New trial denied. Case fully appears in the opinion.

William P. Donahue, for complainant.

Armstrong & Spill,

John P. Deering, for respondent.

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

HUDSON, J. On March 21, 1936, the complainant, seventeen years old, was delivered of a child. Eleven days previously she had sworn out a bastardy complaint against this respondent. Jury tried, he was adjudged to be its father. He attacks the verdict both by general and special motions, the latter based on alleged newly discovered evidence.

General Motion

We are satisfied that the verdict should not be overturned on this motion. Even would this Court have come to a different conclusion in the first instance, we can not say that the jury was not warranted in returning its verdict. *Foster* v. *Eastern Trust & Banking Co.*, 110 Me., 552, 88 A., 474; *Gammon et al.* v. *Libby*, 110 Me., 552, 88 A., 480.

The complainant testified that late in the evening of June 21, 1935, she and Lucille McMullen, a married woman, took an automobile ride with the respondent and Arthur Gendron; that upon its completion they went into the respondent's room in his apartment, and there in darkness the intercourse took place upon his bed in the presence of Mrs. McMullen and Mr. Gendron. Upon discovery of her pregnancy, she said, she accused the respondent and asked him to marry her, which he refused to do.

On December 13, 1935, an attorney drafted a settlement agreement between the parties which they both signed under seal. While as to her, due to her minority, it had no legal efficacy, yet it contains matter, which, no doubt, influenced the jury in reaching its verdict, as the undertaking by the respondent to make weekly payments to the complainant, both before and after the birth of the child (which he did for a time), besides paying "all of her medical and doctor's bills that will be incurred by the said Annebelle Boisvert in the confinement and birth of the child to be born." Had he been innocent, while he might have signed such an instrument, in all likelihood he would not have done so.

Truly the agreement stated that the paternity of the child was unknown and that the respondent did not admit it, but the jury could have found and probably did find that this young French girl did not understand the meaning of the word "paternity." She so testified. He had consulted the attorney before they appeared in his office. The settlement was extremely unfavorable to her. The jury no doubt thought that he desired to get rid of the complainant as easily and quickly as possible and at small expense, but for his own sake would have the document so drawn that if, due to her minority, it should not be complied with, it would contain no damaging admission of guilt upon his part.

The witnesses for the complainant were her sister, Irene, who testified that the respondent told her that if the complainant would submit to an operation he would give her $50 for that purpose; Dr. Stickney, who testified as to the accusation during travail, and the Recorder of the Municipal Court.

The defense offered a young lady with whom the respondent had kept company, her mother, and the attorney who drew the agreement. The complainant's story was denied in toto by the respondent. The evidence of his witnesses was to the effect that he kept such steady company with his young lady that he had no opportunity to have committed this act with the complainant. Their evidence was not convincing.

The verdict must stand as against the general motion.

Special Motion

On this, the respondent seeks a new trial on the ground that the complainant gave perjured testimony, viz: That the intercourse took place in the presence of Mrs. McMullen and Mr. Gendron. To establish the perjury, the respondent produced the latter named as witnesses. They denied explicitly that they were in his room at all the night of June 21st or at any other time or that they went automobiling as claimed by the complainant. He also presented one Regina Rousell, a young woman who took care of Mrs. McMullen's children, and she testified that she slept with the complainant on the night of June 21st.

Where a party, himself a witness, commits wilful perjury or makes use of false testimony which he knows to be false and thereby obtains a verdict, the court in its discretion may and perhaps should set aside the verdict returned. *Hill* v. *Libby et al.*, 110 Me., 150, 85 A., 487; *Ordway* v. *Cluskey*, 129 Me., 13, 149 A., 386.

Still, a party against whom the perjured evidence is given can not sit by and do nothing, if something can be done to protect himself, when surprised with such testimony.

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

with the false testimony at the risk of the judgment." *Ordway* v. *Cluskey*, supra, page 18.

Evidence discoverable by due diligence before will not upon discovery following the trial justify an order for a new trial.

> "Without such limitation there would always be the danger of a retrial of every case because of the laxity of the party or his counsel seeking such relief." *Bumpus* v. *Lyon*, 133 Me., 125, 127, 174 A., 265, 266.

> "The law holds parties to the exercise of due diligence in the preparation of their cases, and public welfare as well as the interest of litigants requires that suitors should prepare their cases with reference to all the probable contingencies of the trial. A new trial will not be granted on the ground of newly discovered evidence when the moving party, by proper diligence, might have discovered such evidence in season for the trial." *Kimball* v. *Clark*, 133 Me., 263, 267, 177 A., 183, 184, and prior Maine cases cited on page 267.

The only exception to this rule is when on all the evidence it is apparent that an injustice has been done. *Cobb* v. *Cogswell*, 111 Me., 336, 89 A., 137; *Rodman Company* v. *Kostis*, 121 Me., 90, 115 A., 557.

This respondent upon hearing the testimony with relation to the presence of Gendron and Mrs. McMullen made no effort whatever to protect himself as against what he now claims to be her perjured testimony. She was the first to testify at the trial. She then told her story. The trial lasted two days. Within two days after the verdict, the respondent took the affidavits of both Gendron and McMullen. No doubt they were available and could have been produced at least on the second day of the trial. Anyway, there is no evidence to the contrary. Instead of then producing them, the respondent was satisfied to permit the case to be submitted to the jury. Afterwards, if the verdict should be adverse, he would resort to a special motion. This can not be countenanced.

As said in *State* v. *Shea*, 132 Me., on page 18, 164 A., 739, 740, "It" (meaning the evidence to support such a motion) "must have

been discovered since the trial, and it must appear that it could not have been discovered before the trial by the exercise of due diligence."

With reference to the testimony of the other affiant, Regina Rousell, it, too, it would seem, should have been discovered before the trial upon the employment of due diligence. It was set forth in the complaint that the begetting took place on the night of June 21st. Naturally almost the first act upon the part of an innocent defender, particularly in an action of this sort, would be to attempt to ascertain the complainant's whereabouts at the designated time and to discover with whom she then was, if anybody. This was not done. Lack of due diligence is apparent.

But if the case were ordered to a new trial and the evidence of these three witnesses were produced before a jury, we are not satisfied that then a different verdict would probably result. *State* v. *Shea*, supra; *Bolduc* v. *Garcelon*, 127 Me., 482, 144 A., 395. Mrs. McMullen was a married woman with six children. The jury might well believe that she would screen her presence on such an occasion with Gendron as her companion; and, too, Gendron, it might think, would testify falsely in his own interest.

The young Rousell girl, working for Mrs. McMullen, it might be thought, would be under her dominance and testify so as to protect her friend and employer.

The fact that this respondent signed the condemnatory agreement, above referred to, would probably be sufficient to overcome the testimony of these new witnesses.

General motion overruled.
Special motion overruled.
New trial denied.

LUGIE BEAROR'S CASE

Kennebec. Opinion, August 26, 1937.

WORKMEN'S COMPENSATION ACT.

Incapacity due from a skin infection caused by entry of a germ through an abrasion on a hand, which abrasion was itself suffered in the course of employment, is compensatory.

Exact time of receiving abrasion is unimportant, if evidence shows causal connection between abrasion and infection received in course of employment.

On appeal from a decree affirming an order of the Industrial Accident Commission awarding compensation to the claimant. Appeal dismissed. Decree affirmed. Counsel fees and costs to be allowed appellee to be fixed by the court below. Case fully appears in the opinion.

Robinson & Richardson, for appellant.

James Boyle, for respondent.

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

THAXTER, J. This is an appeal from a decree affirming an order of the Industrial Accident Commission awarding compensation to the claimant.

The claimant was employed as a mule fixer in a woolen mill of the American Woolen Company. He claims to be entitled to compensation by reason of an injury which arose out of and in the course of his employment. It appears that in his work in repairing machinery, he handled tools such as wrenches and from time to time received bruises and abrasions on his hands. The commissioner has found that he was incapacitated by reason of a skin infection caused by oil, grease and dirt coming in contact with such an abrasion on one of his hands.

The insurance carrier claims that there is nothing in the evidence to show an accident arising out of and in the course of the employment, that this was in effect an occupational disease, and that there was not sufficient evidence of notice to the employer.

The defense to the claim seems to be based on the theory that because the employee is unable to tell with exactness just when the particular bruise or abrasion was suffered, that because such slight injuries were received almost daily, that because the injury in question was dismissed by him when received as trifling, it was therefore a mere incident of his employment and not an accident as that term is generally understood.

There was sufficient evidence to warrant the commissioner in finding that the dermatitis from which the employee suffered was caused by the entry of bacteria through an abrasion on his hand. Such was the opinion of Dr. Towne. That the abrasion itself was of such small consequence that he can not remember the exact time when it was received is unimportant, if the evidence shows a causal connection between an abrasion and an infection received in the course of his work.

The case of *Brintons, Limited* v. *Turvey*, A. C., 1905, 230, is cited with approval in *Brodin's Case*, 124 Me., 162, 167, 126 A., 829. The facts in this English case are important and singularly like those in the present case. An employee died of anthrax, the germ of which was carried in wool which in the course of his employment he was sorting. According to the medical testimony such infection ordinarily enters through some abrasion in the skin. The court found that the focal point was a spot in the corner of the eye. The important feature of the case is that it was the entry of the germ into the system which was regarded as the accident. Lord Macnaghten in his opinion says, page 234: "The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death, and would no doubt be certified as such in the usual death certificate." So in the case before us it was the entry of a germ through an abrasion on a man's hand, which abrasion was itself suffered in the course of his employ-

ment, that caused his incapacity. That germ was carried in the oily wool or waste which the employee had occasion to handle.

In *Brodin's Case*, supra, the claimant contracted typhoid fever from drinking contaminated water furnished by his employer. This was held to be a personal injury by accident arising out of and in the course of the employment and accordingly compensable.

It is hard to see any distinction between the entry of typhoid bacteria through the mouth as in *Brodin's Case*, of the bacillus of anthrax as in *Brintons, Limited* v. *Turvey*, or of the particular germ as in the case before us through a break in the skin.

The same distinction which the court points out in *Brodin's Case*, supra, page 168, between the sudden onset of an infection, which is held to be a compensable injury, and an occupational disease is applicable to the case now before us.

The employer's contention that it had not received the notice of the injury required by the statute can not be sustained. There was evidence to justify the commissioner's finding that the employer had sufficient knowledge of the injury.

Appeal dismissed.
Decree affirmed.
Counsel fees and costs to be allowed appellee to be fixed by the court below.

HARRY M. GOODWIN *vs.* EDWARD ALTON LUCK.

Oxford. Opinion, October 2, 1937.

CONSTRUCTION OF STATUTES. CONTRACTS.

Intent of legislature is plain that under provisions of Chap. 123, *Sec.* 12, *R. S.* 1930, *contracts entered into for sale or transfer of real estate shall be void in one year from date of contract unless time of termination is definitely stated therein.*

On report by agreement on questions of law and fact. Action brought to recover a commission on sale of real estate. Judgment for the defendant. Case fully appears in the opinion.

E. Walker Abbott, for plaintiff.

Harry M. Shaw, for defendant.

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

THAXTER, J. This action, brought to recover a commission on the sale of certain real estate, is before this Court on report.

The plaintiff and the defendant entered into a written agreement under the terms of which the plaintiff was to have the exclusive right to sell certain real estate owned by the defendant. The stipulated price was $4200; and, if the plaintiff procured a customer able and willing to buy at that price, he was to receive a commission of six per cent. If, during the existence of the contract, the property should be sold by the owner, the plaintiff was nevertheless entitled to receive the commission. The contract was entered into August 13, 1935. March 1, 1937, the defendant sold the property for $3500, and the plaintiff claims to be entitled to a commission of $210 on this sale. On different occasions after the execution of the contract there was talk between the parties about a reduction in the selling price. It is not altogether clear whether such conversations resulted

in an actual modification of the original agreement. It is not, however, necessary to decide this question, for the plaintiff has elected to sue on the written contract, and it is our opinion that a suit on such contract in view of the provisions of R. S. 1930, Chap. 123, Sec. 12, can not be maintained whether the contract may have been modified as to a reduction in price by a subsequent parol agreement or not. The statutory provision in question reads as follows:

> "All contracts entered into for the sale or transfer of real estate and all contracts whereby a person, company, or corporation becomes an agent for the sale or transfer of real estate shall become void in one year from the date such contract is entered into unless the time for the termination thereof is definitely stated."

This law was passed to give protection to the owners of property against agreements of this nature, which might continue indefinitely without the owners of the property suspecting because of the lapse of time that they might be still in force. The intent of the legislature is plain, that at the end of one year such contracts are not merely voidable, but are void, unless the time for termination is definitely stated. *Odlin* v. *McAllaster*, 112 Me., 89, 90 A., 1086; *Sawyer* v. *Federal Land Bank of Springfield*, 135 Me., 137, 190 A., 731.

The plaintiff argues, however, that the time for the termination of this contract is definitely stated and he refers to the following clause in the contract: "This contract and agency shall continue and be in full force until the expiration of sixty days' written notice given to said Agent by said Principal of his intention to revoke the same."

This provision does not fix a definite time for the termination of the contract. It indicates rather an attempt to avoid the consequences of the statute. Such would certainly be the case if the language had stated merely that the contract should remain in force until written notice should be given by the principal to the agent of its termination; and such result is in no wise changed because it is provided that it shall terminate sixty days after such notice.

Plaintiff's counsel argues that if a note payable sixty days after demand is regarded as payable at a fixed or determinable future

time and hence negotiable, the aforesaid provision of this contract must likewise be held to fix a definite time for termination. Without discussing all of the incidents which attach to commercial paper, it is only necessary to say that in interpreting the provision of the statute in question, we must look to the end which the legislature sought in its enactment, and that the interpretation asked for by the plaintiff would nullify its purpose.

The contract here in question by reason of the provisions of the statute was not in force at the time when the defendant made the sale of the property on March 1, 1937.

Judgment for the defendant.

JEANETTE HUBERT *vs.* WILFRID CLOUTIER

alias WILFRED ROUTHIER.

York. Opinion, October 7, 1937.

BASTARDY. EVIDENCE.

Presumption that child born during wedlock is the child of husband and legitimate may be rebutted.

Testimony of neither husband nor wife can be admitted to show non-access by husband, if the result would be to bastardize issue born after marriage, and statutes removing the bar against parties testifying or even those specifically authorizing the mother to testify in bastardy proceedings do not change the rule.

On exceptions. Complaint in bastardy tried before jury. At conclusion of complainant's case respondent rested. Each party moved for directed verdict. Motion of complainant granted and that of respondent denied. Respondent filed exceptions. Exceptions sustained. Case fully appears in the opinion.

Armstrong & Spill, for complainant.

Leroy Haley, for respondent.

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

THAXTER, J. This complaint in bastardy was duly tried before a jury. At the conclusion of the complainant's case the respondent rested without introducing any evidence and each party moved for a directed verdict. The motion of the complainant was granted and that of the respondent denied. To these rulings the respondent has filed exceptions.

The complainant at the time the child was conceived and born was a married woman; and the presumption is that such child born during wedlock is the child of her husband and legitimate. In early times in England such presumption was held to be conclusive, if the wife had issue while the husband, not being impotent, was within the four seas, that is, within the jurisdiction of the King of England. Co. Litt., 244; Rolle's Abr., 358, tit. Bastard; *Matter of Findlay,* 253 N. Y., 1, 170 N. E., 471, 472; 7 Am. Jur., 636. The rigor of such doctrine has now given way to reason; and it is held that such presumption can be rebutted. It is, nevertheless, as Cardozo, Ch. J. says in *Matter of Findlay,* supra, "one of the strongest and most persuasive known to the law" and "will not fail unless common sense and reason are outraged by a holding that it abides." Proof of the mother's adultery is not in itself sufficient to rebut it. *Grant* v. *Mitchell,* 83 Me., 23, 21 A., 178; *Matter of Findlay,* supra.

In the case now before us it was accordingly necessary for the complainant to prove non-access by her husband. The only evidence of any weight on this point is her own testimony to the effect that she and her husband had not lived together for two years. Without such evidence her case would fall. The respondent objected to its introduction. We think his objection was well taken.

In 1777, Lord Mansfield laid down the rule in England that the testimony of neither husband nor wife could be admitted to show non-access by the husband, if the result would be to bastardize issue born after marriage. "It is," he said, "a rule founded in decency, morality, and policy." *Goodright, ex dem. Stevens* v. *Moss,* Cowp., 591. This doctrine has since been followed in England and by the

vast majority of courts in this country. *The Aylesford Peerage*, 11 A. C., 1; *Russell* v. *Russell*, 1924, A. C., 687; *Kennedy* v. *State*, 117 Ark., 113, 173 S. W., 842; *Wallace* v. *Wallace*, 137 Ia., 37, 114 N. W., 527; *Craven* v. *Selway*, 216 Ia., 505, 246 N. W., 821; *Martin* v. *Stille*, 129 Kan., 19, 281 P., 925; *Scanlon* v. *Walshe*, 81 Md., 118, 31 A., 498; *Haddock* v. *The Boston and Maine Railroad*, 3 All., 298; *Taylor* v. *Whittier*, 240 Mass., 514, 138 N. E., 6; *Rabeke* v. *Baer*, 115 Mich., 328, 73 N. W., 242; *Chamberlain* v. *The People*, 23 N. Y., 85; *Matter of Findlay*, supra; *Boykin* v. *Boykin*, 70 N. C., 262; *Tioga County* v. *South Creek Township*, 75 Pa., 433; *Mink* v. *The State*, 60 Wis., 583, 19 N. W., 445; 7 Am. Jur., 640; 7 C. J., 944; Ann. Cas., 1917 A., 1031, note.

Statutes removing the bar against parties testifying or even those specifically authorizing the mother to testify in bastardy proceedings do not change the rule. The effect of such enactments is merely to make a witness competent, not to let down the bars as to the evidence which may be properly admitted. *Kennedy* v. *State*, supra; *Boykin* v. *Boykin*, supra; *Russell* v. *Russell*, supra.

The rule which we feel must be applied to this case has been criticized by very eminent authority. 4 Wigmore on Evidence, 2 ed., 381, *et seq.* It was, however, promulgated by Lord Mansfield, a very great and an essentially practical judge. It has been followed because it has appealed to the sober common sense of subsequent generations. Cases may be cited, real or suppositious, where it may work a hardship. The question, however, is not what may be the bearing of the rule on a particular problem, but whether by and large the enforcement of it is politic. The application of it prevents many unseemly contests over the legitimacy of children, and tends to keep inviolate those marital confidences, the disclosures of which arouse only disturbing suspicion and prove nothing.

The vital evidence in this case of non-access was objected to, but exceptions were not taken to its introduction. As the rule justifying its exclusion rests on broad grounds of public policy, the court had no right to consider it even though it might technically be in the case. Without it the proof utterly fails.

Exceptions sustained.

DAVID B. EASTMAN ET AL.

APPELLANTS FROM DECREE OF JUDGE OF PROBATE.

Waldo. Opinion, October 9, 1937.

WILLS. WORDS AND PHRASES. PROBATE COURTS.

The term "unsound mind" as used in Chap. 80, *Sec.* 4 *of the Revised Statutes, relates to the ability of the person to transact business; it is such debility or impairment of mentality as deprives the person affected of competency to manage his estate.*

The fact of guardianship, under Chap. 80, *Sec.* 4 *of the Revised Statutes, raises the presumption that some degree or form of mental unsoundness afflicts the ward; but this is rebuttable.*

Although a person of age does not have, as between living persons, the faculty to transact business, he may, nevertheless, have testamentary power and may still be capable of making a will.

There is no statute law, or constitutional provision, which gives an absolute right to trial by jury, in a probate appeal, although the court may, by statute, make up issues of fact and refer them to a jury. The function of a jury in a probate appeal serves only to advise, and the court is not bound to defer to the judgment of the jurors.

The influence of kindness is not undue influence.

Exceptions to rulings excluding evidence, and admitting evidence, detail whereof would promote no serviceable end, are not sustainable.

On motion and exceptions. The Superior Court, sitting as the Supreme Court of Probate, affirmed the decree of the Probate Court, which had allowed the last will and testament of one George Glover. Exceptions overruled. Motion overruled. Case fully appears in the opinion.

William H. Niehoff, for appellants.

James M. Gillin, for appellee.

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

DUNN, C. J. This was the contest of a will, on the alleged grounds that, at the time of the execution of the instrument, its signer, a cousin to the contestants, was incompetent to make it, and that its making and execution were procured through the fraud, deceit and undue influence of the principal beneficiary.

The Superior Court, sitting as the Supreme Court of Probate, affirmed the decree of the Probate Court, which had probated, that is, allowed, the document as and for the last will of the testator, George Glover, late of Knox, deceased.

The will (attested by two gentlemen, lawyers of standing and repute in the profession, and their typist, all of whom, in the trial, gave testimony, as did other persons, for the proponent,) purported to dispose of $100 for the care of the family burial lot, to bestow a legacy of $200 on testator's cousin, Mary Hustus, or, should she predecease testator, on another cousin of his, Jane Jones of name, and to pass the residue to one Myrtle Tucker, a stranger both by blood and marriage, in the following item:

> "Third — And lastly I give, bequeath and devise to my good friend Myrtle Tucker of Knox, who has cared for me so tenderly for some time and with whom I am now boarding, her heirs and assigns forever, all the rest, residue and remainder of my estate real, personal and mixed, wherever situated and however and whenever acquired. . . ."

The will bears date May 6, 1932.

Myrtle Tucker was named sole executrix, and freed from bond in the trust.

When the will was written, the testator was aged seventy-six years. It is fairly inferable that he was a bachelor. He had, ever since babyhood, been nearly blind. He had lived with his mother until her death in January, 1908; after that, he had boarded for a short time with a Mr. Sprague; then he had gone to an aunt, with whom he made his home while she lived. After her decease, and until his own, on January 19, 1937, a period of five years and eleven

months, Mrs. Tucker, (now Farwell,) the beneficiary, cared for him, at an agreed weekly rate, which appears to have been punctually paid.

On December 9, 1931, a guardian was appointed for Mr. Glover. The proceeding was under a statute providing, in the case of an adult person of unsound mind, for such appointment. R. S., Chap. 80, Sec. 4. As used in the statute, the term "unsound mind" relates to the ability of the person to transact business; it is such debility or impairment of mentality as deprives the person affected of competency to manage his estate. "All persons, including those insane or of unsound mind, . . . who, by reason of infirmity or mental incapacity, are incompetent to manage their own estates, or to protect their rights" are the words of the statute. R. S., *supra.*

The fact of guardianship (such appointment having been, as here, on allegation and proof of unsound mind) raises the presumption that some degree or form of mental unsoundness afflicts the ward; but this is rebuttable. *Chandler Will Case,* 102 Me., 72, 66 A., 215.

It is convenient here to notice that, although a person of age does not have, as between living persons, the faculty to transact business, he may, nevertheless, have testamentary power. He may still be capable of making a will. The statute itself so recognizes. R. S. (*supra*) Sec. 29.

On call of the case, contestants' counsel moved, with respect to the questions of unsound mind, undue influence and fraud, the framing of jury issues. The motion, which averred no specific reason, was denied. Exception was allowed, if allowable.

There is no statute law, or constitutional provision, which gives an absolute right to trial by jury, in a probate appeal. It is true, the court may, by statute, make up issues of fact and refer them to a jury, but the parties have no right to demand the trial of any issue by a jury. R. S., Chap. 75, Sec. 36; *Bradstreet* v. *Bradstreet,* 64 Me., 204; *Randall, Appellant,* 99 Me., 396, 59 A., 552.

A jury, if called, serves only to advise; the court is not bound to defer to the judgment of the jurors. Should the judge, in the trial, need assistance as to facts, he may, in his discretion, submit issues to a jury, and obtain the findings of the panel. The verdict of the

jury on such an issue is advisory only. Such is the capacity in which a probate appeal jury functions. *Bradstreet* v. *Bradstreet*, supra; *Randall, Appellant*, supra.

Indeed, in probate, as in equity, (*Redman* v. *Hurley*, 89 Me., 428, 36 A., 906,) the court cannot, by means of a jury verdict, shift its own responsibility respecting the ascertainment, from a disputed factual situation, of the truth. A jury does not figure, ordinarily, in the trial of an admiralty suit. *United States* v. *La Vengeance*, 3 Dall., 297, 1 Law Ed., 610.

It was stressed in argument that discretion may be abused. The answer is that contention that this case was such as to require a jury, is futile. *Cogan* v. *Cogan*, 202 Mass., 58, 88 N. E., 662. No error has been committed.

Exceptions to rulings excluding evidence, and admitting evidence, detail whereof would promote no serviceable end, are not sustainable. Clearly, no ruling did prejudice to any legal right. *Neal* v. *Rendall*, 100 Me., 574, 62 A., 706; *Ross* v. *Reynolds*, 112 Me., 223, 91 A., 952.

This Court sits to determine whether or not there was sufficient evidence (any evidence is the common expression,) to justify the findings and decree of the appellate Probate Court.

The record contains substantial evidence, the effect of which was not counterbalanced, to support the conclusion of the court. There was, in the extended hearing, ample evidence to uphold the finding that, at the time of making his will, George Glover, the testator, had the privilege or right so to dispose of his property; that he was testable. Furthermore, that neither fraud, in the sense of deception, nor that species of constructive fraud called undue influence, was practiced to induce the testator to favor Myrtle Tucker over others; to persuade him to give her not only what might be remaining of his tangible things, but everything of an exchangeable value, every interest in any and every thing left that had been the subject of ownership by him — such fraud was not established.

The will, in the phrase of counsel, is the offspring of the untrammeled mind of the testator. His mind was one age had weakened somewhat, but it yet was, in a legal sense, a sound mind. R. S., Chap. 88, Sec. 1; *Hall* v. *Perry*, 87 Me., 569, 33 A., 160; *Randall*,

Appellant, supra. His mind was proven that of a man of human frailties and imperfections, easy enough to see with retrospective eye; the mind of a man of intelligence, who, in willing his goods and possessions, understood the nature and ambulatory force of his act; there was abundant proof that he knew what he was doing, and did deliberately what he meant to do; he had capability to will.

There was nothing remarkable that Myrtle Tucker should be named devisee and legatee of the residuary estate (around $4000) of the testator. The court could rightfully have found from the testimony that she had, during those years which proved to be the testator's last, when his heirs and next of kin were seemingly manifesting no especial concern for his welfare, been considerate and helpful, to his satisfaction, and, for aught the transcript of the evidence discloses, to the approval of his guardian. The influence of kindness is not undue influence. *Barnes* v. *Barnes*, 66 Me., 286.

The procedure here, that of exceptions to the decree, is commended. *Martin, Appellant*, 133 Me., 422, 179 A., 655.

The motion, consideration of which has not been pressed, to avoid the verdict for transcending evidence, presents the appearance of precaution.

All exceptions are overruled; the motion is overruled.

Exceptions overruled.
Motion overruled.

CLARA E. BOUCHARD

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Penobscot. Opinion, October 11, 1937.

INSURANCE.

The plaintiff, in an action to recover on an insurance policy for double indemnity in accidental death, has the burden of proof to show that death resulted from one or more of the causes enumerated by the terms of the contract as establishing liability of the defendant.

In an action on a policy of insurance stating that death must result, directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means, the plaintiff must prove that the insured met his death solely through external, violent and accidental means.

In a policy of this type, there is no question of proximate cause, but only whether there were two cooperating causes, or only a sole cause.

When the death is attributable directly or indirectly to "disease in any form" not occasioned by the accident, recovery may not be had on the type of policy concerned in this case, even though the accident is the active, efficient, procuring cause.

When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident can not be considered as the sole cause or as the cause independent of all other causes.

On report. Action of assumpsit brought by beneficiary under a policy of insurance to recover additional indemnity on account of accidental death of the insured. Judgment for defendant. Case fully apears in the opinion.

Stanley Needham,

John Needham, for plaintiff.

James E. Mitchell, for defendant.

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

HUDSON, J. On report. The plaintiff, widow of the insured, J. Peter Bouchard, and beneficiary under a policy of insurance issued to him by the defendant company on November 5, 1926, sues in assumpsit to recover additional indemnity on account of his alleged accidental death.

The facts, undisputed, may be stated briefly. Mr. Bouchard ran a restaurant in Orono. One Burton, somewhat under the influence of liquor and making some disturbance while therein, he gently ejected. An altercation followed just outside the door. Blows were exchanged. The proprietor returned to the restaurant very pale, in pain, and physically exhausted. Taken almost immediately to a doctor's office, he died in the waiting room before receiving treatment.

The burden of proof is upon the plaintiff to show that the death resulted from one or more of the causes enumerated by the terms of the contract as establishing liability of the defendant. *Leland* v. *Order of United Commercial Travelers of America*, 233 Mass., 558, 565, 124 N. E., 517, 520.

The pertinent language of the policy provides for payment of additional indemnity "upon receipt of due proof that the death of the insured occurred . . . as a result, directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means, . . ."; and denies it, if death results "directly or indirectly from bodily or mental infirmity or disease in any form."

The language quoted constituted the promise of the defendant. It must do what it promised to do and no more.

Liability is denied on two grounds; the first contention being, that the death did not occur as a result of bodily injuries effected through accidental means; and the second, that if so, it did not occur as a result, directly and independently of all other causes, of bodily injuries effected *solely* through accidental means.

The first contention need not be considered, for assuming without deciding that the death was due to accidental means, the sustaining of the second, as we must, defeats recovery.

The defendant introduced no evidence, satisfied to have the case determined upon the plaintiff's testimony. Two reputable physi-

cians, one an acknowledged expert and the other a general practitioner, both having participated in an autopsy performed the day following the death, testified as to its cause. The expert (and with him the general practitioner agreed) said that it was due to "cardiac failure — heart failure; congestive heart failure . . . brought on by a combination of causes . . . ." The autopsy disclosed fatty degeneration of the heart and an advanced case of arteriosclerosis, the coronary arteries being badly sclerosed with some calcareous deposits. In answer to the question, whether "the death was brought about by the sudden strenuous exertion on top of the weakened heart condition," the doctor replied: "Yes, sir. That is my opinion." He said: "It needed the extra exertion and extra load and excitement too; *it took the combination of the two to produce the results.*" He explained: "The heart is called upon to do more work than it was capable of doing, that is, due to a diseased condition. First, the circulatory system slows down. . . . Of course, when it slows down, one side of the heart carries blood through the body and the other side carries the blood through the lungs; if the left side of the heart, which carries the blood through the body, can not carry on that function and take the blood from the lungs, the blood backs up in the lungs and you get practically a drowning in their own blood, so to speak; the lungs just fill right up. . . . As soon as the circulation slows down, clots are likely to form; clots usually form; and clots were found in both sides of this man's heart."

Suffocation took place because the heart, due to disease, was unable to function properly. Its condition alone probably would not have caused his death on that day, nor would the blows alone, but both acting in concert killed him. The plaintiff's own witnesses so testified and there was no evidence to the contrary. The contract expressly denied liability for a death so caused, though accidental.

It is argued by plaintiff's counsel that the encounter was the proximate cause; but in this action, founded on this specific promise, it is not a question what was the proximate cause of the deceased's death. The contract itself clearly creates liability only when the death results from bodily injuries effected *solely* through accidental means.

Quite true it is that very often different forces and conditions

concur in producing a result and that it is not necessary to go farther back in the line of causation than to find the active, efficient, procuring cause known in law as the proximate cause. In the instant case, the blows might well be said to be the proximate cause; but, nevertheless, that does not permit recovery under the language of this policy, that cause, although proximate, being accompanied by another contributing cause, the diseased heart.

In *Commercial Traveler's Mutual Accident Assn. of America* v. *Fulton*, 79 Fed., 423, 430, the court said:

> "As was said before, under this policy, and upon the facts in proof, there was no question of proximate or remote cause, but only whether there were two co-operating causes, or only a sole cause." Also see *Crandall* v. *Continental Casualty Co.*, 179 Ill., App. 330, 345.

To the same effect is *Carr* v. *Pacific Mutual Life Ins. Co.*, 100 Mo., App. 602, 75 S. W., 180, 182, in which the court said:

> "But the question presented under the terms of the policy is not whether the plaintiff's sickness was the proximate and immediate cause of his injury, but whether the injury was directly or indirectly caused by his disease. . . . It is contended by the respondent that such a construction would practically nullify an accident policy, besides being contrary to all reason. There is some force in this position but what are the courts to do in such cases? We can only construe the contract as we find it. The parties had a right to so contract, as there is no law prohibiting such, and it does not appear to be *ultra vires*. Until the Legislature places a limit upon the right of life insurance companies to make contracts limiting their liability to the minimum the courts are bound to recognize them as they find them."

So when the death is attributable directly or indirectly to "disease in any form" not occasioned by the accident, recovery may not be had on a policy containing this particular promise, even though the accident is the active, efficient, procuring cause.

McGlinchey et al. v. *Fidelity and Casualty Co.*, 80 Me., 251, 14 A., 13, is relied upon, but it is clearly inapplicable, for it does not appear therein that there was any pre-existing disease that in combination with the accident caused the death. Again, while the policy in that case stipulated that it must be proved that the death was caused "by bodily injuries effected through external, violent and accidental means" it did not contain the very limitative language of this policy, viz., "directly and independently of all other causes of bodily injuries, effected *solely* through . . . accidental means" and the additional words in the proviso, viz., "directly or indirectly from bodily or mental infirmity or *disease in any form.*"

The other Maine case cited by plaintiff's counsel, *Thompson* v. *Columbian National Life Insurance Co.*, 114 Me., 1, 95 A., 229, likewise is distinguishable, for in it the accident was the cause of the disease that resulted in death.

We have found no apt Maine decision, but other courts, both State and Federal, have dealt with the point in issue. In *Leland* v. *United Commercial Travelers of America*, supra, Chief Justice Rugg, having cited the case of *Freeman* v. *Mercantile Mutual Accident Assn.*, 156 Mass., 351, 30 N. E., 1013, and other cases, said:

> "The application of that principle of law to the case at bar is that, if the injured was suffering from a disease, which was accelerated and aggravated by the accident so as to be a cause cooperating with it to produce the fatal end, then there can be no recovery."

It was there held that there could be no recovery because the deceased was suffering from disease which actively cooperated with the fall in causing the death.

In *Stanton* v. *Travelers' Insurance Co.*, 83 Conn., 708, 78 A., 317, the Connecticut court stated:

> ". . . The consensus of opinion is that, if an injury and an existing bodily disease or infirmity concur and cooperate to that end, no liability exists. If, however, the disease results from the injury, the company is liable, though both cooperate in causing the death. . . . And even in cases where the insured is afflicted at the time of the accident with some bodily disease,

if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability will exist."

Also see *Thomas* v. *Fidelity and Casualty Co. of New York*, 106 Md., 299, 67 A., 259; *Modern Woodmen Accident Assn.* v. *Shryock*, 54 Neb., 250, 74 N. W., 607; *Preferred Accident Insurance Co.* v. *Patterson*, 213 Fed., 595; *Runyon* v. *Commonwealth Casualty Co.*, 109 N. J. Law., 238, 160 A., 402; *Phillips* v. *Travelers' Insurance Co. of Hartford, Conn.*, 288 Mo., 175, 231 S. W., 947; *Vernon* v. *Iowa State Traveling Men's Assn.*, 158 Iowa, 597, 138 N. W., 696; *Fetter et al.* v. *Fidelity and Casualty Co. of New York*, 174 Mo., 256, 73 S. W., 592.

Penn v. *Standard Life Insurance Co.*, 160 S. C., 399, 76 S. E., 262, is a leading case. The Court deduces from the decided cases three rules, viz:

1. "When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death."

2. "When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause."

3. "When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident can not be considered as the sole cause or as the cause independent of all other causes."

The case at bar comes clearly within the third rule.

The insured contracted for a limited coverage. The plaintiff's claim is not within it.

Liability not having been established, the entry, as stipulated in the report, must be,

Judgment for defendant.

SOPHIA M. CHAVARIE ET AL.

vs.

FREDERICK ROBIE, SECRETARY OF STATE ET AL.

Penobscot. Opinion, October 12, 1937.

CERTIORARI. PLEADING AND PRACTICE.

Petitioner in certiorari must allege, and establish to the satisfaction of the court to which the application is made, that substantial justice demands that the writ should issue.

Allegation in certiorari must show that the record, a review of which is asked, is necessarily inaccurate.

Consideration can only be given, on certiorari, to such errors or defects as appear on the face of the record of the tribunal below.

On exceptions. Certiorari to quash so much of the record of the election hearing in the Town of Hermon on September 14, 1936, as relates to the vote on the local option question of licensing the sale of malt liquor under P. L. 1935, Chap. 157. Respondents filed demurrers. Demurrers adjudged good. Petitioners excepted. Exceptions overruled. Case fully appears in the opinion.

Ross St. Germain, for petitioners.

Fellows & Fellows,

Mayo & Snare,

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

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

DUNN, C. J. This was a petition by two persons, alleging themselves property owners, taxpayers, and voters in Hermon, for certiorari to quash so much of the record of the election held in that town on September 14, 1936, as relates to the vote on the local

option question of licensing the sale of malt liquor. P. L. 1935, Chap. 157.

The petitioners claim that, notwithstanding the conduct of election officials had invalidated two absentee ballots, such ballots were, nevertheless, intentionally received, were erroneously included in the count of votes, and find reflection in the return of the election, showing its result "No," when it was, and should be "Yes."

The respondents, one the Secretary of State, the other the clerk of the town, each for himself, demurred to the petition.

As causes for demurrer, want of essential allegations, specifically relative to the record sought to be quashed, a failure to aver particular errors or irregularities, unavoidably inexact, as well as the omission from the petition of a copy of the record, or some sufficient reason therefor, were assigned.

Both demurrers were adjudged good. The case is forward on exceptions.

Certiorari is a common-law writ, but provided for by statute. R. S., Chap. 116, Sec. 13.

The petitioner in certiorari must allege, and establish to the satisfaction of the court to which the application is made, that substantial justice demands that the writ should issue.

Allegation must show that the record, a review of which is asked, is necessarily inaccurate. This is because, if the writ is granted, the court must determine, upon the record, whether or not the proceedings of the subordinate tribunal or officer, exercising judicial powers or functions, are legal and regular. On certiorari, the object of which is only to bring up the record, such errors or defects alone as appear on the face of such record can be considered. *Ross* v. *Ellsworth*, 49 Me., 417; *Emery* v. *Brann*, 67 Me., 39; *Hewett* v. *County Commissioners*, 85 Me., 308, 27 A., 179; *Stevens* v. *County Commissioners*, 97 Me., 121, 53 A., 985; *Rogers* v. *Brown*, 134 Me., 88, 181 A., 667; *Jellerson* v. *Board of Police*, 134 Me., 443, 187 A., 713.

Entry of the exceptions availed nothing.

Exceptions overruled.

IRA JEFFERY *vs.* J. FRED SHEEHAN.

Penobscot. Opinion, October 12, 1937.

TROVER. PLEADING AND PRACTICE.

Measure of damages in actions of conversion is the value of the property at the time of conversion, with interest.

Right of immediate possession and possession in law of an automobile held by a bailee or agent remains in a conditional purchaser, as bailor.

An admission may occur in a declaration in a writ as well as in the plea or answer.

Defendant is not precluded from insisting upon an admission in the declaration by disputing its correctness.

On motion and exceptions. Action of trover tried before a jury. Verdict for the plaintiff in the sum of $568.90. Defendant filed exceptions and motion for new trial. Exceptions overruled. If, within twenty days, plaintiff files remittitur, and agrees that verdict shall be for but $500.00, motion overruled; otherwise, motion sustained; new trial granted. Case fully appears in the opinion.

Albert C. Blanchard, for plaintiff.

John M. Needham, for defendant.

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

DUNN, C. J. On jury trial of this trover case, the determining factor was whether or not the automobile that the defendant, a deputy sheriff, attached and took away, was then in the legal possession of the plaintiff. The attachment was made on December 11, 1936, at Bangor, on a writ sued out by one corporation against another corporation, both retail dealers in motor vehicles. The con-

cern latest of mention may sometimes hereinafter be called merely "corporation" or "seller."

Testimony was introduced that the automobile was, on October 14, 1936, following its demonstration, sold, under a conditional sale contract, by the corporation to the plaintiff, and that actual though perhaps not manual delivery was made. On the completion of the writings, the seller's representative standing near the automobile, said to the buyer: "The car is yours." Thereupon, (still rehearsing testimony,) the buyer entrusted the automobile for storage until springtime, to the seller, or to the president of that corporation, individually. The vehicle was removed from the showrooms, where, following the tryout, it had been returned, to the garage of the bailee, on another street.

The buyer, it was testified, never breached his right to control and use the automobile, pending performance of the purchase contract.

Whether or not this automobile and the one attached were the same was a deciding element, also.

Want of delivery, effectual as against attaching creditors, was the question concerning which evidence, pro and con, was first directed. If delivery, contention was that the conditional sale automobile and the attached automobile were not identical.

The trial resulted in a general verdict for plaintiff, the award of damages being $568.90. The measure of damages in such cases is the value of the property at the time of its conversion, with interest. *Brown* v. *Haynes*, 52 Me., 578; *Bradley Land, etc., Company* v. *Eastern Manufacturing Company*, 104 Me., 203, 71 A., 710. Interest is allowable. *Brown* v. *Haynes*, supra; *Wing* v. *Millikin*, 91 Me., 387, 40 A., 138.

Exceptions noted by defendant, to the exclusion of evidence, to the admission of evidence, and, at the close of all the evidence, to denial of motion for direction of a verdict, were allowed.

Exceptions, aside from the last, of which more presently, have been argued for and against.

There has been, too, argument of a motion to set aside the verdict, and grant a new trial, the alleged grounds being that the conclusion

of the jury is against evidence and contrary to law, and the damages excessive.

Exception to refusal to direct a verdict, and the new trial motion depend upon like basic propositions. The motion presents what the exception, had it been argued, would have presented, and vice versa.

Of the exceptions argued, none is shown or perceived to be prejudicial to the rights of the excepter. *Neal* v. *Rendall*, 100 Me., 574, 62 A., 706; *Ross* v. *Reynolds*, 112 Me., 223, 91 A., 952.

With regard to liability, plaintiff fairly sustained the burden of proof.

The jury appears to have found, not unreasonably, by way of predicate for the decision of the issues between the parties, on the evidence adduced, formal delivery, in good faith, under the conditional sale contract, of the particular automobile, to the buyer, almost two months before the attachment; and that, and solely for his own benefit, the buyer gave the automobile into the custody of the corporation or its officer, as bailee or agent.

The bailee had the automobile only for the purpose of storing it.

Although the bailee or agent had the physical thing itself, possession, not in deed or in fact, but legal possession, the right to immediate possession, possession in law, of the automobile, remained in the conditional purchaser, as bailor. *Goodwin* v. *Goodwin*, 90 Me., 23, 37 A., 352; *Bridgham* v. *Hinds*, 120 Me., 444, 115 A., 197; *Amey* v. *Augusta Lumber Company*, 128 Me., 472, 478, 148 A., 687.

The weight, credit and value of the aggregate evidence on either side was for the triers of fact. They accepted plaintiff's version. Thus far, the verdict is validly rested.

But, the award of damages is more than plaintiff, on his own assertion, may recover.

The declaration in the writ averred the automobile to be of great value, that is to say, the value of five hundred dollars. An admission may occur in the declaration as well as in the plea or answer. *White* v. *Smith*, 46 N. Y., 418. The defendant is not precluded from insisting upon the admission, by disputing its correctness. *White* v. *Smith*, supra.

The plaintiff may, within twenty days of the filing of the rescript, exercise the option which is hereby given him, to reduce the amount of the verdict to $500.00, and to agree that the verdict shall stand for the residue; otherwise, defendant's motion will be sustained.

Exceptions overruled. If, within twenty days, plaintiff files remittitur, and agrees that verdict shall be for but $500.00, *motion overruled; otherwise motion sustained; new trial granted.*

JAMES E. HOGAN, APPELLANT.

FROM DECREES OF JUDGE OF PROBATE IN RE PATRICK T. HOGAN.
(2 cases)

Cumberland. Opinion, October 15, 1937.

GUARDIAN AND WARD. CONSERVATOR.

Appointment of a conservator, as well as that of a guardian, is within the discretionary power of the Probate Court.

Either guardian or conservator may be appointed for an adult person of a sound mind but unfitted or incompetent to manage his own estate by reason of infirmities of age or physical disability, and if such a person has sufficient mental capacity to understand the nature and consequences of his application, his wishes, if conducive to his welfare, may properly be given great weight in determining which appointment is to be made.

In bearing on the issue of the sanity of a person, his conversations, delarations, claims and acts are admissible as evidence of the real state of his mind but they are not taken as evidence of the truth of the matter stated, but only as bearing on his mental condition.

Exclusion of the testimony of the ward in the Probate Court, when read in its

entirety, tended to support rather than refute the finding that the man was of sound mind and, therefore, was not prejudicial.

Sufficiency of proof can not be reviewed on exception.

On exceptions. These cases involve petitions for the appointment of a conservator of the estate of Patrick T. Hogan and the guardianship of Patrick T. Hogan. Cases were tried in the Probate Court for the County of Cumberland. Petition for conservatorship was granted. Petition for guardianship was denied. On appeal, the decrees below were affirmed. Cases came forward on exceptions reserved in the Supreme Court of Probate. The entry in each case is exception overruled. Cases fully appear in the opinion.

Henry C. Sullivan,

John M. Curley, for appellant.

Joseph E. F. Connolly, for appellee.

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

STURGIS, J. At a term of the Probate Court held in and for Cumberland County, the petition of Patrick T. Hogan for the appointment of a conservator of his estate was granted and the petition of his brother James E. Hogan that he be placed under guardianship was denied. On appeal, the decrees below were affirmed. The cases come forward on exceptions reserved in the Supreme Court of Probate.

The bill of exceptions shows that Patrick T. Hogan, an elderly man of somewhat limited mental capacity, having inherited about fifty thousand dollars from an older brother recently deceased, deems himself unfitted by reason of infirmities of age and physical disability to manage his estate with prudence and understanding and petitions for the appointment of a highly respected and eminent member of the local bar as his conservator. No question is raised as to the ability and integrity of the conservator selected or his fitness for the performance of the duties imposed upon him. The claim of the appellant is that the petitioner is of unsound mind, incompetent to make application in his own behalf for a conserva-

tor, and a proper subject only for guardianship. The ward, as for convenience we may term Patrick T. Hogan, denies the charge of insanity and incompetency made by his brother and objects to the appointment of a guardian.

The transcript of evidence taken out in the Supreme Court of Probate shows that the ward is and always has been a person of less than average intellect, illiterate, never particularly industrious and not always sober. Through life he has been more or less cared for and dominated by his older brothers, has never had substantial sums of money at his disposal, and is without business experience. He is now about eighty years of age and is suffering from hardening of the arteries, eczema and incurable psoriasis. It is the opinion of a specialist in mental diseases that he is weak-minded but not of unsound mind. The Superintendent of the Augusta State Hospital, a psychiatrist of note, after a most careful and extended examination of the ward, relates in detail the many questions asked and answers given and is positive in his opinion that the man is not insane but his normal mental faculties are slowed up and diminished by his senility. The testimony of the ward, who was carefully examined and cross-examined by opposing counsel, tends to confirm the conclusions reached by these experts.

Upon this state of facts, the question of whether a guardian or a conservator should be appointed for Patrick T. Hogan was addressed to the sound judgment and discretion of the Justice presiding in the Supreme Court of Probate. The welfare of the ward was the controlling consideration. The discretionary power of the Probate Court in the matter of the appointment of a guardian is well settled. *Fickett, Appellant*, 125 Me., 430, 134 A., 544; *Dunlap, Appellant*, 100 Me., 397, 61 A., 704. No different rule can apply when the appointment of a conservator is sought, as the proceeding is but a voluntary application for a guardian with limited powers, dignified under the law by another name.

If the Justice below had deemed it for the best interests of the ward, he could have appointed a guardian for him on his brother's petition. The statute now in force authorizes the appointment of guardians for "all persons, including those insane or of unsound mind, and married women, who, by reason of infirmity or mental in-

capacity, are incompetent to manage their own estates or to protect their rights." R. S., Chap. 80, Sec. 4. There is abundant proof in this record that Patrick T. Hogan, although neither insane nor of unsound mind, was by reason of infirmity and some mental incapacity incompetent to manage his own estate.

We are convinced, however, that it was a proper exercise of discretion to allow the ward to have a conservator. This permitted him to obtain competent assistance in the management of his estate without sacrificing either his independence or self-respect. It carried no imputation of unsound mind or surrender of his continued control of his own person, against which he protested throughout the entire proceedings. The appointment of a conservator is authorized "whenever any person shall deem himself unfitted, by reason of infirmities of age or physical disability, to manage his estate with prudence and understanding." R. S., Chap. 80, Sec. 9. The conservator, so appointed is required to give bond, and all provisions of law relating to the management of estates of adult persons under guardianship apply. There can be no doubt that either a guardian or a conservator may be appointed for an adult person of sound mind but unfitted or incompetent to manage his own estate by reason of infirmities of age or physical disability. If such a person has sufficient mental capacity to understand the nature and consequences of his application for a conservator, his wishes, if conducive to his welfare and particularly his contentment of mind, may properly be given great weight in determining which appointment is to be made. The decision of the Justice below that Patrick T. Hogan was mentally competent to make application for a conservator has abundant support in the evidence. So, too, with the finding that he is unfitted to manage his estate by reason of infirmities of age and physical disability. The psychiatrist testifies that senility slows up or causes a loss of acquired knowledge and experience, and diminishes the capacity of the mind, and that eighty, this man's age, is well along in the senile period. Hardening of the arteries, as found by his family physician, indicates mental and physical infirmity directly attributable to old age. That physical degeneration, complicated as it is here by skin afflictions producing open running sores on the legs, of necessity disables the man to some degree. The

appellant's claim that old age and disease have not impaired Patrick T. Hogan's normal mind and body must be rejected. His present condition of infirmity and disability can, on this record, be attributed to the ravages of senility and disease upon a once sound body but a weak mind.

In support of his petition for the appointment of a guardian, the appellant in the Supreme Court of Probate offered a certified transcript of the testimony of Patrick T. Hogan given at the original hearing in the Probate Court as bearing upon his sanity, and it was excluded. The reasons for the ruling are not indicated. Exception to it is the only error alleged in the bill of exceptions filed in that proceeding. Although technically the evidence seems to be admissible, we are not convinced that its exclusion was prejudicial.

The general rule is well settled that whenever the sanity of a person is in issue, his conversations, declarations, claims and acts are admissible and the most satisfactory evidence of the real state of his mind. They are not taken as evidence of truth of the matter stated, but only as bearing upon his mental condition. 1 Wigmore on Evidence, Sec. 228 and cases cited. See also *Robinson* v. *Adams*, 62 Me., 369, 413; *Wilkinson* v. *Service*, 249 Ill., 146, 94 N. E., 50; *Lane* v. *Moore*, 151 Mass., 87, 89, 23 N. E., 828. The rule is applied in a very similar case to that at bar in *Cogan* v. *Cogan*, 202 Mass., 58, 88 N. E., 662. There, in a proceeding for the appointment of a guardian for an alleged insane person, evidence of what he had testified to at the hearing in the Probate Court was held admissible on appeal as bearing upon the question of his insanity although he was present, called as a witness and testified as such.

The testimony of the ward in the Probate Court is brought forward and is here for examination. Read in its entirety, it tends to support rather than refute the finding that the man was of sound mind. We find no ground upon which it can be held that its rejection was prejudicial.

Although the appellant in his bill of exceptions in the conservatorship proceeding recites several contentions made in the Supreme Court of Probate, the single exception perfected is

> "to the finding of the presiding Justice that Patrick T. Hogan was a person who was unfitted, by reason of infirmities of

age and/or physical disability, to manage his estate with prudence and understanding.*"

The finding on that issue, as already stated, is supported by the evidence. The sufficiency of the proof can not be reviewed on exception. *McKenzie* v. *Farnum*, 123 Me., 152, 122 A., 186.

The entry in each case is

Exception overruled.

WILLETTE'S CASE.

Kennebec. Opinion, October 15, 1937.

WORKMEN'S COMPENSATION ACT.

In order to recover compensation for injury under Workmen's Compensation Act employee must show injury arose out of and was also received in the course of his employment.

Injury "arises out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

Injury is received "in the course of" employment when it comes while the workman is doing the duty which he is employed to perform.

An employee acting outside the scope of his employment, and engaged in activity not in any sense incidental to his employment can not recover for injuries sustained.

On appeal. This is an appeal by employer from affirmation of commissioner's decree awarding compensation to one Gilbert Willette, employee. Appeal sustained. Affirmatory decree reversed. Case fully appears in the opinion.

F. Harold Dubord, for employee.

Perkins & Weeks, for employer.

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

BARNES, J. This is a proceeding under the Workmen's Compensation Act to recover compensation for wages lost by reason of an accident to petitioner, an employee of defendant company, which occurred on June 8, 1933, in the woodroom of its pulp or paper mill.

Petitioner had worked for this employer for about thirty years, and when injured was employed as the woodroom cleaner or sweeper.

He suffered a trifling wound of the left arm, in law the direct cause of a grievous illness, when he tilted a truck, bearing a heavy, circular, wood saw, the saw rolling toward the rear of the truck, past the point where a pin, had it been securely in place, should have stopped the rolling, petitioner interposing his arm to stop the saw.

The commissioner decreed, and the court below affirmed an order awarding compensation.

Employer brings this appeal with principal defense that the injury complained of did not arise out of and in the course of petitioner's employment.

Before our compensation law was enacted, for the Court of Massachusetts, Chief Justice Rugg, in an opinion followed in many jurisdictions, expressed what we hold to be the solution of a perplexing question in a case such as this. He wrote,

> "The first question is whether the deceased received an 'injury arising out of and in the course of his employment,' within the meaning of those words in part 2, Sec.1, of the act. In order that compensation may be due the injury must both arise out of and also be received in the course of the employment. Neither alone is enough."

> "It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act, and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty

which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been forseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *Re McNicol et al.*, 215 Mass., 497, 102 N. E., 697, L. R. A., 1916 A., 306.

Our Court, in numerous decisions, has acted upon like reasoning, among the decisions are: *Westman's Case*, 118 Me., 133, 106 A., 532; *Saucier's Case*, 122 Me., 325, 119 A., 860; *Taylor's Case*, 126 Me., 450, 139 A., 478; *Gooch's Case*, 128 Me., 86, 145 A., 737; *Sullivan's Case*, 128 Me., 353, 147 A., 431.

The commissioner found, as matter of fact, that petitioner's "work was, a cleaner in the woodroom." The record shows, beyond question, that he contracted and was employed to perform no other duties than that of a cleaner, or sweeper; that it was not his duty to approach, manipulate, or have anything to do with saws or the apparatus in which they were moved from room to room in the mill.

If the report makes it apparent to the rational mind that petitioner was engaged in activities beyond the scope of his employment when he received the accidental injury, no consideration of emergency being involved, it is error of law upon the part of the com-

missioner to hold his employer subject to pay compensation for injury suffered by petitioner when so engaged.

Let us look at the facts developed in the hearings before the commissioner.

In the room beyond the woodroom, on one side, pulp wood was cut into required lengths by circular saws.

On the other side was the filer's room, where saws were sharpened.

It was the filer's duty, and no part of the work of the petitioner, to remove a saw from the room where it had been in use to the filing room and to return it to the sawyer, on each trip passing, with the saw, through the woodroom.

A truck was furnished the filer, to convey the saws through the woodroom.

The accident occurred just before twelve o'clock, when operation of this part of the mill would be suspended, for lunch.

The filer came into the woodroom with a saw on a new truck, and left the truck standing in the room.

The truck had two wheels, to carry the load, and another wheel at its front.

The handles by which it was propelled were at the rear of the truck, and the saw, in this case about three and a half feet in diameter, when rolled onto the truck could be secured by a pin through the rear of the frame.

It was the duty of the filer to load the truck and to adjust a wooden pin at the rear of the saw so that it might not roll out rearward.

So standing on the floor the truck was approached by the petitioner, who testified it was no part of his work to handle the saws, and that the truck was not in his way. He testified that he spoke to the filer, before the latter stopped the truck, and said to him that there were no nuts on the bolts that held the forward wheel, and that the filer replied, "All right. We will put some on this afternoon."

He testified that he moved the truck a little, "moved it to see how it went." "I wanted to show him in pushing it like that that it might fall to pieces."

He said, "The pin was out. The saw came towards me. I put my

(left) arm there to hold it," and his arm was punctured or lacerated by the saw.

Through the portal thus opened infection entered.

Such in fact is the history of this case.

The issues are but two as stated with entire frankness by counsel for the petitioner:

First, did he, while in the employ of the company, suffer an accident?

Second, did the accident arise out of and in the course of his employment?

The accidental prick of the saw, had it been received in the course of Willette's employment, would have justified the commissioner in awarding compensation.

But it does not appear that the accident arose while claimant was operating in the course of his employment.

If so, the commissioner made error of law in awarding compensation.

Claimant urges that he acted under impulse raised by emergency which threatened loss to his employer, or injury to a fellow employee.

We find no emergency existent.

If the absence of nuts from bolts in the forward end of the truck contributed to the happening of the accident, the record shows that the loaded truck entered the woodroom propelled by and literally in the hands of the only employee intrusted with the moving of saws from room to room; that when notified by claimant of a defect in the truck, the saw filer replied, "All right, we'll put some on this afternoon."

Nothing within the course of petitioner's employment required his further interest in the condition of the truck. Whatever the cause prompting him to demonstrate the possible result of moving the truck, when he "pushed it a little," he was an interferer, a mere volunteer, acting outside the scope of his employment, and engaged in activity not in any sense incidental to his employment.

A few of the decided cases in other states holding to this effect are: *Spooner* v. *Detroit Saturday Night Co.*, 187 Mich., 125, 153 N. W., 657; *Central Garage* v. *Industrial Com.*, 286 Ill., 291, 121

N. E., 587; *Great A. & P. Tea Co.* v. *Ind. Commission*, 347 Ill., 596, 180 N. E., 460, 83 A. L. R., 1208; *Eugene Dietzen Co.* v. *Ind. Board*, 279 Ill., 11, 116 N. E., 684; *Michael* v. *Henry et al.*, 209 Pa., 213, 58 A., 125; *Mann* v. *Glastonbury Knitting Co.*, 90 Conn., 116, 96 A., 368; *Utah Copper Co.* v. *Ind. Com.*, 62 Utah, 33, 217 P., 1105; *Re John Borin* v. *Am. Mut. Liability Ins. Co.*, 227 Mass., 452, 116 N. E., 817, L. R. A., 1918 A., 217; *Stagg* v. *Western Tea & Spice Co.*, 169 Mo., 489, 69 S. W., 391, where a floor cleaner left his work, began to operate a bolting saw and was injured; *Bullard* v. *Cullman Heading Co.*, 220 Ala., 143, 124 So., 200, distinguishing *Ex parte Majestic Coal Co.*, cited by complainant.

We have carefully considered the cases cited by petitioner's counsel, but in each of them have found that the work upon which the employee was engaged at the time of the accident was by him entered upon in an emergency, to prevent injury to persons from employer's machines, such as to facilitate the employer's business and the performance of his own work, or was clearly incidental thereto.

Perhaps the Maine case most nearly like this at bar is *Sullivan's Case*, 128 Me., 353, 147 A., 431. This opinion and our decisions cited therein give our view of the law under the circumstances of those cases, and it is against recovery.

Always should be borne in mind the position of this Court, announced in *White* v. *Eastern Manufacturing Co. et al.*, 120 Me., 62, 69, 112 A., 841: "The employer has rights as well as the employed. Their rights stand upon an equality in the eye of the law. Perversion of the law, either to benefit the employee or protect the employer, has the tendency only to bring the law into contempt."

Appeal sustained.
Affirmatory decree reversed.

PERCY Y. FOGG *vs.* TWIN TOWN CHEVROLET, INC.

Oxford. Opinion, November 2, 1937.

MORTGAGES. FORECLOSURE.

Mortgagor, at common law, had no estate after breach, the right of redemption was created by chancery.

Respecting real estate foreclosures, Sec. 15 *of Chap.* 104, *R. S.* 1930, *provides for an accounting and redemption, while Section* 16 *of the same chapter regulates redemption when the amount due on the mortgage has been paid or actually tendered.*

The fact that a year's period of redemption is concluded on Sunday does not extend the one year period of redemption.

If plaintiff, under Sec. 15 *of Chap.* 104, *R. S.* 1930, *providing for an accounting and redemption, makes a demand for an accounting and the defendant unreasonably refuses or neglects to render such account in writing, plaintiff's bill would then be maintainable within the year without tender; and if the defendant designedly prevented the plaintiff from making a demand he would not be permitted to say that there had been no demand for an accounting.*

A previous demand by plaintiff's predecessor in title does not enure to the benefit of the plaintiff.

On appeal. Defendant appeals from decision by single Justice on a bill in equity brought to redeem from foreclosure of mortgage of real estate. Appeal sustained. Decree below reversed. Case fully appears in the opinion.

Seth May, for plaintiff.

Clifford & Clifford, for defendant.

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

HUDSON, J. The defendant appeals from a decision by a single Justice on a bill in equity brought to redeem from foreclosure of mortgage certain real estate in the Town of Norway. On March 15, 1928, the mortgage was given by the then owners, Stone and Mc-

Daniels, to the Norway National Bank, assigned by it on July 21, 1931, to the Casco Mercantile Trust Company of Portland, and by the latter to the defendant on October 8, 1935. The Casco Mercantile Trust Company had started foreclosure proceedings in which the date of the first publication of notice was August 9, 1935.

On April 24, 1934, McDaniels deeded his half interest in the equity to Stone, who conveyed to the plaintiff on August 8, 1936.

The right to redeem mortgaged real estate appears in two sections of our statutes, viz., 15 and 16 of Chapter 104, R. S. 1930. At common law, the mortgagor had no estate after breach. The right to redeem was created by chancery. *Wilkins* v. *French et al.*, 20 Me., 111, 116; *Kennebec & Portland Railroad Company* v. *Portland & Kennebec Railroad Company*, 59 Me., 9, 28, *et seq.* Our present statutes were first enacted in 1837. Chapter 286, P. L. 1837. The redemptioner must bring himself within them. *Brown* v. *Snell*, 46 Me., 490, 496. The bill must be brought in accordance therewith. *Wing* v. *Ayer et al.*, 53 Me., 138, 142. It "will not be entertained by this Court without full compliance on the part of the plaintiff with these statutory prerequisites." *Doe* v. *Littlefield*, 99 Me., 317, 318, 59 A., 438; *Munro* v. *Barton*, 95 Me., 262, 264, 49 A., 1069.

In general, Section 15 provides for an accounting and redemption, while Section 16 for redemption when the amount due on the mortgage has been paid or actually tendered. *Sweeney* v. *Shaw*, 134 Me., 475, 188 A., 211.

The plaintiff brought this bill under Section 15. Thereby it is provided that such a bill may be brought "in equity for the redemption of the mortgaged premises within the time limited in Section seven . . . ." Section 7 permits redemption of "mortgaged premises within one year after the first publication . . ." of the notice of foreclosure and then states "and if not so redeemed, his right of redemption is forever foreclosed." As already stated, the first publication of this notice was on August 9, 1935, and consequently the one year for redemption expired on August 9, 1936 (this bill was not brought until August 10, 1936), unless, as claimed by the plaintiff, the fact that the last day of the year for redemption was a Sunday extended the time one day. If so, the bill was brought timely; otherwise, not.

In *Oakland Manufacturing Company* v. *David Lemieux and Land and Buildings*, 98 Me., 488, 57 A., 795, it was held that when the last day of the ninety (in which to commence an action to enforce a lien upon land and buildings for materials furnished) falls upon Sunday, an attachment upon the following Monday is not seasonably made. The Court cited *Aldermen* v. *Phelps*, 15 Mass., 225 (decided when Maine was a part of the Commonwealth of Massachusetts and so now having the force of decision in this state) and quoted this language from it:

> "The statute has limited the lien formed by the attachment on mesne process to thirty days from the rendering of the judgment. It is not for this Court to extend the term; nor do we see any reason why the last day of the thirty should be excluded because it happens to be Sunday, rather than any or all of the Sundays during the time limit."

It also cited *Haley* v. *Young*, 134 Mass., 364, in which it was held that if the last day of the three years limited by the statute for the redemption of land from a mortgage falls on Sunday, a tender of the amount due upon the mortgage upon the following day is too late. *Haley* v. *Young*, supra, was approved in *Stevenson* v. *Donnelly*, 221 Mass., 161, 163, 108 N. E., 926, and remained law in Massachusetts until abrogated by statute. Mass. G. L., c. 4, Sec. 9; *Grant* v. *Pizzano*, 264 Mass., 475, 477, 163 N. E., 162. Our Court in *Oakland Manufacturing Company* v. *Lemieux and Land and Buildings*, supra (see page 490), said:

> "We are satisfied with the rule laid down in these cases. When a statute requires an act to be done within a certain number of days which must include one or more Sundays, if the last day happens to fall on Sunday, no good reason is perceived why that Sunday should be excluded and the others included. It is fair to presume that if the Legislature had intended such a result it would have expressed that intention in unmistakable terms, as it expressed its intention in regard to days of grace when they were allowed in this State."

It clearly distinguished *Cressey* v. *Parks*, 75 Me., 387, holding

that the time was so extended with relation to the statute providing for sales on distress for taxes, and stated:

> "The Legislative intention to exclude Sunday in such cases is shown by the statute, which does not permit a sale to be made before or after the four days, but only upon the fourth day. Such a case differs widely from one in which the act may be done upon any day of a long period of time which necessarily includes one or more Sundays."

Section 20, Chapter 104, R. S. 1930, provides:

> "No bill in equity shall be brought for redemption of mortgaged premises, founded on a tender of payment or performance of the condition made before commencement of the suit, unless within one year after such tender."

Sections 15, 16 and 20 of Chapter 104, R. S. 1930 were numbered respectively 14, 15 and 19 in Chapter 90 of the Revised Statutes of 1883. Referring to the 1883 revision, this Court in *Brown* v. *Lawton*, 87 Me., 83, 32 A., 733, 735, said:

> "Under § 14 of c. 90, the bill must be filed before the time for redemption has elapsed. Under § 15 tender or performance of condition must be made during that time, and the bill may be brought at any time within the year named in § 19."

We hold that the last day being Sunday did not extend the one year period of redemption.

But, contending that the defendant designedly and wrongfully prevented him from redeeming within one year, the plaintiff relies upon the decision in *Stevens Mills Paper Company, In Equity* v. *James E. Myers, Jr.*, 116 Me., 73, 100 A., 11, in which in an action to redeem under Section 16 it was held that where "the defendant designedly prevented the plaintiff from tendering performance of the condition of the mortgage by rendering it impossible for him to do so," a Court of Equity would not "listen to his plea that the tender was not seasonably made." In the instant action, based on Section 15 providing for an accounting and redemption, neither the plaintiff nor anyone in his behalf made any demand whatever

for an accounting. Had that been done, and had there been an unreasonable refusal or neglect upon the part of the defendant to render such account in writing, the bill would have been maintainable within the year without tender; and, under the doctrine of the *Paper Company Case*, supra, had the defendant designedly prevented the plaintiff from making a demand for an accounting within the year, he would not have been permitted to say that there had been no demand for an accounting. The facts, however, fail to show fraudulent conduct upon the part of the defendant which prevented the plaintiff from making the demand. As already stated, no demand whatever was made by the plaintiff. The previous demand by the plaintiff's predecessor in title does not enure to the benefit of the plaintiff.

Appeal sustained.
Decree below reversed.

ROBERT P. MANSON ET AL. *vs.* PARKER N. MOULTON ET AL.

Sagadahoc. Opinion, November 5, 1937.

WILLS. EXECUTORS AND ADMINISTRATORS.

The intent of a testator must be found from the will itself read as a whole, if its language, when so read, is unambiguous.

A direction to an executor by a testator to sell real estate gives no discretionary authority to the executor, as the direction is imperative and the executor is absolutely obliged to make the conversion.

A legacy to one who died before the testatrix, leaving no descendants, lapses and becomes a part of the residue of the estate.

On report. Bill in equity seeking construction of the will of Ada Manson. The case is remanded for a decree in accordance with this opinion. So ordered. Case fully appears in the opinion.

Charles T. Small, Jr.,
William B. Mahoney, for plaintiffs.
Edward W. Bridgham,
John P. Carey, for defendant.

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

THAXTER, J. This case is before us on report. It is a bill in equity seeking the construction of the will of Ada Manson, late of Bath. The will was admitted to probate January 7, 1936, and the defendant, Parker N. Moulton, was appointed and qualified as executor. The defendants in their answer admit all of the material allegations of the bill. The essential parts of the will read as follows:

"After the payment of my just debts, funeral charges and expense of administration, I dispose of my remaining estate as follows:

"First, I direct my executor, herein named, to sell, without license from any court or judge, the homestead property now occupied by me, located on Garden Street.

"Second, It is my intention to attach to this will, a memorandum specifying certain articles of a personal nature—gifts I would like to make; and it is my request that my executor carry out my wishes as therein expressed.

"Third, From the amount of cash assets remaining in my estate after providing for the necessary obligations, I desire to dispose of in the following manner:

To:	Robert P. Manson	one-fourth
	Parker N. Moulton	one-fourth
	Roger Moulton	one-eighth
	M. Frank Manson	one-eighth
	Central Church of Bath	one-eighth
	Old Ladies' Home of Bath	one-eighth

"All of the remainder of my estate, of whatever name and nature, I give and bequeath to Parker N. Moulton, if he be living at the time of my decease; otherwise to Robert P. Manson.

"I nominate and appoint Parker N. Moulton to be the executor of this, my last will, if he be then living and able to perform such service. If not, I appoint Robert P. Manson to serve in said

capacity. It is my request that no surety bond be required of either."

The defendants, Parker N. Moulton and Roger Moulton, claim that the direction to sell the real estate contained in the first clause is conditional, and that such real estate is only to be sold if there shall be insufficient assets to pay the debts and expenses of administration; that the residuary legatee, Parker N. Moulton, takes title to the real estate under the residuary clause of the will; and that the legatees mentioned in the third clause are entitled only to the balance of the cash assets owned by the testatrix at her death, remaining after the payment of debts and expenses of administration.

The plaintiffs claim that there is a mandatory direction to the executor to sell the real estate and that the proceeds of it, together with the other cash assets of the estate, pass after payment of debts and expenses of administration to the legatees mentioned in clause three.

In construing this will our aim is to find the intent of the testatrix. That intent must be found from the will itself read as a whole, if its language when so read is unambiguous. *Shaw* v. *Hussey*, 41 Me., 495; *Cotton* v. *Smithwick*, 66 Me., 360; *Bradbury* v. *Jackson*, 97 Me., 449, 54 A., 1068; *Doherty* v. *Grady*, 105 Me., 36, 72 A., 869; *Palmer* v. *Palmer*, 106 Me., 25, 75 A., 130.

The language of the will seems perfectly clear; the directions of the testatrix to her executor are positive. After the payment of her debts, funeral charges, and expenses of administration, he is ordered to sell the homestead property. Such property is to be sold not for the purpose of providing funds for taking care of these obligations, but after her debts have been paid. The phrase in the third clause "cash assets remaining in my estate" refers to the cash left in the executor's hands after the payment of the debts and after the sale of the real estate. It is obvious that she intended to give to the legatees mentioned in this clause not only the balance of the cash which she left at her death, but the proceeds received from the sale of the real estate. The legacy to M. Frank Manson, who died before the testatrix leaving no lineal descendants, lapsed and became a part of the residue of the estate.

The case of *Thissel* v. *Schillinger*, 186 Mass., 180, 71 N. E., 300, is analagous to the one before us. There was there a direction to the executor to sell and dispose of all of the real estate. The court said, page 185: "By these words no discretionary authority is given, but the direction is imperative, and the executors are absolutely obliged to make the conversion."

To construe this will in any other way than we have done, would be to do violence to the language which the testatrix has used.

The case is remanded for a decree in accordance with this opinion.

So ordered.

J. WALLWORTH'S SONS, INC. *vs.* DANIEL E. CUMMINGS COMPANY.

Somerset. Opinion, November 5, 1937.

SALES. UNIFORM SALES ACT.

The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. And when such intent is not expressed, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties.

On report. Action on an account annexed to recover purchase price of a waste machine alleged to have been sold by plaintiff to defendant. Judgment for the defendant. Case fully appears in the opinion.

Bernard Gibbs, for plaintiff.

James H. Thorne, for defendant.

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

THAXTER, J. This case is before us on report. It is an action on an account annexed to recover the purchase price of a waste

machine alleged by the plaintiff to have been sold by it to the defendant.

It is conceded that this is a proper form of action to recover the purchase price of personal property the title to which has passed to the buyer. *Smith, Fitzmaurice Co.* v. *Harris*, 126 Me., 308, 138 A., 389. The sole question before us is, had title passed. If it had not, this action can not be maintained.

March 8, 1935, the defendant wrote asking the plaintiff if it had a waste machine for sale. The plaintiff replied to this letter stating that it did have such a machine at a price of $1000, "f. o. b. cars Chester, Penna., and on terms of net cash." Through further correspondence the defendant was given on the payment of $50 an option on this till April 10, 1935. About April 8th, Willard H. Cummings, representing the defendant, visited the plant of the plaintiff, examined the machine, and agreed to take it at the price named. This agreement was confirmed by the plaintiff in writing, and an invoice of the machine to be shipped later was sent. This set forth the terms of the sale and contained the notation "F. O. B. Cars, Chester, Pa. Terms Net." During the conversation between Mr. Cummings, and Mr. Wallworth representing the plaintiff, it was agreed that the plaintiff might use the machine for sixty or ninety days. Mr. Wallworth's testimony on this point is as follows:

"Q. Now what further did Mr. Cummings say about the machine?

"A. The only further conversation was with reference to the shipping date, because we had the machine in operation in our own plant, and it wasn't possible for us to make an immediate shipment of it.

"Q. Yes.

"A. And we explained to him at that time that it wouldn't be possible for us to ship the machine for possibly sixty or ninety days."

On April 29, 1935, the defendant wrote to the plaintiff saying that a check would be sent when the plaintiff was ready with the machine, but that there was no hurry. Nothing further happened

until February 12, 1936, when the plaintiff wrote the defendant asking for shipping instructions. The defendant replied to this letter stating that it did not wish the machine, and that it would forfeit the $50 which had been advanced for the option. A demand was then made by the plaintiff for the balance of the price, and, on the failure of the defendant to pay, this action was brought.

The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. *Bethel Steam Mill Co.* v. *Brown et al.*, 57 Me., 9; *Russell* v. *Clark*, 112 Me., 160, 91 A., 602; *American Thread Company* v. *Milo Water Company*, 128 Me., 218, 146 A., 695; R. S. 1930, Chap. 165, Sec. 18. Where such intent is not expressed, as in the instant case, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties. Under the terms of the Uniform Sales Act, which is in force in Pennsylvania as well as in Maine, certain rules are laid down for ascertaining such intention. Those which have a bearing on the present problem read as follows, R. S. 1930, Chap. 165, Sec. 19:

> "Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.
>
> "Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.
>
> * * *
>
> "Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The plaintiff contends that there was here an unconditional contract to sell specific goods, in a deliverable state, and that the

title passed to the buyer on April 10, 1935, when the plaintiff wrote to the defendant confirming the sale. The fact, however, that the plaintiff was to use the machine for several months as if it were its own militates strongly against the contention that title passed immediately. Could it have been the intention of the parties that under these circumstances the risk of damage from fire or other casualty was on the defendant? Was it not the duty of the plaintiff after it had finished with the machine to see that it was placed in good working order? Was it not likewise contemplated by the parties that the machine should be delivered to the carrier before the defendant should be charged with the obligations of an owner?

Like many cases of this kind where the intention must be gleaned from correspondence and from the surrounding circumstances, evidence can be found supporting the contention of either party. On the whole, however, we are satisfied that the parties intended that this contract should remain executory until delivery of the machine to the carrier had been made. This conclusion is in accord with the provisions of Rule 5 of the Uniform Sales Act, *supra*.

Judgment for the defendant.

JANE E. BANKS *vs.* MARGARET E. ADAMS

AND

ANDROSCOGGIN & KENNEBEC RAILWAY COMPANY.

JOHN BANKS *vs.* SAME.

EDITH M. ADAMS *vs.* SAME.

JOHN BANKS *vs.* SAME.

Androscoggin. Opinion, November 13, 1937.

NEGLIGENCE. MOTOR VEHICLES.

If the failure of a motor vehicle operator to see that which by reasonable care he should have seen is the proximate cause of an injury to another, he is liable in damages for his negligence.

"Apparent" danger of which the passenger must give warning, is that danger not necessarily apparent to the individual but that which is or ought to be reasonably manifest to the ordinarily prudent person.

When dangers which are either reasonably manifest or known to an invited guest confront the driver of a vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, and sits by without warning or protest, such negligence will bar recovery.

It is the duty of the court to correct error on the part of the jury when such error is unmistakable.

On general motions for new trial. Cases tried together before jury. Verdicts for the plaintiffs against the Androscoggin & Kennebec Railway Company and verdicts in favor of defendant, Margaret E. Adams. Defendant Railway Company filed general motions for a new trial. Plaintiffs filed motions to set aside verdicts rendered in favor of defendant, Margaret E. Adams.

In the case of Jane E. Banks and the two cases of *John Banks* v. *Margaret E. Adams and Androscoggin & Kennebec Railway Company*, motions of plaintiffs as to Margaret E. Adams, granted. Motions of defendant, Androscoggin & Kennebec Railway Company, overruled.

In the case of *Edith M. Adams* v. *Margaret E. Adams and Kennebec Railway Company*, motion of plaintiff as to Margaret E. Adams, overruled. Motion of defendant, Androscoggin & Kennebec Railway Company, granted. Cases fully appear in the opinion.

Berman & Berman, for plaintiffs.

Fred H. Lancaster,

Skelton & Mahon, for defendants.

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

MANSER, J. These four cases, arising out of a collision between an electric street car and an automobile, were tried together and resulted in verdicts for the plaintiffs against the Street Rail-

way Company and verdicts in favor of the other defendant, Margaret E. Adams. The defendants were sued jointly upon the ground that the accident was occasioned by their concurrent negligence. The defendant Railway Company filed motions for a new trial upon the usual grounds. The plaintiffs filed motions asking that the verdicts rendered in favor of the defendant, Margaret E. Adams, be set aside There were no exceptions.

The plaintiffs were all passengers in the automobile driven by the defendant, Margaret E. Adams. The Court is called upon to determine whether upon examination and analysis of the entire record the several verdicts require its intervention.

The plaintiffs insist that it does, as against Margaret E. Adams. Even though a verdict has been rendered in their favor against the Railway Company and they maintain its integrity, yet if the verdict against the other defendant is erroneous, they are entitled to their remedy against her, although they can obtain but one indemnity. *Gregware* v. *Poliquin*, 135 Me., 139, 190 A., 811.

In the forenoon of February 2, 1936, a cold, clear rather windy day, Margaret E. Adams, driving a Ford sedan was conveying her mother, Edith M. Adams, her aunt, Jane E. Banks and her aunt's husband, John Banks, in the open country on the highway leading from Lewiston to Lisbon. This highway is paralleled along its westerly side and approximately eight feet from the edge of the macadam by the tracks of the defendant railway. The intended destination of the parties was the Webber house, so called, from which was to be held in the afternoon, funeral services for the paternal grandmother of Margaret Adams. The house was situated westerly of the highway, 108 feet distant therefrom and upon a rise of land. It was reached by a narrow, private driveway running practically at right angles with the highway and crossing the tracks of the Railway Company. The collision occurred on the driveway at its junction with the tracks. The issues involved are (1) due care on the part of each plaintiff as a passenger. (2) negligence of the defendant Railway Company as a proximate cause and (3) negligence of the defendant, Margaret E. Adams as a proximate cause.

On the first two issues the plaintiffs have the benefit of jury verdict. On the third, the plaintiffs have the burden of showing error.

We consider first the verdicts as to Margaret Adams. In epitome, she testified that she was entirely familiar with the vicinity; had lived in the Webber house; knew about the crossing and the driveway; was fully aware of the proximity of the car tracks and the frequency of the operation of street cars; was driving at a moderate speed; that as she approached the driveway she looked into the rear vision mirror of her car which enabled her to see the track for a good distance back; that she slowed up to allow a delivery truck to back out of the driveway and pass her going in the direction towards Lewiston; that she then operated her automobile so that it described an arc, and as she was about to leave the highway and enter the driveway, she was at right angles to the track, and less than 15 feet therefrom. The windows of the car were all clear. She had slowed down her car to what she described as practically a walking pace and had shifted gears to negotiate the slight rise up to and across the tracks. The window upon her side of the car was open. At this point she had clear vision up the tracks at least as far as the next house, which was located 624 feet away. Here she says she again looked and saw and heard nothing coming.

The only logical conclusion to be drawn from her testimony would seem to be that there was no electric car approaching. But there was. Before she had traversed less than the width of an ordinary highway, the electric car coming from the direction in which she had looked smashed into the rear of her automobile. It was a large winter type trolley car, nearly 50 feet in length, weighing over 22 tons and approaching on a slightly descending grade. If its speed were twice what any witness estimated, it must still have been in close proximity when she looked. The jury evidently accepted as proof of her due care the evidence that she looked and did not see; that she listened and did not hear.

The rule is definitely stated in *Gregware* v. *Poliquin*, supra:

> "This Court has repeatedly called attention to the settled and salutary rule that an automobile driver is bound to use his eyes and to see seasonably that which is open and apparent, and govern himself suitably. Whenever it is the duty of a person to look for danger, mere looking will not suffice. One is

bound to see what is obviously apparent. If the failure of a motor vehicle operator to see that which by the exercise of reasonable care he should have seen is the proximate cause of an injury to another, he is liable in damages for his negligence." Citing *Clancey* v. *Cumberland County Power and Light Co.*, 128 Me., 274, 147 A., 157; *Callahan* v. *Bridges Sons*, 128 Me., 346, 147 A., 423; *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872.

The defendant, Adams, was about to cross the right of way of the defendant Railway, and at right angles thereto. She was about to enter a private way, serving but one house; her car was under complete control; she could have stopped instantly. She neither saw nor heard the electric car, which was indubitably within sight and hearing. It was her duty to apprehend the obvious danger and it was within her power to avoid it.

In *Bramley* v. *Dilworth*, 274 Fed., 267, the court said:

"He, (the defendant) was not only required to look, but he must look in such an intelligent and careful manner as will enable him to see the things which a person in the exercise of ordinary care and caution, for his own safety and the safety of others, would have seen under like circumstances." See also *Pratt* v. *Kistler*, 233 P., 600.

There was testimony by others of conduct on the part of the defendant, Adams, calculated to show a failure to either look or listen and tending to establish clear actionable negligence in other respects, but this may be disregarded, as the jury had a right to rely upon her own version.

Her evidence corroborated by that of her mother, with all the inferences which the jury could justifiably draw from it, still spells negligence.

Even though negligence of the defendant, Adams, is established, yet it is incumbent upon the plaintiffs to prove that no want of due care contributed as a proximate cause of the injury. Each case must be governed by its own facts and circumstances. The plaintiffs were all passengers, and the negligence of the driver is not imputable to them. Analysis of the record discloses a clear distinction be-

tween the situation of Edith M. Adams and the other plaintiffs, John Banks and Jane E. Banks. The latter two were riding in the rear seat. Testimony justifies the conclusion of the jury that they were not aware of the immediate approach to the driveway. Mr. Banks knew of the proximity of the railway tracks and said he was looking ahead and saw no electric car in sight. None was coming from that direction. He had little opportunity to make observation in the other direction. So with Mrs. Banks, who was a passive passenger, unaccustomed to the risks of automobile travel and apprehensive of no danger.

On the other hand, Mrs. Adams, was fully aware of the risks to be anticipated at the time. Knowing well the location, observing closely all that her daughter was doing, herself seated at the right of the driver, her testimony was in effect that she was watchful. As the automobile made its turn to enter the driveway, she had even better opportunity than her daughter to see the approaching electric car, and warning from her might well have been in time to avert disaster.

> "It is of 'apparent' danger which the passenger must give warning, not necessarily apparent to the individual but that which is or ought to be reasonably manifest to the ordinarily prudent person. As is said in *Minnich* v. *Transit Co.*, 267 Pa. St., 200, 18 A. L. R., 296, it is, 'when dangers which are either reasonably manifest or known to an invited guest confront the driver of a vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, and sits by without warning or protest and permits himself to be driven carelessly to his injury' that his negligence will bar his recovery." *Peasley* v. *White*, 129 Me., 450, 152 A., 530, 531.

Her own negligence is clearly shown for the reasons indicated in the foregoing citation and already discussed with relation to her daughter.

As to motions presented by the Railway Company for new trials. While the facts were controverted, there was justifiable inference that the electric car had attained a high rate of speed, based principally upon the evidence that it was coasting on a down grade and

continued for a considerable distance beyond the scene of the accident, although all available means were used to bring it to a stop; that two other employees were standing with the motorman; that the highway was in clear view; that as before referred to, there was testimony showing a lessening of speed of the automobile as it approached the crossing to give opportunity for a delivery truck to back out of the driveway, and the automobile was then swung in an arc to make the turn. These occurrences were unnoticed, and while denied as actually happening, were within the realm of credibility. According to the motorman, he had seen the automobile pass the electric car. It was in the highway ahead of him. He knew he was about to cross a private way which entered that highway. The Court can not say that the care required under such circumstances, if exercised, would not have avoided the accident.

The damages assessed, while apparently large, are not beyond the reasonable computation of a jury. Physical injuries sustained, categorically listed, seem of a somewhat minor character. The testimony of the attending physician as to resultant effects is positive and not denied. This, coupled with the recital given by the plaintiffs, justifies the awards.

The Court gives due recognition to the rule that it may not usurp the proper functions of the jury; that there can be no substitution of judgment on questions of fact where reasonably fair minded men might differ, but it is still the duty of the Court to correct error on the part of the jury when such error is unmistakable. *Peasley* v. *White*, supra.

Following are the mandates:

Cases No. 11, 12 *and* 14, *Jane E. Banks and the two cases of* John Banks *vs.* Margaret E. Adams and Androscoggin & Kennebec Railway Comany. *Motions of plaintiffs as to Margaret E. Adams, granted. Motions of defendant, Androscoggin & Kennebec Railway Company, overruled.*

Case No. 13, Edith M. Adams *vs.* Margaret E. Adams and Androscoggin & Kennebec Railway Company. *Motion of plaintiff as to Margaret E. Adams, overruled. Motion of defendant, Androscoggin & Kennebec Railway Company, granted.*

FIRST AUBURN TRUST COMPANY

APPELLANT FROM DECREE OF JUDGE OF PROBATE.

RE: ESTATE OF ABRAHAM B. BAKER.

Androscoggin. Opinion, November 13, 1937.

EXECUTORS AND ADMINISTRATORS. WILLS. PROBATE COURTS.

When the statutory period of limitations for prosecution of claims has expired, creditors of an estate might avail themselves of provisions of R. S., Chap. 101, *Sec.* 20.

Executors are not required to determine at their peril whether the statutory bar would be effective.

When it appears to the administrator, that the estate may be eventually insolvent, he may so represent to the court and have commissioners appointed to adjudicate upon claims, and the estate must thereafter be settled as an insolvent estate, even though it be in fact abundantly solvent.

A Probate Court has the power and duty upon subsequent petition, notice and hearing to vacate or annul a prior decree, even a decree of probate of a will, clearly shown to be without foundation in law or fact, and in derogation of legal right.

If by fraud and misconduct, one has gained an unfair advantage in proceedings at law, whereby the court has been made an instrument of injustice equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly gained.

In proving fraud, the law imposes upon the moving party the burden of substantiating it by clear and convincing proof.

The findings of the court below on questions of fact are conclusive and are not to be reviewed by the Law Court if the record shows any evidence to support them.

On exceptions to ruling by the presiding Justice in the Supreme Court of Probate dismissing an appeal from a decree of the Judge of Probate, the probate decree appealed from being one sustaining

a former decree of insolvency of the estate of Abraham B. Baker and which was attacked as procured by fraud. Exceptions overruled. Case fully appears in the opinion.

Webber & Webber, for appellant.

Berman & Berman,

Harris M. Isaacson, for appellees.

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

MANSER, J. This case comes up on exceptions to a ruling by the Justice presiding in the Supreme Court of Probate dismissing an appeal from a decree of the Judge of Probate. The probate decree appealed from was one sustaining a former decree of insolvency of the estate of Abraham B. Baker and which was attacked as procured by fraud.

The decedent died testate, leaving a widow and three minor children. His executors qualified December 22, 1932. The widow was sole beneficiary. An inventory was returned showing an appraisal of $62,575, divided into real estate of over $28,000, personal estate approximately $34,000. Most of the personal estate consisted of assets of the partnership of Abraham B. Baker and his brother, Joseph Baker, and similarly, most of the real estate was owned in common by the decedent and his brother.

While the inventory may be technically correct in form, it did not disclose the true situation. Full value of the real estate was set out in the schedule, but it was subject to mortgages aggregating $43,500. Using the figures of the appraisal, the apparent equity in all the real estate of the deceased was slightly over $12,000 instead of $28,000, as reported. Again, as to the personal property represented by partnership assets, no allowance was made for liabilities of the partnership. The one-half interest of the estate in such assets is listed at approximately $34,000, but testimony showed substantial liabilities against the partnership.

Joseph Baker qualified as surviving partner and administered the partnership estate.

Within one month from the qualification of the executors, Joseph

Baker purchased the partnership assets and also received a deed from the widow, as devisee, of all real estate owned in common. The net result of this transaction was that $20,000 was paid over to the executors and to the widow, $5000, less an adjustment of about $500, arising out of a previous real estate transaction between the decedent and the purchaser. Whether these sums were considered as representing the proportionate values of the real and personal property is not definitely disclosed.

The result was that the executors ostensibly had $20,000 in their hands, and other assets appraised at $2200. Subsequently, claims were filed against the estate aggregating $37,000, the principal one being that of the present appellant of $31,000. These claims represented largely the liability of the decedent upon mortgage notes on real estate which had been sold and the mortgages assumed by the purchaser. Because of depreciation in value of the mortgaged property, accumulation of interest and other charges, the creditors sought to charge the original makers of the mortgage notes.

There were also funeral expenses and expenses of administration estimated at $3600.

The appellant brought suit upon a portion of its claims and recovered judgments aggregating $15,280. Suit was pending upon the claim of another creditor in the sum of $5000; one claim of about $900 was dropped. This was the situation when the limitation of the statute as to commencement of suits became operative.

Negotiations pending for the compromise of the claims of the appellant proved unavailing and there was refusal to allow any credit for the mortgage security. Neither did the appellant cancel or waive by affirmative act any part of its entire claim as filed. On November 1, 1934, the executors filed in the Probate Court representation of insolvency of the estate. After notice and hearing on December 20, 1934, the estate was decreed insolvent. Subsequently, the widow waived the provisions of the will and presented a petition for allowance upon which award was made. These proceedings were taken in accordance with statutory regulations. Without legal fault on the part of the executors or widow, the appellant, having no actual notice, did not appear and did not seasonably file an appeal. Its petition to do so from the decree of allowance to the

widow was denied in *Trust Company* v. *Baker*, 134 Me., 231, 184 A., 767.

The present proceeding arose in the form of a petition to the Probate Court, seeking an annulment of the decree rendering the estate insolvent. It is based upon the contention that the executors and the widow, who were acting under the advice of counsel, by false representations, by withholding important information as to assets and liabilities and by a course of fraudulent conduct secured decrees which diverted the funds of the estate to the widow at the expense of creditors. Hearing was had upon this petition at which all parties were represented. After review of the facts, the Judge of Probate dismissed the petition. Appeal was then taken to the Supreme Court of Probate. The sitting Justice in his findings and decision says:

> "Upon a hearing before said Judge of Probate, the Judge by his decree found that no fraud had been practiced upon his court; that his findings in rendering the estate insolvent and granting the widow's allowance were not rendered by any fraud or accident or mistake, and that his decree should stand."

The findings of the Judge of Probate were confirmed and the appeal dismissed.

By exceptions to the latter ruling, this Court is asked to determine, notwithstanding the consideration and review given by the courts below, that the Probate Court was in fact actually misled by misrepresentation and fraud.

It is asserted on behalf of the appellant that at the time of the representation of insolvency the amount of the indebtedness was practically fixed, that further claims were barred by the statute of limitations and there actually existed a clear surplus of assets over liabilities. This is predicated upon the contention that debts aggregated a little less than $24,000, that assets amounted to $27,200 without taking into account the salvage value on mortgaged property to which the estate would be subrogated upon payment of the claims of two of the creditors.

On the other hand, it is clearly shown that the personal assets were insufficient to pay the debts. The real estate must be taken also, and upon license to sell granted by the Probate Court, the

widow would be entitled to one-third of the equity. Again, Joseph Baker, in taking over the partnership estate assumed the partnership obligations. He had since died and his estate was in process of settlement. The partnership liabilities had not been liquidated. While the statutory period of limitations for prosecution of claims had expired, creditors both of the partnership and of the estate might be able to avail themselves of the provisions of R. S., Chap. 101, Sec. 20, affording relief from the statute bar under certain circumstances.

With these unliquidated liabilities to an amount substantially in excess of the assets of the estate, the executors were not required to determine at their peril whether the statutory bar would be certainly effective.

As pointed out by the court in *Walker* v. *Newton*, 85 Me., 458, 27 A., 347, 348:

> "Hence it is provided that when it appears to the administrator, that the estate may be eventually insolvent, he may so represent to the court and have commissioners appointed to adjudicate upon claims. . . . The estate must thereafter be settled as an insolvent estate, even though it be in fact abundantly solvent."

The probate decree is attacked for fraud on the part of the executors.

> "It is well settled that a probate court has the power and duty upon subsequent petition, notice and hearing to vacate or annul a prior decree, even a decree of probate of a will, clearly shown to be without foundation in law or fact, and in derogation of legal right." *Merrill Trust Company, Appellant*, 104 Me., 566, 72 A., 745, 748.

The principles involved are stated thus in 15 R. C. L., Judgments, Par. 214,

> "For any description of *mala fides* practiced in obtaining a judgment equity will grant relief. If by fraud and misconduct, one has gained an unfair advantage in proceedings at law, whereby the court has been made an instrument of injustice

equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly gained. . . . A judgment will not, however, be relieved against merely upon surmise or suspicion of fraud, or for mere technical fraud, but only for actual and positive fraud in fact, established by evidence which naturally and reasonably tends to establish it."

Our Court has said with regard to proof of fraud,

"The charge is a serious one and the law imposes upon the defendant the burden of substantiating it by clear and convincing proof." *Strout* v. *Lewis*, 104 Me., 65, 71 A., 137, 138.

In the present proceeding the court below was called upon to determine essentially a question of fact, and findings of that character are conclusive and not to be reviewed by the Law Court if the record shows any evidence to support them. *Trust Company* v. *Baker*, supra, and cases cited.

The record, upon careful review, fails to show error in the ruling of the presiding Justice.

Exceptions overruled.

ALVA TAYLOR *vs.* HAROLD S. PRATT.

Androscoggin. Opinion, November 18, 1937.

EMPLOYMENT. CONTRACTS.

Wherever a person, by means of fraud or intimidation, procures, either the breach of a contract or the discharge of a plaintiff, from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom.

General motion by defendant for new trial. An action of tort brought to recover damages sustained by reason of plaintiff's procurement of her discharge from employment. Verdict for plaintiff.

Defendant filed motion for new trial. Motion overruled. Case fully appears in the opinion.

Charles R. Pomeroy,
Brann & Isaacson, for plaintiff.
Edmund C. Darey,
Frank T. Powers, for defendant.

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

HUDSON, J. By general motion the defendant asks this Court to order a new trial in this action of tort brought to recover damages which the plaintiff claims she sustained by reason of his procurement of her discharge as an employee of one Ham.

The plaintiff, a married woman, was employed on October 12, 1935, as a clerk in Ham's Drug Store in Livermore Falls. Intermittently for a period of approximately two and a half years she had worked for him, her latest service having started some five weeks before October 12th.

The defendant, a physician and surgeon, had been a valued customer of Mr. Ham for about twenty years. Previously to October 12th, the plaintiff's husband had cut his foot with an ax and the defendant attended him. It seems that the plaintiff and her husband were not satisfied with the doctor's services and had consulted other surgeons. Rumors had reached the defendant that a claim for malpractice was to be made against him. Although he denied it, the jury might have found that on October 12th the defendant, resentful, whether justified or not, visited the drug store on the day mentioned for the purpose of having a talk with the plaintiff about the prospective malpractice suit and possibly then of procuring her discharge. That there was a conversation in the store on that day between the plaintiff and the defendant, there is no question; but as to what was said is in irreconcilable dispute. The plaintiff's version is that after the defendant had inquired for the proprietor and learned that he was out, he asked when he would return. She answered, "five o'clock" and then, she continues, "he said—he gave me to understand and my husband to understand, where we were concerned, he would have no more to do with and if I was to continue

working in that store he would withdraw all prescriptions and see that none of his patients came there to have prescriptions filled." Then she added that he told her he would later see Mr. Ham concerning her.

On the other hand, the defendant, admitting that the plaintiff told him what the other surgeons had said about her husband's foot, and that there was an expectation on their part to make him pay damages, denied explicitly that he made any inquiry as to when Mr. Ham would return, that he said he would have no more to do with them, that if she remained a clerk in the drug store he would withdraw all of his prescriptions and see that none of his patients came there to trade.

Following this conversation, whatever it was, the plaintiff did not see her employer until about seven o'clock that evening, when she told him what she now claims the defendant then told her. Mr. Ham, a witness for the plaintiff, testified that some two days following October 12th he had a talk with the defendant, during which he told him what the plaintiff had said to him the evening of October 12th. He also testified that the doctor "did not deny but what he said to her was so about wherever she worked would never get any more of his business," and that he said in addition: "It isn't pleasant for me to come in and meet her where he was having a law suit." Afterwards the defendant said on the stand that what he told Mr. Ham was that "he probably should not come into the store when she was there."

That the plaintiff was discharged by her employer either on October 12th or shortly afterwards, there is no dispute.

As already stated, the case is before us on general motion. No exceptions were taken to the charge of the presiding Justice and it must be assumed that the law given was unexceptionable. The applicable law is stated succinctly in *Perkins* v. *Pendleton et al.*, 90 Me., 166, 176, 38 A., 96, 99:

> ". . . Wherever a person, by means of fraud or intimidation, procures, either the breach of a contract or the discharge of a plaintiff, from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; . . ."

But the defendant insists that the plaintiff herself induced the discharge and that it was not attributable to him in any way. True it is, she testified that she was discharged by Mr. Ham in the evening of October 12th, and that the defendant did not talk with Mr. Ham until some two days later, but her employer testified that she worked for him a day or two after the 12th of October and that he discharged her the morning following his talk with the doctor, when, he said, he told her "if that was the attitude the doctor took, she would have to get through"—and that he "couldn't afford to keep her."

The time of the discharge and its cause were facts for the jury. It accepted Mr. Ham's statement as true and found that the defendant by intimidation procured her discharge from employment that would have continued but for his wrongful interference.

Manifest error not having been shown, the verdict must stand.

Motion overruled.

JERRY HOSKINS

vs.

THE BANGOR AND AROOSTOOK RAILROAD COMPANY.

Piscataquis. Opinion, November 24, 1937.

NEGLIGENCE. MASTER AND SERVANT. PLEADINGS.

Violation of safety rules is evidence tending to show negligence.

It is the duty of a person to see that which is open and apparent and take knowledge of obvious dangers and govern himself suitably.

When the fellow servant rule is abrogated by the Workmen's Compensation Act, a railroad company is responsible for its foreman's negligence and is charged to use reasonable care in transporting an employee to the place of his labors.

A verdict can not be set aside because the declaration lacks allegations of negligence relied upon before the jury when the evidence was admitted without objection.

All necessary amendments must be considered by the Law Court as duly made and allowed.

On general motion for new trial by defendant. Action of negligence to recover damages by employee of defendant who was riding on a section car operated by an employee of defendant. Verdict for plaintiff. Defendant filed general motion for new trial. Motion sustained. New trial on damages only. Case fully appears in the opinion.

Durgin & Villani,
Fellows & Fellows, for plaintiff.
Henry J. Hart,
Frank P. Ayer,
Perkins & Weeks, for defendant.

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

STURGIS, J. The plaintiff, a carpenter in the employ of The Bangor and Aroostook Railroad Company, brings this action to recover damages for injuries received on October 18, 1934, through the derailment of a gasoline-propelled section car on which he was riding from Schoodic to West Sebois to get material for repairs he was making on railroad property. It was proved and conceded at the trial that the defendant Railroad Company was a nonassenting large employer under the Workmen's Compensation Act and the defenses of contributory negligence of the employee, negligence of a fellow servant and assumption of risk were properly denied. R. S., Chap. 55, Sec. 3, see Sec. 4 as amended by P. L. 1931, Chap. 225, Sec. 4. It appearing that the plaintiff's employment was purely intrastate, counts and pleadings under the Federal Employers' Liability Act, 35 U. S. Stat. at L. 65, Chap. 149, were disregarded. The case was submitted to the jury on the single issue of whether the negligence of the driver of the section car was the proximate cause of the plaintiff's injury. The jury having returned a verdict for the plaintiff for $9550 the Railroad Company files a general motion for a new trial on the ground that liability is not established and the award of damages is grossly excessive.

The evidence, admitted without objection, tends to show that the section car in which the plaintiff rode at the time of his accident was equipped with sixteen-inch flanged wheels in no way protected by guards, a platform body and a raised seat divided lengthwise by an iron rail. It was operated by Roland Tweedie, acting foreman of the section, who was seated on the left side facing diagonally forward in a westerly direction. Another sectionman faced to the rear, and the plaintiff, sitting on the right side with his back to the center, had a quartering view, as it is termed, forward and easterly of the track. As the car, which left Schoodic right after the lunch hour, approached Packard's Siding, an intermediate flag station, and was about five hundred feet away, it was slowed down for a switch but speeded up again and driven on towards the station at a rate of from twenty-five to thirty miles an hour. Suddenly, a rather small black and white dog came leaping and barking on to the track in front of the section car, derailing it and throwing the plaintiff and the sectionman between the rails. The driver jumped and landed safely on the ground, the car continuing on on the soft roadbed some little distance and until the engine stalled.

There was evidence, apparently credible and uncontradicted, which warranted the jury in finding that the dog had come from a house located about fifty feet west of the track, ran barking and leaping diagonally across a lawn, down into a shallow ditch and, without stopping, directly on to the track; also that, although the dog's approach was at all times in plain view of the section foreman, he did not hear it barking or see it until it was about six feet to the left and four feet in front of the section car, and then had no opportunity to adequately apply brakes, slow the car or avoid a collision and the resulting derailment. The foreman was fully acquainted with the operation of the section car and had repeatedly used it in his work. He admits that he was fully aware that if a dog got on the track in front of the car it might cause trouble, if he had seen the dog coming rapidly towards the track he would have slowed up or stopped and that would have avoided a derailment, and had he been looking in the direction from which it came he probably would have seen it coming over the rise back of the ditch and some little distance from the track as there was nothing to obstruct his view for several hundred feet back down the track.

Rules of the Company, introduced in evidence, require operators of motor section cars to run at a speed not greater than twenty miles per hour, carefully watch the track for obstructions and keep the car under full control past stations and at other places where they may be required to stop quickly. Violation of analogous safety rules has been held to be evidence tending to show negligence. *Stevens* v. *Boston Elevated Railway*, 184 Mass., 476, 69 N. E., 338 and cases cited. If violation of these rules were not in the case, however, the proven facts warrant the finding of negligence. The foreman's failure to see the dog coming towards and upon the track in time to reduce the excessive speed of his car and bring it and keep it under control so that the derailment could be avoided was clearly a proximate cause of the accident which can only be attributed to his careless inattention, which spells negligence. It was his duty to see that which was open and apparent, take knowledge of obvious dangers and govern himself suitably. *Callahan* v. *Bridges Sons*, 128 Me., 346, 147 A., 423; *Gregware* v. *Poliquin*, 135 Me., 139, 190 A., 811. With the fellow servant rule abrogated by the Workmen's Compensation Act, the Railroad Company must be held responsible for its foreman's negligence and charged with a breach of its duty to use reasonable care in transporting the plaintiff, not as a passenger but as an employee, to the place of his labors. *Birmingham Ry. L. & P. Co.* v. *Sawyer*, 156 Ala., 199, 47 So., 67; *St. Louis I. M. & S. Ry. Co.* v. *Harmon*, 85 Ark., 503; 109 S. W., 295; *St. Clair* v. *St. L. & S. F. Ry. Co.*, 122 Mo. A., 519, 99 S. W., 755; 39 Corpus Juris 283. Cases decided on very similar facts and analogous principles of law are *Sands, Receiver* v. *Linch*, 122 Ark., 93, 182 S. W., 561; *Petty* v. *A. & B. Air-Line Ry. Co.*, 132 Ga., 153, 63 S. E., 817; *Atchison T. & S. F. R. Co.* v. *Molone*, 81 Okla., 193, 197 P., 164.

The verdict can not be set aside because the declaration lacks allegations of the negligence relied upon before the jury and on the briefs. The case was tried and is here argued on the theory that the negligence of the defendant's foreman in not seeing the dog coming on to the track and taking due precautions to prevent a derailment of the section car was properly pleaded and evidence on that issue was admitted without objection. All necessary amendments must be considered here as duly made and allowed. *Burner* v. *Jordan Fam-*

ily Laundry, 122 Me., 47, 118 A., 722; *Clapp* v. *C. C. P. & L. Co.*, 121 Me., 356, 117 A., 307; *Wyman* v. *American Shoe Finding Company*, 106 Me., 263, 76 A., 483.

The damages awarded, however, were clearly excessive. The plaintiff states that when he was thrown from the section car he struck on his head, was rendered unconscious, taken to a hospital and did not regain his senses for several days. He suffered pains in the neck and shoulders, stayed at the hospital three weeks and remained at home until the middle of the following January. He then resumed his employment with the Railroad Company, stayed more than a year, but was finally discharged and has not since had work. In good health before his accident, he now claims some impairment of vision, continued pain in head and shoulders and frequent attacks of dizziness. He admits, however, that when he returned to his job after the accident, he was able and willing to do the work he had done in previous years, but objected to and refused to take on additional work, which he was called upon to perform. He was and had been a foreman carpenter and his wages were $160 a month. He drew the same amount during the period he worked after the accident. The bills of the hospital and the physicians who attended him having been paid by the Railroad Company, he shows personal expenditures of $208 for x-rays and osteopathic and eye treatment, and loss of wages for the three months immediately following the accident.

The plaintiff's wife confirms his claim of pain and suffering immediately following his injuries and continued discomfort in the head and shoulders but, stating that her husband came home on numerous occasions suffering from dizziness and headaches while he was employed the last time by the Railroad Company, admits that he worked regularly there as a general rule and knows of no deductions in his pay roll for loss of time. His family physician reports that the plaintiff has a large triangular scar in the region of his right forehead and another scar down and across his left cheek. It is his opinion that the plaintiff has suffered an impairment of his left eye through intracranial disturbances caused by the accident which is likely to be permanent but has been corrected by glasses. This physician also finds a slight deafness but has no fixed opinion as to its cause. Although several other physicians treated

and examined the plaintiff, they do not appear as witnesses and their diagnoses and opinions are unknown.

It is undoubtedly true that the plaintiff Hoskins has been out of work and unable to find profitable employment since he was discharged by the Railroad Company, but there is no evidence of probative value sustaining the claim that this loss of earning capacity can be attributed to the injuries which he received through the negligence of the defendant's foreman. It is apparently due to other independent causes for which his employer is not liable, at least in this action. His pain and suffering, past, present and future, the expenditures and actual loss of wages, and such continued impairment as is shown do not entitle him to the liberal award allowed him. We are convinced that error, if not sympathy and prejudice, prompted the jury to disregard the evidence and the law of damages governing the case.

The liability of the defendant being clearly established, the case must be sent back for a new trial on damages only and the general motion sustained accordingly.

Motion sustained.
New trial on damages only.

ROGER BROOKS *vs.* FRED BESS.

Somerset. Opinion, December 8, 1937.

TROVER. HIGHWAYS.

The presumption is that an adjoining landowner owns the soil to the center of the way, subject to the easement of passage, and he may cultivate the soil and take the herbage growing thereon.

The town in which the road lies holds title to the easement of passage as trustee for the travelling public.

An adjoining landowner to a town highway presumptively has title to the

trees growing thereon subject to the right of the town in cutting and removing them in order to make possible the enjoyment of the easement.

No provision of Sec. 79 of Chap. 27, R. S. 1930, gives the right of divesting an abutter of his property rights in trees when cut and removed.

Report on agreed statement of facts. An action of trover brought against a former road commissioner of Skowhegan for an alleged conversion of thirty-five cords of wood. Defendant caused this wood to be cut and removed from land within the exterior limits of a town way. Plaintiff owned the adjoining land. Judgment for the plaintiff in the sum of $87.50. Case fully appears in the opinion.

Gower & Eames, for plaintiff.

Butler & Butler, for defendant.

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

HUDSON, J. Report on agreed statement of facts.

This is an action of trover brought against a former road commissioner of Skowhegan for an alleged conversion of thirty-five cords of wood. The defendant caused this wood to be cut and removed from land within the exterior limits of a town way, of which the wrought portion was only eight feet wide. The plaintiff owned the adjoining land.

It is conceded that "the defendant allowed the workmen to remove this growth from the premises to their respective homes and use the same for domestic purposes."

Also that the purpose of cutting and removing the trees was to widen the wrought portion of the way so that it could be plowed by "a modern motor driven snow plow."

It is not claimed that the defendant did not have the right to cut and remove this growth.

It is well-established law that presumptively the adjoining landowner owns the soil to the center of the way. Subject to the easement of passage, he may cultivate the soil and take the herbage growing thereon. *Dyer* v. *Mudgett*, 118 Me., 267, 268, 107 A., 831. Also see *Burr* v. *Stevens*, 90 Me., 500, 503, 38 A., 547; *Farns-*

worth v. *City of Rockland*, 83 Me., 508, 512, 22 A., 394; *Wellman* v. *Dickey*, 78 Me., 29, 30, 2 A., 133; *Lynn* v. *Hooper*, 93 Me., 46, 50, 44 A., 127.

> "The public have no right in a highway excepting the right to pass and repass thereon. *Stackpole* v. *Healy*, 16 Mass., 33. 'Subject to the right of mere passage, the owner of the road is still absolute master.'" *Stinson* v. *City of Gardiner*, 42 Me., 248, 254.

The town in which the road lies holds title to the easement as trustee for the travelling public. *Inh. of Charlotte* v. *Pembroke Iron Works*, 82 Me., 391, 393, 19 A., 902.

Nothing in this record rebuts the presumption of centerline ownership. As owner of the soil, the title to these trees was in the plaintiff, subject, however, to the right of cutting and removal in order to make possible the enjoyment of the easement.

The New Hampshire Court has declared:

> "Generally they" (meaning trees by the roadside) "are the property of the adjoining land owner. In the absence of evidence transferring the title out of him, it is to be assumed such trees are his property. In him is vested the right of property and of beneficial enjoyment. The public has no right to the trees or to use them, even if necessarily removed, to construct or maintain the way. For any interference with his possession or right of possession in such trees the adjoining owner has his action." *McCaffery* v. *Concord Electric Company*, 114 A., 395.

Also in *Baldwin et al.* v. *Wallace*, 146 A., 90 (N.H.), it is stated:

> "As to everything except the public right of passage and the incidents thereto, the land was the property of the plaintiffs. . . . They have a right to recover for the defendants' trespass thereon and to be paid the value of the trees he cut and carried away."

As the plaintiff owned the trees before they were cut and removed, the wood therefrom was his when converted. It is not con-

tended that the acts of the defendant in allowing the workmen to take and consume this property did not constitute conversion.

But the defendant claims a defense under Sec. 79 of Chap. 27, R. S. 1930. Therein it is provided:

> "Each city, town, or plantation shall each year set aside five per cent of the money raised and appropriated for ways and bridges, to be used in cutting and removing all trees, shrubs and useless fruit trees, bushes and weeds, (except shade trees, timber trees, cared-for fruit trees, and ornamental shrubs) growing between the road limit and the wrought part of any highway or town way, until all the trees, shrubs and worthless fruit trees, bushes and weeds, have been once removed from the limits of such highway or town way, after which the owner of the land adjoining such highway or town way shall each year, before the first day of October, remove all bushes, weeds, worthless trees, and grass from the roadside adjoining his cultivated or mowing fields. The city, town or plantation shall care for all land not included in the above, except wild land."

It is admitted that the trees in question do not come within the statutory exception.

We do not consider that this statute constitutes a defense to this action. Nowhere in it is to be found anything that indicates (although the right to cut and remove is given) that the abutter shall be divested of his property rights in the trees when cut and removed.

In Section 79 a duty is imposed upon the adjoining landowner (each year after the growth is once cut and removed by the town) "to remove all bushes, weeds, worthless trees and grass from the roadside adjoining his cultivated or mowing fields." In Section 80, if he does not do this, a lien is created upon his adjoining land to cover the actual expenses of such cutting and removal by the town. This provision indicates that the legislature considered the title to the trees to be cut and removed to be in him, for, if not so, why place upon him the burden to cut and remove, and create a lien upon his adjoining property, if he fails in the performance of his duty.

Such a statute must be construed strictly and any doubts, if they exist, be resolved in favor of him whose property is taken for

public purposes. The statute not only does not afford a defense but strengthens the plaintiff's position.

In the report it is stipulated, "if the Court finds the defendant liable, it may assess damages in the sum of eighty-seven dollars and fifty cents ($87.50)."

Judgment for the plaintiff in the sum of $87.50.

CHARLES CUSHMAN COMPANY ET AL.

vs.

WILLIAM J. MACKESY ET AL.

VENUS SHOE MANUFACTURING COMPANY

vs.

WILLIAM J. MACKESY ET AL.

Androscoggin. Opinion, December 10, 1937.

EXCEPTIONS. CONTEMPT.

What the bill of exceptions taken in trial for contempt must contain is, in the first instance, for the trial judge to settle.

To be available, exceptions must conform to allowance.

There is authority that exceptions cannot, even by agreement of the parties, be changed in any material respect, unless with the consent of the judge who allowed the bill, he being alive and not incapacitated.

The parties litigant and the presiding justice are parties to bill of exceptions.

Exceptions not complete and introducing no subject of review must be dismissed.

On exceptions. A temporary injunction was issued, and entered on the equity docket in the County of Androscoggin, commanding

the exceptants to desist from strike activities. Contempt proceedings followed alleged violation of temporary injunction. Trial was had before a jury. Upon verdicts of guilty, defendants were sentenced to imprisonment. Exceptions filed by defendants appearing to challenge jurisdiction. Exceptions dismissed, that they may be made right. It is so ordered. Case fully appears in the opinion.

Skelton & Mahon,
Webber & Webber,
David V. Berman, for complainants.
Joseph Kovner,
A. Raymond Rogers,
Ernest L. Goodspeed, for respondents.

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

DUNN, C. J. On April 20, 1937, a temporary injunction was issued, and entered on the equity docket in Androscoggin, a member of the Supreme Judicial Court sitting singly, commanding the now exceptants, as well as other persons, defendants in suits consolidated and tried together, to desist from certain strike activities.

Within three days, the plaintiffs in the original causes, shoe manufacturers of Lewiston and Auburn, instituted the present contempt proceedings, alleging in substance, in complaints in the nature of pleadings, that the defendants had violated the injunction by continuing to aid and abet the strike, asserted acts of disobedience, deliberately done, disclosing purpose to flout the court and its orders. So, in short, averments run.

Issue joined, trial was at one time, as a part of the pioneer cases, respectively.

A jury was the tribunal for determining guilt. P. L. 1933, Chap. 261, Sec. 2.

Verdicts of guilty led to sentences to imprisonment for six months in jail; the sentences were carried into execution immediately.

When the justice who presided had, on presentation of formal bills of the exceptions taken in the trial, authenticated them, the adjudged contemnors were, by another justice, admitted to bail, pending disposition of their exceptions.

Allowance of the exceptions was not unconditional, but "if allowable."

The exceptions appear to challenge jurisdiction. They raise, besides, questions which may not fall into such category. Apparently the justice was, respecting the protests against his rulings of law, in doubt as to the effect of a statutory provision, R. S., Chap. 91, Sec. 67, which is transcribed verbatim that it may speak for itself:

> "No appeal lies from any order or decree for such punishment, nor shall exceptions thereto be allowed, save upon questions of jurisdiction. . ." R. S., *supra.*

The whole story of judicial intervention in the labor controversy need not be told; these cases turn upon a rule of practice.

The justice required that "the record and the transcript of the testimony," with regard to both temporary injunction and contempt, be of inclusion in the exceptions. What the bill must contain is, in the first instance, for the trial court judge to settle. *Atwood* v. *New England Telephone and Telegraph Company,* 106 Me., 539, 76 A., 949.

The determination referred to above, of what would, properly to present the exceptions, to the end no party might be deprived of legal rights, be requisite, has never been altered.

At the bar of this court, proof by affidavit is made, without contradiction, that the record and the testimony are but partially included in the exceptions, and that omission may not fairly be attributed to inadvertence or mistake.

Counsel opposing the exceptions insist, as indispensable, the entire facts; that is, to comply with the justice's requirement, copies of all papers on file in the cases, and the entries in the docket (perhaps already here,) and all the evidence. Lack, they press, does their side injustice.

To be available, exceptions must conform to allowance. There is authority that exceptions cannot, even by agreement of the parties, be changed in any material respect, unless with the consent of the judge who allowed the bill, he being alive and not incapacitated. *Ashley* v. *Root,* 4 Allen, 504; *Tighe* v. *Maryland Casualty Company,* 216 Mass., 459, 103 N. E., 941. The approved way, it has been held, is to move that the exceptions may be discharged for the

purpose of correction. *Tighe* v. *Maryland Casualty Company*, supra. There are, in fact, three parties to a bill of exceptions — the parties litigant and the presiding judge. *Shepard* v. *Hull*, 42 Me., 577.

The exceptions are inadequate. *Davis* v. *Olson*, 130 Me., 473, 474, 157 A., 542.

Never having been completed, the exceptions are not entitled to reception. Nothing is introduced which may now be the subject of review. It follows that the exceptions must be, as they are hereby, dismissed. *Jones* v. *Jones*, 101 Me., 447, 64 A., 815; *Leathers* v. *Stewart*, 108 Me., 96, 100, 79 A., 16; *Doylestown Agricultural Company* v. *Brackett, etc., Company*, 109 Me., 301, 308, 84 A., 146.

Exceptions dismissed, that they may be made right.

It is so ordered.

MARY PRINGLE *vs.* WILLIAM E. GIBSON.

PETER K. PRINGLE *vs.* WILLIAM E. GIBSON.

Washington. Opinion, December 13, 1937.

COURTS. MOTOR VEHICLES. NEGLIGENCE.

The rights of a plaintiff to recover are controlled by the law of the place where the injuries are received, and the law of the jurisdiction where relief is sought determines the remedy and its incidents, such as pleading, practice and evidence.

A law which destroys a cause of action entirely, clearly comes within the lex loci *rule and if the right is absolutely abrogated, then the law of the forum does not give it new life to determine its incidents such as pleading, practice and evidence.*

Whether an act is the legal cause of another's injury is determined by the law of the place of wrong and if no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.

A liability to pay damages for a tort can be discharged or modified by the law of the state which created it.

While it is the rule that remedies are regulated and governed by the lex fori *and that included in the procedural policy of the state are statutes of limitations, yet it is when the statute relates to the remedy and does not obliterate the right of action that such right continues to exist.*

Under the law of New Brunswick a law remains in full force and effect until repealed or invalidated.

No law has any effect of its own beyond the limits of the sovereignty from which its authority is derived, but foreign law is enforced because it is our law that foreign law shall govern transactions in question and that for purposes of the case the foreign law becomes the local law.

Whether recognition and effect shall be given to foreign law by the courts of this state depend upon the principles of comity.

Comity is neither a matter of absolute obligation nor of mere courtesy and good will. It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Where foreign laws are in conflict with our own regulations, or our local policy, or do violence to our views of religion or public morals, or may do injustice to our citizens, they are not to be regarded in this state.

Under the common law of this state, a gratuitous passenger is entitled to recover upon proof of his own due care and of ordinary negligence on the part of the defendant.

The fact that the law of two states may differ, does not necessarily imply that the law of one state violates the public policy of the other.

The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.

In the case at bar, the defendant, a citizen of Maine, is sued by plaintiffs, being residents of the Province of New Brunswick, for injuries sustained by them while riding as gratuitous passengers in the automobile of defendant. The accident occurred in the Province of New Brunswick. The defense pleaded and proved a law of New Brunswick to the effect that an owner or driver of a motor vehicle, other than one operated in the business of carrying passengers for hire or gain, shall not be liable for injury or death of any person being carried in or upon, or entering, or getting on, or alighting from said motor vehicle. Contention of defense is that plaintiffs, as citizens of a foreign state, are seeking aid of the courts of Maine to enforce a liability denied them by the law of their own jurisdiction.

The Court holds that it recognizes the law of New Brunswick, pertaining to the non-liability of owner or driver of motor vehicle not used for hire or gain to his passengers, and decides the defendant is entitled to the protection accorded him by the law where the alleged tort was committed.

On report. Actions for personal injuries sustained by plaintiffs, resulting from an automobile accident while plaintiffs were riding as gratuitous passengers in the automobile of defendant. In each case, judgment for defendant. Cases fully appear in the opinion.

Stern, Stern & Stern, for plaintiffs.

James E. Mitchell, for defendant.

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

MANSER, J. On report. Actions for personal injuries sustained by the plaintiffs as a result of an automobile accident while plaintiffs were riding as gratuitous passengers in the automobile of the defendant. The accident occurred September 26, 1935, in the Province of New Brunswick. The plaintiffs are residents of that province. The defendant is a citizen of Maine. The defense pleaded and proved the act of the legislature of New Brunswick passed in 1934.

> "The owner or driver of a motor vehicle other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon, or entering or getting on or alighting from such motor vehicle."

The position of the defense is that the plaintiffs as citizens of a foreign state are seeking the aid of the courts of Maine to enforce a liability against a citizen of Maine which is denied them by the law of their own jurisdiction.

The general rule, long established, has been recently reaffirmed in *Winslow* v. *Tibbetts*, 131 Me., 318, 162 A., 785, 786.

> "It is elementary law that the rights of the plaintiffs to recover are controlled by the law of the place where the injuries were received, and the law of the jurisdiction where relief is

sought determines the remedy and its incidents, such as pleading, practice and evidence."

Counsel for plaintiffs assent to the existence of this rule, but assert that the law of New Brunswick does not govern for one or more of the following reasons: It merely affects the remedy; the acts of the defendant were wrongful under the motor vehicle laws of New Brunswick and constituted a violation of its criminal code; the statute is unconstitutional both in New Brunswick and Maine; it is against public policy of this state and will not be enforced by our courts. Further, that if any of the foregoing contentions are sustained and the New Brunswick statute does not apply, then the plaintiffs maintain that the case is to be decided by the common law of New Brunswick, and in the absence of proof to the contrary, the legal presumption is that the common law of both jurisdictions is the same.

The arguments and briefs of counsel show great research and ingenious reasoning. So urgently are emphasized close refinements as almost to be confusing. The Court finds relief in the reflection of Chief Justice Peaslee in *Gray* v. *Gray*, (N. H.), 174 A., 508, that:

> "No rule or set of rules has yet been devised which will make the conflict of laws a logical whole. There are places where logic has to give way to evident facts. In these places horse sense has prevailed over the deductions of the schoolmen. It should continue to do so."

As to the first claim that the New Brunswick statute merely affects the remedy; it is true that distinctions between matters pertaining to the remedy and those going to the basis of the action are sometimes difficult to determine, yet common sense demonstrates that a law which destroys a cause of action entirely, clearly comes within the *lex loci* rule. If the right is absolutely abrogated, then the law of the forum does not give it new life to determine "its incidents such as pleading, practice and evidence."

> "Whether an act is the legal cause of another's injury is determined by the law of the place of wrong."
>
> "If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

"A liability to pay damages for a tort can be discharged or modified by the law of the state which created it."

Restatement, Conflict of Laws, Pars. 383, 384 and 389.

While it is a general and well-settled rule that remedies are regulated and governed by the *lex fori*, *Owen* v. *Roberts*, 81 Me., 439, 17 A., 403; *Miller* v. *Spaulding*, 107 Me., 264, 78 A., 358, and that included in the procedural policy of the state are statutes of limitations, Restatement, Conflict of Laws, Pars. 604 and 605, yet the distinction is pointed out in *Conn. Valley Lumber Co.* v. *R. R. Co.* 78 N. H., 553, 103 A., 263, that it is when the statute relates to the remedy and does not obliterate the right of action that such right continues to exist.

The next point relied upon is that the defendant violated the criminal code of New Brunswick with regard to the speed of his car, inadequate brakes, reckless and negligent operation, operating in a manner to endanger life and limb, and by wanton or furious driving or other wilful misconduct or wilful recklessness causing bodily harm.

The plaintiffs rely upon *Machado* v. *Fontes*, 2 Q. B., 231, as establishing the principle that an action for damages would lie in England for a crime committed in a foreign country, even though the law of that country gave no private action for damages.

The doctrine of this case finds little, if any, support in the courts in this country. Goodrich, Conflict of Laws, Sec. 92, says: "There is no American authority for the modification." It is not necessary to discuss whether it should have force or applicability here because the record lacks proof that any of the acts of the defendant constituted a criminal offense. A necessary element to constitute a violation of the criminal code in New Brunswick, is criminal intent or *mens rea*. Such is the testimony of the expert, admitted in accordance with our rule, as that of a competent witness learned in the law of that jurisdiction. *Owen* v. *Boyle*, 15 Me., 147. The facts here disclose nothing more than civil negligence.

The third point raised is that the statute is null and void, both in New Brunswick and in Maine, being in contravention of guarantees under the Constitution and at common law.

Under the British-North America Act, which defined the sub-

jects of legislation assigned to the provinces, there are included "property and civil rights in the province." That the Act in question was within the category of legislation delegated to the province, can not be gainsaid. From the testimony of the expert, it appears that no case involving this statute has been adjudicated, and that the provincial court has not passed on the validity of the law. In the province, the Act remains in full force and effect until repealed or invalidated. The claim that it must be regarded as unconstitutional in Maine is woven into the question as to whether it should or should not be upheld upon the principle of comity and the exceptions thereto.

This brings us to the last contention, that the law is repugnant and offensive to the public policy of this state and should not be enforced by our courts.

No law has any effect of its own beyond the limits of the sovereignty from which its authority is derived. Ordinarily,

> "We enforce the foreign law because it is our law that the foreign law shall govern the transactions in question. For the purposes of the case, the foreign law becomes the local law." *Gray* v. *Gray*, supra.

This is not an absolute rule. Whether recognition and effect shall be given to the foreign law by the courts of this state depend upon the principles of comity. Comity has been defined by Mr. Justice Gray in *Hilton* v. *Guyot*, 159 U. S., 113 at 163, 16 S. Ct., 139, 143, as:

> "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Perkins* v. *Perkins*, 225 Mass., 82, 86, 113 N. E., 841; *Wooster* v. *Manufacturing Co.* 39 Me., 246; *Long* v. *Hammond*, 40 Me., 204; *Chafee* v. *Bank*, 71 Me., 514.

Justice Wiswell in *Corbin* v. *Houlehan*, 100 Me., 246, 61 A., 131, in a case to recover for the price of intoxicating liquors bought in another state and intended for sale here in violation of our law, said:

> "It is a fundamental and elementary rule of the common law that courts will not enforce illegal contracts, or contracts which are contrary to public policy, or which are in contravention of the positive legislation of the state."

And quoting with approval from *People* v. *Martin*, 175 N. Y., 315, 67 N. E., 589.

> "Where foreign laws are in conflict with our own regulations, or our local policy, or do violence to our views of religion or public morals, or may do injustice to our citizens, they are not to be regarded in this state."

Under these guiding principles, we find that the statute of New Brunswick interposed in defense is controlling and prevents a recovery in this action, unless, according to our concepts it is a denial of justice and subversive of our public policy. Under the common law of this state, a gratuitous passenger is entitled to recover upon proof of his own due care and of ordinary negligence on the part of the defendant. In many states laws have been passed limiting the right of recovery, in others the courts have adopted a more stringent rule than ours. An enlightening discussion is found in *Howard* v. *Howard*, 200 N. C., 574, 158 S. E., 101:

> "The fact that the law of two states may differ, does not necessarily imply that the law of one state violates the public policy of the other. . . . To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interest of our own citizens."

Further elaboration of this principle is found in *Loucks* v. *Standard Oil Company*, 224 N. Y., 99, 120 N. E., 198 in an opinion by Cardozo, J.

The U. S. Supreme Court in *Silver* v. *Silver*, 280 U. S., 117, 50 S. Ct., 57, in an action challenging the constitutionality of a Connecticut statute which exempted automobile owners from liability for injuries to guest passengers unless the conduct of the owner was intentional or in reckless disregard of their rights, held:

> "The constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. . . . We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. . . . Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination, and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts."

Our Court has given effect to laws of other states which substantially limit the right of action in guest cases. In some instances plaintiffs are found to be without remedy when they would have one had the accident occurred in this jurisdiction. The facts in the case at bar as disclosed by a careful reading of the record, fail to show that there was wilful or wanton conduct on the part of the defendant. We can not say that application of the statute of New Brunswick in the instant case is against good morals, natural justice or is prejudicial to our citizens. Instead, we conclude that the defendant in this case, a citizen of Maine, is entitled to the protection accorded him by the law where the alleged tort was committed. In accordance with the terms of the report, the entry in each case will be

Judgment for defendant.

FLOYD D. LIBBY *vs.* WOODMAN POTATO COMPANY.

Aroostook. Opinion, December 21, 1937.

CONTRACT. DAMAGES.

Verdict can not be set aside on contention of defendant that there was a variance between the contract declared upon and proved on motion after verdict.

Plaintiff is entitled to recover the money value of loss resulting from use of adulterated fertilizer sold by defendant and the damages recoverable are the difference between the crop actually raised and the crop that might have been raised had there been compliance with the contract.

On general motion for new trial and exceptions. Action by plaintiff to recover damages for breach of contract in the sale of commercial fertilizer. Verdict for plaintiff in the sum of $1720.40. Motion overruled. Exception overruled. Case fully appears in the opinion.

Doherty & Brown, for plaintiff.

Philip D. Phair,

Bernard Archibald, for defendant.

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

STURGIS, J. This action is brought to recover damages for a breach of contract in the sale of commercial fertilizer. The case comes up on motion and exceptions.

MOTION:

Late in the spring of 1936, the plaintiff purchased fifteen tons of commercial fertilizer from the Woodman Potato Company, a dealer in potatoes and fertilizer in Presque Isle. It was put up in 125 pound bags and delivered in two lots, one of five tons to be paid for

in potatoes and secured by a crop mortgage, and the other of ten tons to be paid for on delivery. The seller described the fertilizer, in accordance with the analysis stamped on each of the bags, as 8-16-17 Albatros brand, the formula indicating a chemical content of eight per cent nitrogen, sixteen per cent available phosphoric acid, and seventeen per cent soluble potash.

When the plaintiff, after planting the ten-ton lot, opened up the five tons, which, although delivered first, was lumpy and had to be screened, he discovered a marked lack of uniformity in the color and texture of the fertilizer indicating that the bags varied in their chemical contents and did not conform either to their brands or the seller's warranty at the time of the sale. Four bags were picked at random from the five-ton lot, poured on the floor in piles and samples taken of each in pint sealers which were filled by running the jar up the side of the pile from the bottom to the top. The sealers were then sent to the Maine Agricultural Experimental Station for analysis, their original contents being intact except as to a small quantity which, without the consent of the plaintiff, was removed in transit by a representative of the manufacturer.

The report of the chemist was as follows:

Sample	*Nitrogen*	*Phosphoric Acid*	*Potash*
1	6.76	20.23	20.42
2	6.80	20.87	19.36
3	6.62	18.52	21.48
4	9.54	12.10	12.57

The samples as taken were fairly representative, we think, of all the bags in the two lots of fertilizer sold by the defendant. *Heal* v. *Fertilizer Works*, 124 Me., 138, 143, 126 A., 644. Their analysis confirmed the lack of uniformity which had appeared when the color and texture of the bags opened and screened were first examined.

After the samples were taken and sent away for analysis, the plaintiff mixed and screened all of the five-ton lot of fertilizer and used it to put in the rest of his potato crop. He planted this fertilizer just as he had the ten-ton lot, spreading eleven hundred pounds to the acre and using the same planters. His cultivation and spraying of his crop were uniform throughout his entire acreage, and, of

course, weather conditions were the same. The plaintiff's potato crop planted with the ten-ton lot of fertilizer was a partial failure. Evidence was introduced without objection that, where the unmixed fertilizer was used, the rows of potato plants were "streaky," being dark green, healthy and well filled out for a distance, then light-colored, sickly and thin, and so on throughout each row. On the other hand, the potatoes planted with the remixed five-ton lot were healthy, of good color and comparatively free from streaks. There was a like variation in the potatoes dug from the two plantings, the yield where the unmixed fertilizer was used varying from forty to eighty barrels to the acre with an excess of undersized potatoes, while the crop planted with the mixed fertilizer was estimated at one hundred and fifteen barrels per acre and the potatoes were of large size and more marketable. This contrast between the potato plants and their yield was particularly apparent in a six-acre field where both lots of fertilizer were used side by side.

And finally, an agronomist from the College of Agriculture, long engaged in experiments in potato fertilization and apparently an expert on that subject, advanced the opinion that the streaked condition of the plaintiff's potato plants could be caused only by the composition of the fertilizer or the amount applied, the latter cause disappearing when, as here, the planting was uniform. He also said that fertilizers of the analyses found in the samples taken by the plaintiff could not be expected to produce as good plants or yield as a brand having an actual 8-16-17 ratio.

The defendant called a potato expert to the stand who was of the opinion that fertilizer of the ratio found in the samples would produce practically as good potato plants and yield as the 8-16-17 brand called for by the plaintiff's contract, and suggested that the streaky conditions of the plaintiff's potatoes and the failure of his crop might be due to soil conditions or mechanical defects in the planters. An inspector from the Department of Agriculture testified that he examined the plaintiff's fields and potato crop for certification but did not notice a streaky condition and reported the appearance of the fields to be in part good and the rest fair. And employees of the seller denied that the plaintiff's potato crop was even a partial failure.

The plaintiff claimed at the trial a breach of the defendant's

contract for the sale of ten tons of 8-16-17 Albatros fertilizer, and no more. Regardless of the allegations of the declaration, the case was tried on the theory that this was the gist of his action, and evidence on that issue was admitted without objection. The verdict can not be set aside on the defendant's contention, first advanced here, that there was a variance between the contract declared upon and proved. On motion after verdict, this objection comes too late. *Brown* v. *Reed*, 81 Me., 158, 163, 16 A., 504.

The defendant not only warranted the fertilizer which he sold the plaintiff generally to be 8-16-17 mixture, but, as required by law, that guaranty was stamped on each and every bag in which it was delivered. R. S., Chap. 41, Sec. 12. If any bag did not contain this ratio of chemical ingredients, its fertilizer content was adulterated within the provisions of R. S., Chap. 41, Sec. 18, and the plaintiff is entitled to recover in this action the money value of his loss resulting from its use. *Heal* v. *Fertilizer Works*, 124 Me., 142, 126 A., 644. The damages recoverable are the difference between the crop actually raised and the crop that might have been raised had there been compliance with the contract. *Philbrick* v. *Kendall*, 111 Me., 198, 203, 88 A., 540. On this record, however, damages are limited to the failure of the crop planted with the ten-ton lot of fertilizer.

The issues of fact and applicable rules of law involved in this case, we must assume, were clearly and properly presented to the jury. A careful and thorough examination of the entire record discloses no ground upon which the verdict can be set aside on the motion.

EXCEPTION:

The defendant reserved an exception to the introduction of the analysis of the samples of the fertilizer taken by the plaintiff on the grounds that the contents of the sealers in which they were forwarded were not intact when received by the chemist, and the samples were not taken in the scientific method adopted by chemists, which is by drawing cores from at least ten bags of fertilizer, mixing them together several times and quartering the mixture for analysis. It is true that the record shows that a representative of

the manufacturer of the fertilizer, without the plaintiff's consent, removed a small quantity of the samples from the sealers while they were in transit. But it is not clear that this tampering with the samples materially varied their chemical ratio. This objection goes to the weight to be given the analysis, not to its admissibility. Nor do we find merit in the contention that the approved method of sampling fertilizer should have been used. This would have established only the average chemical ratio of a remixed ten-bag lot and would have concealed rather than disclosed the lack of guaranteed percentages in the several bags, which is the basis of the plaintiff's complaint. Its use was not appropriate in this case.

Motion overruled.
Exception overruled.

STATE OF MAINE

vs.

ALTON VASHON, CLEMENT COTE AND MILTON GAGNON.

Kennebec. Opinion, January 14, 1938.

EXCEPTIONS. CRIMINAL LAW.

Failure of counsel to take exceptions to charge of presiding Justice tends to indicate that prejudicial aspect was not apparent and it is not to be assumed that it had adverse effect upon the jury.

On general motions for new trials. Respondents tried and convicted on a charge of rape. Each respondent filed a motion for new trial. Motions denied. Appeals taken. In each case appeal dismissed. Judgment for the State. Cases fully appear in the opinion.

Francis H. Bate, County Attorney for the State.

F. Harold Dubord (Law Court only).

Roland J. Poulin,

Arthur J. Cratty, for respondents.

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

MANSER, J. The respondents were separately indicted for rape upon a young woman. With their consent they were tried jointly. It would serve no useful purpose to discuss the facts in detail. Summarized, the evidence for the State was that all three respondents, without intimation of their intention, took the prosecutrix at night-time in an automobile and against her protest to a secluded spot in Waterville. When the car was stopped, she, being permitted to alight, attempted to leave the scene on foot. Thereupon the three young men, acting in concert, forcibly compelled her to submit to sexual intercourse with each one.

Corroborative details were presented to support the State's cases, including the physical condition of the young woman at the time, and negotiations entered into by counsel for the respondents for a comparatively large money settlement. The record contains no intimation that the prosecutrix ever personally countenanced such negotiations, but instead it appears that she flatly refused to consider them. The respondents admitted the successive acts of intercourse but denied the use of force

No exceptions were reserved to the charge, or to any rulings or instructions to counsel or witness, or to any questions asked by the presiding Justice. The cases come up solely by appeal from the refusal to grant motions for a new trial after verdicts of guilty.

In addition to the claim that the evidence was insufficient to sustain the verdicts, complaint is now made in support of the appeal that the conduct of the presiding Justice and certain questions asked by him were prejudicial and reflected to the jury his own opinion of the guilt of the respondents. Upon such complaint, the record will always be examined with great care to determine whether the respondents were accorded a fair and impartial trial. Counsel for the respondents are under the responsibility of preserving their rights, not only as to rulings upon matters of law, but also to protest and except to any prejudicial comments or conduct upon the part of the Justice presiding. If something has been inadvertently said or done by him which appears harmful, his attention should be called to it, that opportunity may be afforded for correction if pos-

sible. Though inexperienced or negligent counsel may fail to perform their duty in this respect, yet the Court in a criminal case will not refuse to review the record to determine whether the constitutional and statutory rights of the respondents have been violated.

In the defense brief, inexperience of counsel is asserted. This may apply to one, although no lack of ability is shown, but it is clear that the respondents were at all times during the preparatory stages of the case, and throughout the trial, represented by two attorneys, one with sixteen years of experience.

As to the statements and questions of the Justice presiding, the printed record can not reproduce inflection, emphasis or demeanor, but failure on the part of counsel to voice protest or take exception tends to indicate that the prejudicial aspect now claimed was not then apparent even to them, and it is not to be assumed that it had adverse effect upon the jury. The reasoning of the Court in *State* v. *Priest*, 117 Me., 223, 103 A., 359, has application here.

As to the questions asked of one or more of the respondents by the court, and certain comments to which objection is now raised, the most that can be said is that they were not perhaps circumspect or germane, but on the other hand, they developed no facts that the respondents had not previously voluntarily admitted in examination by counsel.

From the evidence, the verdicts appear to be fully justified, and there is nothing in the record which shows infringement upon the rights of the respondents or that any injustice was done by the court or by the decision of the jury. In each case, the entry will be

Appeal dismissed.
Judgment for the State.

THIBODEAU'S CASE.

Somerset. Opinion, January 14, 1938.

WORKMEN'S COMPENSATION ACT.

Notice and petition, given within the time limited by law, are prerequisite to an employee's right to recover compensation for accidental injury, except that, "any time during which the employee is unable by reason of physical or mental incapacity to make said claim or file said petition shall not be included in the periods aforesaid."

On appeal from a decree affirming an order of the Industrial Accident Commission awarding compensation. Appeal sustained. Case fully appears in the opinion.

Robinson & Richardson, for appellant.

Fred E. Thibodeau, pro se.

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

BARNES, J. This case comes up on appeal from a decree affirming an order of the Industrial Accident Commission awarding compensation.

On April 11, 1935, claimant filed his petition for compensation, alleging injury by accident, which happened "on the 19th day of July, 1934," while he was employed as cloth washer in defendant's woolen mill. Petition states that the causing accident happened while he was reaching into a tank for soap; its result an inguinal hernia. Petitioner also alleges that his employer had due knowledge or notice.

Answer was seasonably filed denying each allegation and setting up specifically lack of notice or knowledge on the part of the employer as provided by the Workmen's Compensation Act, and was subsequently amended by agreement setting up the statute of limitations.

Certain facts are established by the record. Among them are the following; that a sensation of pain in the lower abdomen, left side of claimant, was felt by him, at intervals from March 13, 1934, to April 3, or 4 following; that he continued in employment, without reporting injury, until the 3rd or 4th of April, 1934; that on one of those April days he presented himself to Dr. Caza, was examined, was told that he was ruptured, and in due season the doctor fitted him with a truss; that he did not then report his condition to his employer, but worked as before until August 14 of that year, when he was totally incapacitated, and, for a time unable to work.

The record is barren of any evidence of accident on July 19, 1934, date of accident in the petition.

It is evident; therefore that the appeal must be sustained for failure of claimant to file his petition and give notice as required by statute.

Notice and petition, given within the time limited by law, are prerequisite to an employee's right to recover compensation for accidental injury, except that, "any time during which the employee is unable by reason of physical or mental incapacity to make said claim or file said petition shall not be included in the periods aforesaid." R. S., Chap. 55, Sec. 32.

The commissioner found as matter of fact that claimant suffered accidental injury on March 13, 1934, "but the employee is allowed the period from that date to August 14, 1934, because relying on the premise his accident had not resulted during that period in any difficulty that would amount to anything, he did not have mental capacity to decide the contrary to be true."

It is unnecessary to attempt a definition of the degree of mental incapacity sufficient to excuse an employee from giving notice of an accident within thirty days after the date thereof, but, from perusal of the record it is clear that the commissioner committed error in law in adjudging the claimant entitled to grace because of "mental incapacity" within the meaning of the statute.

Appeal sustained.

EDNA MAY WELLS *vs.* CITY OF AUGUSTA.

Kennebec. Opinion, January 15, 1938.

HIGHWAYS. NEGLIGENCE. MUNICIPAL CORPORATIONS.

R. S., Chap. 27, Sec. 65 provides "highways, town ways, and streets, legally established, should be opened and kept in repair so as to be safe and convenient for travelers. . . ."

R. S., Chap. 27, Sec. 94 provides "Whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair . . . in any highway . . . may recover for the same in a special action on the case" if, the way being one which the town is obliged to repair, the municipal officers or road commissioner "had twenty-four hours actual notice of the defect or want of repair."

Under these statutes the only standard of duty fixed, and the only test of liability created, is that highways shall be constructed and maintained as to be reasonably safe and convenient for travellers, not that they shall be entirely and absolutely safe and convenient.

Regardless of the cause of the defect, if in fact the way is not reasonably safe and convenient, the town is liable, and it is immaterial whether the defect arises from the negligence of the town or city officials or from causes which could not be avoided or controlled by them in the exercise of ordinary care and diligence, including the acts or omissions of others.

What obstructions, irregularities or conditions render a highway defective are questions for the triers of fact and their conclusion, unless manifestly wrong, will not be set aside.

As a matter of law, mere slipperiness of the surface of a way caused by either ice or snow is not a defect or want of repair within the meaning of the statute.

If a way is not reasonably safe and convenient, the town, upon proper notice, is liable for injuries caused thereby.

Independent of statute there is no liability whatever on the part of municipalities for injuries caused by defective highways.

Notice of a defect in a public highway must be of the indentical defect which caused the injury.

On exceptions to the acceptance of a Referee's report. Case tried before Referee. Reference had under Rule of Court. Decision for the plaintiff for $800. Exceptions filed to acceptance of report. Exceptions sustained. Case fully appears in the opinion.

McLean, Fogg & Southard, for plaintiff.

Charles P. Nelson, for defendant.

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

STURGIS, J. Action on the case for damages for bodily injuries alleged to have been received by the plaintiff through a defect or want of repair in the highway known as Bangor Street in the City of Augusta. The case, having been referred under Rule of Court, comes forward on exceptions to the acceptance of the report.

The Referee, in an extended statement of his findings of fact and rulings of law, reports that at about seven o'clock in the morning of Monday, December 30, 1935, the plaintiff, while walking on the sidewalk on the easterly side of Bangor Street, was struck and seriously injured by a passing automobile which skidded on the icy surface of the street in an attempt to avoid a collision with other cars and ran up on to the sidewalk.

It is also found that small ridges on a large patch of ice in the street, formed by an overflow of water from a defective closet in the house of an abutting owner, caused the automobile to skid and the driver to lose control of it. The water had been running into the street and freezing at times for more than a week before the accident and the Street Commissioner of the city, learning of the condition of the way, had caused it to be treated with a mixture of sand and calcium chloride. The day before the plaintiff was injured, being Sunday, no sanding was done and water, either formed by the melting ice or running in from a further overflow from the abutter's closet, froze in the low temperature and covered the patch with a new coating of ice which obliterated the sanding which had already been done. The street where the ice formed was at no time closed, nor was notice of its condition given to the public.

In this state, it is provided by statute that "highways, town ways, and streets, legally established, shall be opened and kept in

repair so as to be safe and convenient for travelers" etc. R. S., Chap. 27, Sec. 65. And in Section 94 of the same Chapter, that "Whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair . . . in any highway . . . may recover for the same in a special action on the case" if, the way being one which the town is obliged to repair, the municipal officers or road commissioner of such town, or any person authorized to act as a substitute for either of them, "had twenty-four hours actual notice of the defect or want of repair."

In construing these statutes, this Court has uniformly held that the only standard of duty fixed, and the only test of liability created, is that the highways shall be constructed and maintained so as to be reasonably safe and convenient for travellers in view of the circumstances of each particular case, not that they shall be entirely and absolutely safe and convenient. Nor under the statute is the question of liability one of negligence and whether in a given case the officers of the town have used ordinary or reasonable care and diligence in constructing and maintaining the way. Regardless of the cause of the defect, if in fact the way is not reasonably safe and convenient, the town is liable to the traveller who is injured thereby in his person or property, and it is immaterial whether the defect arises from the negligence of the town or city officials or from causes which could not be avoided or controlled by them in the exercise of ordinary care and diligence, including the acts or omissions of others. *Cunningham* v. *Frankfort*, 104 Me., 208, 70 A., 441; *Moriarty* v. *Lewiston*, 98 Me., 482, 57 A., 790; *Morgan* v. *Lewiston*, 91 Me., 566, 40 A., 545; *Hutchings* v. *Sullivan*, 90 Me., 131, 37 A., 883; *Bryant* v. *Biddeford*, 39 Me., 193, 197; *Frost* v. *Portland*, 11 Me., 271.

What obstructions, irregularities or conditions or, as it is sometimes stated, inconveniences will render a highway defective so as to make the town or city liable for injuries occasioned thereby is ordinarily a matter of sound judgment upon which opinions may well differ. *Moriarty* v. *Lewiston*, supra. And as a general rule the conclusions of the triers of fact on that issue, unless manifestly wrong, will not be set aside. *Weeks* v. *Parsonsfield*, 65 Me., 285. It has long been settled, however, that as a matter of law mere slipperiness of

the surface of a way caused by either ice or snow is not a defect or want of repair within the meaning of the statute, and towns and cities are not liable for personal injuries or property damage resulting therefrom. The strictness of this rule is not relaxed because small ridges, waves or irregularities exist in the ice or snow which in themselves would not render the way unsafe if it were not slippery. "In this cold climate, where ice and snow cover the whole face of the earth for a considerable portion of the year, such an inconvenience ought not, and rightfully can not, be regarded as a defect. No amount of diligence can keep our streets and sidewalks at all times free from ice and snow." *Smyth* v. *Bangor*, 72 Me., 249.

The facts in *Smyth* v. *Bangor* are so analogous to those in the case at bar we think that decision controls here and can not be distinguished. There, the plaintiff slipped upon ice on a sidewalk, a part of the street and governed as to the duty of the municipal officers to keep it in a safe and convenient condition by the same statute. The opinion states as a proven fact that "Water which had oozed out of the adjoining bank, and the flow of which may have been increased by the drainage from a privy and a sink-spout, had run across the sidewalk and frozen, forming a spot of ice some six or eight feet long and the width of the sidewalk; and the witnesses estimate its thickness from one to three inches. It was in no respect an obstacle to travel except that it made the sidewalk at that place slippery. . . .

"The spot of ice on which the plaintiff slipped was nearly smooth, and almost as level as the sidewalk itself. There is no pretense that it formed a ridge or hummock upon the sidewalk. Some of the plaintiffs' witnesses say that as the water ran across the walk and froze it formed little ridges or waves; that the surface of the ice was a little wavy; but no one pretends that it had assumed a form or shape that would have been dangerous to travelers if it had not been slippery. The evidence leaves no doubt in our minds that it was the slippery condition of the sidewalk alone that caused the plaintiffs' injury."

In this case, the transcript of the evidence heard by the Referee and made a part of the bill of exceptions discloses that the water which caused the ice patch on which the automobile skidded ran out

from an abutter's premises into the gutter of the street and to a manhole which, in the freezing weather, quickly plugged and caused the water to back out upon the adjoining surface of the way. It flowed in sort of a circle thicker nearer the manhole but tapering off towards the center of the road, with small ridges where the overflow froze from time to time and stopped. No witness claims that the ridges were more than ⅜ to ½ an inch high or formed any obstruction to traffic travelling straight ahead in the street. One man, a lay witness whose qualifications do not clearly appear, was allowed to advance the opinion that the ice as it existed at the time of the accident would have a tendency to cause an automobile circling on it to skid. The operator of the automobile which did the damage, however, makes no such claim. His testimony is only that as he drove down the westerly side of Bangor Street that morning, a truck came out of an intersecting way, turned directly into his path and suddenly slowed down. Swinging out to pass, he saw a car approaching from the opposite direction, attempted to turn back in behind the truck and applied his brakes, with the result that his car began to skid and, in spite of his attempts to straighten it out, it ran across the street and struck the plaintiff as has already been described.

The evidence so recorded, stripped of inference which does not rise above conjecture, shows only that the automobile, when the brakes were applied, skidded on the slippery street and went out of control, a not unusual incident in winter automobile travel in this state. Such irregularities in the ice as existed were no greater or more dangerous than those found throughout the length and breadth of our highways where water, thawing and freezing in the winter weather, forms slightly irregular icy surfaces, or the heavy automobile travel on the ways rolls and wears the ice into small ruts and ridges. Under the existing statute, we are of opinion the doctrine of *Smyth* v. *Bangor* remains the only sound and reasonable rule to apply to such highway conditions.

We have not overlooked the argument advanced that the statute imposes a different standard of responsibility on municipalities when ice is formed in the highways from artificial causes and not by the natural fall of rain or snow. No such distinction was ob-

served or can be read into *Smyth* v. *Bangor* where the ice claimed to be a defect was formed by water which "had oozed out of the adjoining bank and the flow of which may have been increased by the drainage from a privy and a sink spout." There was not then and is not now room for that distinction under the rule of absolute liability established by the statute. If a way is not reasonably safe and convenient, the town, upon proper notice, is liable for injuries caused thereby, whatever and whoever may have caused the defect. If it is reasonably safe and convenient, there can be no recovery. *Hutchings* v. *Sullivan*, *Bryant* v. *Biddeford*, *Frost* v. *Portland*, supra; *Shearman & Redfield on Negligence*, 4th Ed., Sec. 366.

Nor in the absence of a statutory defect in the way can liability be predicated on the negligent failure of the Street Commissioner of Augusta or other municipal officer to remove, guard or give public notice of the ice formation. "This is not a common law action of negligence against an individual or a corporation, but a statutory remedy against a municipality, and the rights of the traveling public and the liability of the municipality are limited by the scope of the statute. Independent of statute there is no liability whatever on the part of municipalities for injuries caused by defective highways. The liability is a creature of the statute, and it does not extend beyond the express provisions." *McCarthy* v. *Leeds*, 116 Me., 275, 101 A., 448, 449. See *Huntington* v. *Calais*, 105 Me., 144, 73 A., 829. Obviously, decisions from other jurisdictions cited on this point, which are based on different statutes or the common-law rules of negligence, can not here be deemed of controlling import.

On the main issue in this case, we are of opinion that the evidence does not establish that the plaintiff was injured by a defect or want of repair in the highway for which the City of Augusta is liable. The exception reserved to the acceptance of the report finding to the contrary must be sustained.

The ruling below was also erroneous on another point and the objection made on that ground is well taken. It is clearly established that the ice patch in controversy on Bangor Street had been repeatedly treated with sand and calcium chloride during the week before the accident occurred on which this action is based, and each

time the slipperiness of the surface was removed or covered up. The mixture was adhesive and it may be inferred that it remained on the ice until another thaw or overflow formed a new coating. As late as half past three o'clock on Saturday afternoon before the accident, the ice was so treated and it was not then, according to the evidence, slippery and unsafe. It became so between that time and Monday morning, when the accident occurred, through a new thaw or overflow, of which and the slippery coating formed by it no city official had actual notice. There can be no doubt, we think, that it was the new coating of ice which caused the automobile in this case to skid. Assuming that the highway thereby became defective, which we have here decided it did not, it can not be held that the officers of the municipality had twenty-four hours actual notice of the defect for which recovery is claimed as required by the statute. "Notice must be of the defect itself, of the identical defect which caused the injury. Notice of another defect or of the existence of a cause likely to produce the defect is not sufficient." *Smyth* v. *Bangor*, supra; *Pendleton* v. *Northport*, 80 Me., 598, 16 A., 253; *Littlefield* v. *Webster*, 90 Me., 213, 38 A., 141; *Gurney* v. *Rockport*, 93 Me., 360, 45 A., 310.

In view of the conclusions reached on the points already considered, it is unnecessary to prolong this opinion by a discussion of other objections filed and argued. It appearing that the bill of exception is sufficient, the entry is

Exceptions sustained.

PORTLAND SAVINGS BANK

vs.

HARRY M. SHWARTZ AND JESSE M. ROSENBERG.

Cumberland. Opinion, January 18, 1938.

BILLS AND NOTES.

Accommodation indorsers are considered as indorsers under provisions of R. S., Chap. 164, *Sec.* 63.

An action against an indorser is not an action on the note, as the indorser's contract is distinct from that of the maker of the note.

Although an indorsement may be on a witnessed note, the indorser's contract does not come within the exception of the statute applicable to witnessed notes, and the general limitation of six years properly pleaded is a bar to recovery.

On report. Defendants are sued jointly as indorsers on a witnessed promissory note. Judgment for the defendants. Case fully appears in the opinion.

Sherman I. Gould,
Charles H. Shackley, for plaintiff.
Abraham Breitbard, for defendants.

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

THAXTER, J. This case is before this Court on report. The defendants are sued jointly as the indorsers of a promissory note of the following tenor:

"Mortgage Loan No. 3935
$2000.00 Portland, June 30, 1923.

For value received, the Lincoln Realty Co. promises to pay to the order of Portland Savings Bank, the sum of Two THOUSAND DOLLARS IN ONE YEAR from and after date, with interest at the rate of six per cent. per annum, payable

semi-annually; also with interest on all over-due interest at the rate of six per cent. per annum.

WITNESS:
C. H. TOLMAN

LINCOLN REALTY CO.
By *Harry M. Shwartz*
PRESIDENT.

Waiving demand, notice and protest.

Documentary stamps
10¢ – 5¢
L. R. Co.
6/30/23"

Harry M. Shwartz
Jesse M. Rosenberg

The defendants have pleaded the general issue with a brief statement setting up the statute of limitations. The plaintiff claims that the six-year limitation does not apply because this is a witnessed note on which the period is twenty years.

The defendants are accommodation indorsers and, prior to the passage of the Uniform Negotiable Instruments Act in 1917, now embodied in R. S. 1930, Chap. 164, would have been regarded as joint or joint and several makers and not as indorsers. *Adams* v. *Hardy*, 32 Me., 339; *Stewart* v. *Oliver*, 110 Me., 208, 85 A., 747. The act abrogated this rule and these defendants are now treated as indorsers. R. S. 1930, Chap. 164, Sec. 63. *Ingalls* v. *Marston*, 121 Me., 182, 116 A., 216; *Barton* v. *McKay*, 135 Me., 197, 193 A., 733.

R. S. 1930, Chap. 95, Sec. 94, provides that the six-year limitation established by Section 90 (IV) shall "not apply to actions on promissory notes signed in the presence of an attesting witness." An action against an indorser is not, however, an action on the note. His is a new and different contract, distinct from that of the maker of the note. *Seavey* v. *Coffin*, 64 Me., 224; *Furgerson* v. *Staples*, 82 Me., 159, 163, 19 A., 158; *Barton* v. *McKay*, supra; 8 Am. Jur., 243. Even though the indorsement may be on a witnessed note, the indorser's contract does not come within the exception of the statute applicable to witnessed notes, and the general limitation of six years properly pleaded is a bar to recovery. *Seavey* v. *Coffin*, supra.

Judgment for the defendants.

STATE OF MAINE *vs.* RALPH LIVINGSTON.

Aroostook. Opinion, January 18, 1938.

GAMBLING.

A machine is none the less a gambling device although skill is a factor in the player's success.

Chapter 82 *of P. L.* 1935 *is a revenue measure and does not modify the general gambling statute.*

On report. Respondent was indicted for a violation of Chap. 136, Sec. 1, of the R. S. 1930 for permitting gambling in a tenement under his care and control. Judgment for the State. Case remanded for sentence. Case fully appears in the opinion.

George B. Barnes, County Attorney for State.

Herschel Shaw, for respondent.

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

THAXTER, J. The respondent was indicted for a violation of R. S. 1930, Chap. 136, Sec. 1, in permitting gambling in a tenement under his care and control. The case is reported under a stipulation that, if the prosecution can be maintained, the case is to be remanded for sentence of the respondent; if not, it is to be remanded for an entry of *nolle prosequi.*

The respondent had in a lunch room operated by him a machine known as a "Ten Grand Pin Game," which was duly licensed under the provisions of P. L. 1935, Chap. 82. It is unnecessary to go into the intricate details of the operation of this machine. In brief, for a nickel two shots may be made. The operator pulls back a pin which, on being released, strikes a steel ball which runs in a trough on the right side of a board, the outer end of which is approximately three inches higher than the end towards the operator. The ball is propelled up to the outer end, and drops back by gravity over the face

of the board in which are holes which may catch the ball. A device under the machine, which in no way can be controlled by the operator, may or may not, depending on chance, so far as the operator is concerned, illuminate a number on the shaft of an arrow set in the machine. If a number is illuminated, the player may win certain tokens good for trade, if he can put a ball in the hole numbered 10,000, or one in the hole numbered 2,000, and one in the hole numbered 3,000. If no number is illuminated, tokens may be won by putting one ball in the 2,000 hole and the other in the 3,000 hole. The 10,000 hole is the easy one to shoot for. If the player wins, the machine ejects the number of slugs shown by the illuminated number. It may be readily seen to what an extent chance plays a part in the winning of the tokens. In the first place, the lighting of a number by a mechanism which is entirely beyond the operator's control, determines whether or not the operator may have the easy chance to put a ball in the 10,000 hole; in the second place, the number of the tokens which the operator will receive is entirely determined by chance. Whether or not the player wins depends to some extent on his skill, to a very large extent on chance; and the amount of his winnings, if he is successful, depends entirely on chance.

It would seem obvious that this machine is a gambling device. It is none the less one because skill is a factor in the player's success. We might as well say that playing cards for money is not gambling because the result is in part dependent on a player's skill. The law in this state is well settled that such a machine as this is a gambling device and comes within the prohibition of the statute. *State* v. *Baitler*, 131 Me., 285, 161 A., 671.

Do the provisions of P. L. 1935, Chap. 82, change the law? This is entitled "An Act to Tax Games of Skill." It provides for a tax on games of skill, for a license to dealers in them, and a penalty for the possession of any game which has not been licensed. Section 1 provides in part as follows:

> "'Game of skill' shall mean any slot machine, or contrivance which releases balls or other objects subject to the controls of the slot machine or contrivance, upon the insertion of a coin, disc or token, the play of which machine or contrivance is in some measure dependent upon the skill of the player."

On its face the act would seem to be a revenue measure. Nothing is said about any modification of the general gambling statute. In fact an intent to amend that law would seem to be negatived by the following provision in Section 4:

> "The licensing of any such game of skill shall not be a defense on the part of the holder of such license to prosecution for violation of any of the provisions of chapter 136 of the revised statutes as amended, relative to gambling nor to seizure and forfeiture thereof if used or permitted to be used for gambling purposes."

Judgment for the State.
Case remanded for sentence.

STATE OF MAINE *vs.* FRASER SHANNON.

Somerset. Opinion, January 18, 1938.

CRIMINAL LAW. COURTS.

An unintentional misstatement of the testimony by the trial judge in his charge to the jury in a criminal case, concerning a vital point in the case, may well be a decisive factor in the verdict, and being prejudicial to the respondent, is error.

Nothing less than a positive correction of the error will suffice; and it has always been taken for granted that it is the imperative duty of the court to make such correction.

The trial judge, having once assumed the burden of referring to the testimony, can not thereafter wash his hands of the responsibility for an inaccurate version of it merely by telling the jury that the duty to decide the question is theirs.

The great deference, which a jury properly gives to an expression by the court, renders it incumbent on a judge to see that no misconception arises in their minds because of any statement by him.

A respondent in a criminal action is entitled to have provisions of Sec. 19, *Chap.* 146, *of the R. S.* 1930, *regarding rights of respondent to testify or not, explained to the jury in unequivocal language.*

On exceptions. Respondent was tried before a jury for perjury. Trial was had at the January Term, 1937, of the Superior Court for the County of Somerset. Verdict guilty. Respondent filed exceptions. Exceptions sustained. New trial granted. Case fully appears in the opinion.

Clayton E. Eames, County Attorney for the State.

W. Folsom Merrill,

Fred H. Lancaster,

Lloyd H. Stitham, for respondent.

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

THAXTER, J. The respondent was tried on an indictment for perjury and convicted. During the course of the trial a number of exceptions were taken which are before this Court. But two of these, being to portions of the judge's charge, need be considered.

The respondent, about midnight of July 3rd, 1932, was severely injured in an explosion which occurred in the garage of one George R. Dow in the Town of Corinth. A number of persons had gathered in and about the garage for a Fourth of July celebration. Powder was brought into the garage and an improvised cannon was loaded and fired. After the cannon had been fired several times and while it was being loaded to be discharged again, it exploded. For the injuries which the respondent received in this accident, he brought suit against Dow and recovered a verdict of $6,181.81 which was affirmed by the Law Court. *Shannon* v. *Dow*, 133 Me., 235, 175 A., 766. The defense to that action was that Shannon had assisted in loading the cannon and was consequently barred from recovery by his own contributory negligence. His testimony in the civil case was that he had nothing to do with loading the cannon and that he took no part in the Fourth of July celebration. The contention of the State in the perjury trial was that this testimony was false.

In the perjury trial, the respondent introduced no evidence. The

two portions of the charge of the presiding Justice to which exceptions have been taken relate, first to an alleged misstatement of evidence, and secondly to an alleged failure to charge the jury properly with relation to the respondent's election not to take the stand.

As to the first objection, the court told the jury that carrying or bringing the powder to the cannon with which to load it might be considered as assisting in loading it with powder. No exception was taken to this. Then came the following comment: "Now you will remember there was some evidence from some witness — I am not undertaking to discuss the evidence of the witnesses — that this respondent was seen with powder or a can or some container in which it was testified the powder was put there at the scene of this affair shortly before, or some time that evening before the explosion which resulted in injury to this respondent." To this portion of the charge, an exception was taken.

As a matter of fact, the only evidence in the case on this point was from Mr. Dow, the proprietor of the garage, who testified: "I think Mr. Shannon had a can in his hand." There was nothing said about what kind of a can it was, what was in it, and there was no reference whatsoever to powder. This was of course an unintentional, but none the less a highly prejudicial, misstatement of the testimony. It concerned a vital point in the case, and a careful reading of the record indicates that such comment from the court may well have been a decisive factor in the verdict. It was clearly prejudicial error. *Stephenson* v. *Thayer*, 63 Me., 143, 147.

When the attention of the presiding Justice was called to the matter, he made the following qualification: "Now that is a statement on my part of my remembrance of the evidence. You will disregard it entirely if it does not coincide with your remembrance of the evidence. It is for you to say what the evidence was. Your remembrance of it controls, and if I was in error in referring to evidence which was not in the case you will disregard it entirely."

This comment was not effective to cure the harm which had been done. Surely nothing less than a positive correction of the error would have sufficed; and it has always been taken for granted that it is the imperative duty of the court to make such correction. *Jameson* v. *Weld*, 93 Me., 345, 355, 45 A., 299; *Grows* v. *Maine*

Central Railroad Company, 69 Me., 412, 416; *State* v. *Fenlason*, 78 Me., 495, 501, 7 A., 385. The trial judge, having once assumed the burden of referring to the testimony, can not thereafter wash his hands of the responsibility for an inaccurate version of it merely by telling the jury that the duty to decide the question is theirs. *Commonwealth* v. *Marcinko*, 242 Pa., 388, 392, 89 A., 457; *Mullen* v. *United States*, 106 Fed., 892; *People* v. *Jacobs*, 243 Ill., 580, 592, 90 N. E., 1092. The great deference, which a jury properly gives to an expression by the court, renders it incumbent on a judge to see that no misconception arises in their minds because of any statement of his.

The second exception concerns that portion of the charge wherein the presiding Justice attempted to explain to the jury the rights given to the respondent by R. S. 1930, Chap. 146, Sec. 19. This section reads in part as follows:

> "In all criminal trials, the accused shall, at his own request, but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him of any other crime than that for which he is on trial; and the fact that he does not testify in his own behalf, shall not be taken as evidence of his guilt."

The court referred to this statute in the following language:

> "Now you have heard the evidence from the witnesses for the State. That is all the evidence in the case. The respondent has not seen fit to take the stand and offer——any evidence. A party is not obliged to take the stand in a criminal case. He may do so. In former times no respondent was allowed to testify, but as the rights of people were made more liberal persons charged with crime were allowed to testify. They were not obliged to, but they were allowed to. And when they do, of course, they subject themselves to the usual cross-examination and the usual liability of witnesses. When they do not they are protected to some extent by the statute which says the fact that they do not see fit to testify shall not be used as evidence against them. And so in this case you will not consider the fact that this respondent has seen fit not to take the stand as evi-

dence against him. You are to consider the case and decide it upon the evidence in the case which has been produced wholly on the part of the State."

The statute gave to this respondent a certain right. The jury was to draw no inference against him because he did not elect to testify. He was in the same position as if the law did not allow him to be a witness. He was entitled to have this explained to the jury in unequivocal language. *State* v. *Banks*, 78 Me., 490, 7 A., 269; *State* v. *Landry*, 85 Me., 95, 26 A., 998. This the presiding Justice failed to do. The first portion of the charge on this point refers to the fact that the only evidence was from witnesses for the State; that the respondent did not take the stand; that he could have done so; that thereby he would have been subjected to cross-examination; and that the statute protected him to some extent. Protected him from what? The implication is from having to make disclosure of certain facts on cross-examination. The language of the court, not only failed to give to the respondent that affirmative protection which the statute intended him to have, but inferentially at least tended to arouse in the jury the very prejudice against him by reason of his election not to testify, which it was the purpose of the statute to remove. The fact that the court in the next sentence explained the effect of the statute does not remedy the evil. Such statement is inconsistent with what went before, and, if it had any effect at all, served only to confuse the jury as to respondent's rights.

Exceptions sustained.
New trial granted.

WILLARD B. BRYNE *vs.* JAMES L. BRYNE ET AL.

Lincoln. Opinion, January 20, 1938.

EXCEPTIONS. BILLS AND NOTES.

The excepting party, in his bill of exceptions, must set forth enough in his bill to enable the Court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial; also what the issue was, and how the excepting party was aggrieved. The aggrievance must be shown affirmatively. It can not be left to inference.

Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact.

The issue raised by exception to the direction of the verdict is one of law, and all of the evidence by necessity becomes a part of the case, and this would be so even though it had not been mentioned in the bill of exceptions.

It is presumed that all material exhibits are included in a bill of exceptions where the Justice, whose ruling is under attack, has allowed the bill.

Where no express reservation of interest is made in a demand note, it will not carry interest until demand.

The commencement of suit on a demand note constitutes a demand.

On exceptions. An action of assumpsit by plaintiff to recover on six promissory notes, tried before a jury. At conclusion of plaintiff's case the court ordered a verdict for the plaintiff for the principal of the notes and interest from date of writ. To the direction of this verdict plaintiff excepted. Exceptions overruled. Case fully appears in the opinion.

Burleigh Martin,
Arthur A. Hebert,
James S. Ellis, for plaintiff.
McLean, Fogg & Southard,
Weston M. Hilton, for defendant.

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

HUDSON, J. Action of assumpsit on six promissory notes, of all of which the defendant, James L. Bryne, is maker and the plaintiff, Willard, his brother, payee. Upon the resting of the plaintiff's case (the defendants offering no testimony), the court ordered a verdict which besides the principal gave to the plaintiff interest only from the date of the writ. To the direction of this verdict the plaintiff excepted.

He filed three exceptions, the first two of which are not pressed, the exceptant stating in his brief:

> "The only question presented to this Court is the ruling and the instructions by the Court in relation to the date from which the plaintiff is entitled to recover interest on the pleadings and the evidence."

Counsel for the defendants attacks the sufficiency of the exception. Omitting the formal parts, it reads:

> "Third Exception: At the conclusion of the testimony the Presiding Justice directed the jury to return a verdict for the plaintiff for the amount of $2666.47 which included interest from the date of the writ; and instructed the jury as a matter of law that '. . . the plaintiff, under the evidence and the pleadings filed in this case, is entitled to recover interest on his notes only since the date of the writ which is November 10, 1936.'
>
> "By which said rulings and instruction the plaintiff was and is now aggrieved, and having seasonably excepted, and having reduced his exceptions to writing, prays that the same may be allowed.
>
> "The writ, pleadings, evidence, exhibits reported, and the charge of the Presiding Justice are made a part of this bill of exceptions."

It is fundamental that "an excepting party, if he would obtain any benefit from his exceptions, must set forth enough in the bill of exceptions to enable the Court to determine that the points raised are material and that the rulings excepted to are both erroneous and prejudicial. The bill of exceptions must show what the issue was, and how the excepting party was aggrieved." *Jones* v. *Jones et al.*, 101 Me., 447, 450, 64 A., 815, 817; *Feltis et al.* v. *Lincoln County*

Power Co., 120 Me., 101, 102, 112 A., 906; *State of Maine* v. *Mooers*, 129 Me., 364, 369, 152 A., 265; *State of Maine* v. *Holland*, 125 Me., 526, 527, 134 A., 801.

The aggrievance must be shown affirmatively. It can not be left to inference. *State* v. *Wombolt et al.*, 126 Me., 351, 353, 138 A., 527; *Borders* v. *Boston & Maine R. R.*, 115 Me., 207, 208, 98 A., 662.

Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact. *Laroche* v. *Despeaux*, 90 Me., 178, 38 A., 100; *American Sardine Co.* v. *Olsen et al.*, 117 Me., 26, 29, 102 A., 797; *Bowman* v. *Geyer*, 127 Me., 351, 352, 143 A., 272; *Hurley* v. *Farnsworth, Admx.*, 115 Me., 321, 322, 98 A., 821.

The instant exception was taken to a ruling of the presiding Justice by which the jury was ordered to return a verdict for the plaintiff in a certain amount which did not include interest on the notes anterior to the date of the writ. The issue raised by this exception to the direction of the verdict is one of law, *Rhoda* v. *Drake Jr.*, 125 Me., 509, 131 A., 573; and all of the evidence by necessity becomes a part of the case, and this would be so even though it had not been mentioned in the bill of exceptions. *People's National Bank* v. *Nickerson*, 108 Me., 341, 343, 80 A., 849; *Williams* v. *Sweet*, 121 Me., 118, 119, 115 A., 895; *Brown* v. *Sanborn*, 131 Me., 53, 54, 158 A., 855.

The exactions of the law are satisfied by this exception in that it does set forth the issue, the claimed aggrievance, and enough to enable the Court to determine whether the point raised is material and the ruling excepted to erroneous and prejudicial.

For authority *Rose* v. *Parker*, 116 Me., 52, 99 A., 817, 818, is decisive on the question of the sufficiency of this exception. Therein a verdict was ordered for the plaintiff to which exceptions were taken. They are so brief that we quote them, omitting the formal parts:

> "At the close of the evidence the presiding Justice directed a verdict for the plaintiff.
>
> "The writ, the plea and all evidence is made a part of these exceptions.
>
> "To all which rulings excepts and prays that his exceptions may be allowed."

It was held that while questions regarding the admission or exclusion of evidence were not open to the exceptant, "the order of Court directing a verdict" was before the court.

In directing this verdict, the Justice must have found that on the evidence with correct application of law thereto a different verdict from that ordered could not properly have been rendered by the jury and that, considering the evidence most favorably for the exceptant, it would not have warranted a verdict including the interest denied him. *Toole, Assignee* v. *Bearce et al.*, 91 Me., 209, 214, 39 A., 558; *Colbath* v. *Stebbins Lumber Co.*, 127 Me., 406, 416, 144 A., 1; *Shaw* v. *Kroot*, 124 Me., 439, 440, 126 A., 922; *Shackford* v. *New England Tel. & Tel. Co.*, 112 Me., 204, 205, 91 A., 931.

To pass upon the correctness of this ruling, we are presented with all that the court below had before it, in spite of a contention of the defendants which will now be considered.

It is contended that the whole record is not before us because in the exception it is stated that "exhibits *reported*" are made a part of the bill. This, it is said, implies that not all of the exhibits are presented. While perhaps the language is a bit unfortunate, we think a fair construction of it would be that all of the exhibits were made a part of the bill. Anyway, that should be the presumption, even from the language used. As in *Toole, Assignee* v. *Bearce et al.*, supra, where the bill did not contain an affirmative statement that the exception to the instruction complained of was noted before the jury retired, the court held that it would be presumed that it was seasonably noted, so here a presumption that all material exhibits were included in the bill should obtain, where the Justice, whose ruling is under attack, has allowed the bill. Furthermore, as above noted, where the exception is to the direction of a verdict, all of the evidence becomes a part of the exceptions, even though not mentioned in the bill. There is no claim, as a matter of fact, that all of the exhibits are not now before this Court.

It now becomes necessary to determine whether the direction of this verdict constituted reversible error. The question presented was whether the plaintiff could recover any interest on the notes prior to the date of the writ and that depended upon whether any demand for their payment had been made before suit was brought.

Where no express reservation of interest is made in a demand note, it will not carry interest until demand. 8 C. J., Sec., 1426, page 1095; *Whitcomb et al.*, v. *Harris*, 90 Me., 206, 211, 38 A., 138; also see *Swett* v. *Hooper*, 62 Me., 54.

The commencement of suit constitutes demand. C. J. *supra*, same section.

That the defendant, James, gave the plaintiff these six notes, and that they were demand notes, without mention of interest, is conceded.

In 1919 the brothers were contractors, living in Massachusetts. Later James moved to this state. On May 2, 1919, the plaintiff loaned $2500 to him and took his witnessed note in that amount, payable on demand at any bank in Massachusetts.

On June 26, 1919, an additional loan of $500 was made and a like note taken, excepting that the place of payment was not stated.

From 1919 down to March 1, 1923, the plaintiff made twenty-seven additional loans to his brother not evidenced by notes. On the last named date, James, at the request of the plaintiff, visited him at his home in Massachusetts to the end that they might determine just how they stood financially. This they had no difficulty in doing and it was determined and agreed that including the two 1919 notes and the loans subsequently made James was indebted to the plaintiff in the sum of $7193. Of this amount the two 1919 notes evidenced $3000, the balance being in open account. The amount having been determined, four new demand notes were then given by James to the plaintiff, all dated March 1, 1923, three each in the sum of $1000 and the fourth $1193.

A careful examination of the record convinces us that the jury could not have properly found that any demand for payment was made by the plaintiff after the four new notes were given. It reveals that any demand, if one were made, was to pay that which the brothers had determined as the amount then due and this determination was made before the new notes were given.

Although the plaintiff had held the two 1919 notes for many years, he had never demanded payment nor attempted to collect interest. This was true also as to the loans thereafter made not evidenced by notes. Payments had been made but without exception were credited on the principal. Then the most commendable spirit

of friendship and helpfulness obtained between these brothers rather than that of a purely financial transaction between strangers. When the amount of indebtedness had been determined, James told the plaintiff he could not pay immediately and then it was that the arrangement was entered into, by which the two old notes were to stand and the four new notes be given. It is hardly conceivable that this plaintiff, feeling as friendly as he did toward his brother, would take demand notes without mention of interest and then immediately demand payment in order to get interest. Nowhere in the record is there any evidence that the matter of interest as such was ever mentioned between the two brothers. If the plaintiff had desired to have these notes bear interest from their date, the natural thing would have been to have had them made payable with interest. That was not done. To argue that the new notes were written without interest solely to evidence a settlement but that all the time there was an intent to demand payment forthwith so as to be able to collect interest would make a trickster of the plaintiff.

While it might be true that the demand for payment of the $7193, before the giving of the four new notes, would have been sufficient to cause interest to run on the old notes, yet later, when the new arrangement was entered into whereby the old notes were to stand and the new notes to be given, that constituted a waiver of the previous demand as to the old notes. Consequently, interest could be reckoned only from the date of the writ.

Exceptions overruled.

JAMES A. WALLACE *vs.* BOOTH FISHERIES CORP.

Washington. Opinion, January 22, 1938.

WORKMEN'S COMPENSATION ACT.

Under Chap. 55, Sec. 32 of the Revised Statutes an employee, in full possession of his mental faculties, is not excused from statutory compliance as to notice on the ground of mental incapacity simply because he was led to believe "he would be better."

On appeal from decree in favor of petitioner under the Workmen's Compensation Act. Appeal sustained. Case fully appears in the opinion.

Hubert E. Saunders, for petitioner.

Robinson & Richardson, for respondent.

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

MANSER, J. Appeal from decree in favor of petitioner under the Workmen's Compensation Act.

The Industrial Accident Commissioner found that the petitioner sustained a compensable injury, which occurred on April 18, 1934 and which date is fixed by the commissioner as the date of incapacity. The defendant denies that any injury by accident was sustained. It is unnecessary to review the finding of fact in this respect as the appeal must be sustained bcause of errors of law upon other points.

R. S., Chap. 55, Sec. 32 provides:

> "An employee's claim for compensation under this act shall be barred unless made to an employer within six months after the date of incapacity, and unless an agreement or a petition as provided in the preceding section shall be filed within one year after the date of the accident; provided, however, that

any time during which the employee is unable by reason of physical or mental incapacity to make said claim or file said petition shall not be included in the periods aforesaid."

The petitioner made no claim for compensation within six months after the date of incapacity and his petition for award of compensation was filed June 14, 1935, nearly two months after the statutory period of limitation had expired. There is no finding by the commissioner, and no evidence in the record of any waiver of these requirements. The commissioner found that the petitioner was totally incapacitated from performing his work for about three weeks, and partially incapacitated for a major portion of the time throughout the year and continuing thereafter. The commissioner further found that the physician employed by the petitioner "told the employee he would get better, and because of that opinion the employee kept trying to work as he could get work, and as he could perform it."

Then followed this ruling:

"Because the employee relied upon his physician's opinion that he would be all right he did not make his claim for compensation within six months after the date of incapacity, nor file his petition for award of compensation within the statutory limitation of one year after the date of the accident. The employee had a right to rely on the opinion of a reputable physician that he would be better and therefore, he did not have the mental capacity to decide he would not be better until a reasonable period of time had elapsed to show the contrary to be true."

With this ruling we can not agree. In the *Garbouska Case*, 124 Me., 404, 130 A., 180, our Court said:

"The words of the statute book are plain, positive and inexorable. Each limitation period for the beginning of proceedings is jurisdictional. It pertains to the remedy. The filing of an agreement or petition is action essential to the allowing of compensation. It is mandatory that the one or the other should be placed on record sufficiently early."

Thus is emphasized the necessity of compliance with the statute, unless the petitioner is excused by physical or mental incapacity. The petitioner knew he had received an injury. He knew that injury had resulted in his incapacity to perform his work. He is charged with knowledge that, if he sustained an accident arising out of and in the course of his employment, he was entitled to compensation upon compliance with the established rules of procedure.

In full possession of his mental faculties, he can not allow the statutory period of limitation to expire and then seek an award of benefits for disability existing during nine months of that period, and be excused for such non-action on the ground of mental incapacity to prosecute his rights, simply because he was led to believe "he would be better."

A man may delay making a testamentary disposition of his property because his physician advises him that his early demise is unlikely, but that does not render him mentally incapable of making a will.

A similar ruling was reviewed in *Thibodeau's Case*, 135 Me., 312, 196 A., 87, recently decided, and the Court therein spoke to the same effect.

Appeal sustained.

EUROPEAN AND NORTH AMERICAN RAILWAY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion, January 28, 1938.

LANDLORD AND TENANT. TAXATION. RAILROADS.

Regarding corporations, income taxes are not assessed and levied directly on property, but against the gain or income derived therefrom, and such taxes are exacted upon the basis of annual earnings.

The rule of practical construction has no place in the construction of a lease containing no ambiguity.

In the case at bar the defendant, as lessee, must pay federal income tax assessed on rentals, because the terms of the lease definitely provide payment of rental on the basis for the stockholders of the lessor to receive, as dividends, five per cent on their shares, "without any deduction whatever."

On report, on an agreed statement of facts and stipulation from Superior Court for the County of Cumberland. Agreeably to a stipulation of the report, the case is sent down for the Superior Court to enter judgment for plaintiff; damages, twenty thousand one hundred seven dollars and twelve cents ($20,107.12), with interest; costs follow. It is so ordered. Case fully appears in the opinion.

George F. Eaton,

Cook, Hutchinson, Pierce & Connell, for plaintiff.

Skelton & Mahon, for defendant.

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

DUNN, C. J. What is in issue in this case is whether or not the terms of a lease of a railroad obligate the defendant as lessee, to pay the plaintiff as lessor, the federal income tax assessed upon rental received by it.

In 1882, the European and North American Railway, a Maine corporation owning and then operating a line of railroad about one hundred and fourteen miles long, from Bangor to the easterly boundary of the state, in the town of Vanceboro, demised, for nine hundred and ninety-nine years, beginning with April 1, in the aforesaid year, its entire system, to the Maine Central Railroad Company, also a corporation under local laws, and a common carrier by rail, this company's line coming into Bangor from the westward.

The lease was inclusive, not only of the lessor's road, its engines, cars, equipment, apparatus and supplies, without exception, but as well of all its other property and assets, real, personal and mixed, wheresoever, cash and causes of action falling into the category, together with all its rights, except only its right to be and maintain its organization.

The rent, set down in words, was one hundred and twenty-five

thousand dollars ($125,000.00) a year, payable in equal semi-annual instalments, the first on October 1, in the year of 1882. Such rent was, so the clause reserving it recites, fixed at exactly five per cent at the par value of the outstanding capital stock of the lessor. That the lessee should render accordingly, and compensate the lessor, in addition, as, to illustrate, for taxes, then in being, or not, laid against the demised property, or assessed on franchise, or earnings, is not in dispute. The controversy between these litigants, at the expense of repetition, solely relates to whether federal income tax, as applied to the rental, is for the lessee to defray.

The lease is, in itself, complete and perfect.

On taking possession, the lessee assumed, as the lease provided that it should, the lessor's obligations of any and every kind, and their performance, discharge and satisfaction; the lessee proceeded to fulfill the lessor's duties as a public utility.

In effect, the lines of the two corporations were, for the purpose of operation, united as one. They so continue.

Certain provisions in the lease are of the tenor following:

> "FOURTH. The said lessee further covenants, that it will pay the rent herein reserved, at the times, and in the manner herein provided, without demand of the same, and that it will pay all assessments, duties, charges and taxes, that have been or may hereafter be lawfully assessed, laid or imposed, on said European and North American Railway, or the stockholders thereof, by the United States, said State, or towns and cities, or by any power or authority whatever, or on the earnings, franchise, traffic, business, real estate, property, capital stock or shares of the capital stock of said European and North American Railway; . . . . the intention being that the stockholders of said European and North American Railway shall, during the term of this lease, have from said lessee five per cent. per annum on the par value of the shares in the capital stock of said corporation, as hereinbefore provided, free from all taxes on said shares, and without any deduction whatever . . . . And it is further agreed that the rights of the stockholders and every one of the stockholders of said European and North American Railway to the said rental and income of five per centum annually on the par value of the said shares, and with-

out any deduction as above, shall never be changed, diminished or abridged; the Maine Central Railroad Company, however, not assuming any questions, or suits, between said European and North American Railway and its stockholders as to the disposition or distribution of the rental received from said lessee, nor any liability to account to individual stockholders for said rent, after the same has been paid, as above provided, by said lessee to said European and North American Railway. . ."

There is, it should not escape notice, in the obligations of the defendant, as lessee, no express mention of income taxes; there is no explicit reference to the possibility of the enactment by any taxing authority of an income tax law; nor, in the event of the enactment of a law of the kind, that a tax might be assessed against the plaintiff lessor.

No federal income tax was in force when the lease was made. Acts taxing incomes had, beginning in 1861, been enacted by the United States Congress. These acts lasted through the Civil War period. They were classed under the head of excises, duties and imposts. *Brushaber* v. *Union Pacific Railroad*, 240 U. S., 1, 15, 36 S. Ct., 236, 60 Law Ed., 493.

Under the Civil War Act, 13 Stat., 223, as amended, the tax on corporations was based on gross income and on profits, including dividends and interest paid, and, in so far as dividends were paid, the stockholders eventually paid the tax, for it was withheld from the dividends. *Rensselaer, etc. Co.* v. *Delaware, etc. Co.*, 152 N. Y. S., 376, 380.

Corporate income taxes now form a part of the internal revenue system of the United States. 26 U. S. C. A., Sec. 13, *et seq.*

The present income tax is not assessed against, nor is it paid by the stockholders.

Touching corporations, income taxes are not assessed and levied directly on property, but against the gain or income derived therefrom. *Stony Brook Railroad Corporation* v. *Boston and Maine Railroad*, 260 Mass., 379, 394, 157 N. E., 607. Such taxes are exacted upon the basis of annual earnings. *Cleveland Railroad Company* v. *Commissioner of Internal Revenue*, 36 Fed. (2nd) 347, 349.

The covenant in the instant lease, true enough, makes use of the words "assessments, duties, charges and taxes, that have been or may hereafter be lawfully assessed, laid or imposed, on said European and North American Railway." It is significant, though, that agreement does not stop there. A stipulation includes taxes on earnings; still another, in effect, that payment by the lessee, all in all, should always be adequate in amount to afford, not dividends merely, but at a given ratio to par, per annum.

The income of the plaintiff, aside from an annual office maintenance allowance from the defendant of five hundred dollars, has consisted chiefly, if indeed not exclusively, of the rental. The activities of the lessor have been those of keeping up its corporate entity, collection of the rental, and apportionment thereof among its stockholders.

Defendant paid the income tax, beginning with 1913, and thence to 1936, assessed against plaintiff on its rental. For a time, payments were as a supposed obligation; more recently, under protest, without prejudice to liability.

In this class of cases, the rule, in certain jurisdictions, is that unless the lease expressly provides for the payment of taxes on the income from rentals, the burden of payment is not on the lessee. *Brainard et al.* v. *New York Central Railroad Company et al.*, 242 N. Y., 125, 151 N. E., 152; *Young* v. *Illinois Athletic Club*, 310 Ill., 75, 141 N. E., 369; *Illinois Central Railroad Company* v. *Indianapolis Union Railway Company*, 6 Fed., (2nd) 830; *Catawissa Railroad Company* v. *Philadelphia & Reading Railway Company*, 255 Pa., 269, 99 A., 807; *Boston and Maine Railroad* v. *Wilton Railroad Co.*, 87 N. H., 416, 181 A., 545.

The words "or otherwise," in addition to property franchise and capital stock, sufficed for differentiation. *Whitlock* v. *Boston and Maine Railroad*, 29 Fed., (2nd) 351.

In *Boston and Providence Railroad Corporation* v. *Old Colony Railroad Company et al.*, 269 Mass., 190, 169 N. E., 157, 158, is this paragraph, quoted here approvingly:

> "If it fairly appears from the lease as a whole that the parties intended to impose upon the lessee ultimate obligation to pay an income tax assessed upon the lessor in respect to the

rental, that intention will be given effect, although there is in express words no provision to that effect in the lease."

The particular lease, not some other contract, the words of such lease, the company they keep, the meaning the language itself gives out, the purpose effectively expressed, — all these are of relevancy in seeking the intention of the makers of the instrument.

In this lease, there is no ambiguity. Evidence of what has been done, the so-called rule of practical construction, finds no place. *Ames* v. *Hilton*, 70 Me., 36, 43; *Snow* v. *Pressey*, 85 Me., 408, 27 A., 272; *Oakland Woolen Company et al.* v. *Union Gas and Electric Company et al.*, 101 Me., 198, 63 A., 915; *Stanley* v. *True*, 114 Me., 503, 96 A., 1057.

Nor does estoppel arise. The position of the parties has not been altered. *Rice* v. *Washington County Building & Loan Association*, 145 Miss., 1, 11, 110 So., 851; *Allen* v. *Goodnow*, 71 Me., 420, 425.

Does this lease, the contract actually made, integral and total, make the defendant liable to the plaintiff, as the latter has declared?

The conception of lessor and lessee, one and both, was that the relation of landlord and tenant should exist for nearly ten centuries.

The parties provided for a rental, expressed definitely. They took care, besides, as it was competent for them to do, that the rental, so defined, should, from time to time, be buttressed, as occasion might present, by the payment of assessments, duties, charges and taxes, to the end that, yearly, there might be basis for the stockholders of the lessor to receive, as dividends, five per cent on their shares, "without any deduction whatever."

Herein is this case distinguishable from the doctrine of cases decided by other courts, of citation by defendant's counsel in their exhaustive brief.

The plaintiff is entitled to prevail.

Agreeably to a stipulation of the report, the case is sent down for the Superior Court to enter judgment for plaintiff; damages, twenty thousand one hundred seven dollars and twelve cents ($20,107.12), with interest; costs follow.

It is so ordered.

LOU CAIN PERKINS *vs.* ROBERT H. KAVANAUGH ET AL.

Penobscot. Opinion, January 28, 1938.

WORKMEN'S COMPENSATION ACT. APPEALS. EQUITY.

In compensation cases, it may be assumed, generally, that, at the time of a workman's accident, his wife was dependent upon him for support.

In equity, appeals lie from all final decrees; in probate cases to "any person aggrieved" and in actions at law, exceptions are limited to "parties aggrieved."

The literal import of the equity act notwithstanding, an appeal cannot, within the spirit of that act, be presented by a party not aggrieved. A thing within the letter is not within the statute if contrary to the intention of it. The real meaning of the statute is to be ascertained and declared, even though it seems to conflict with the words of the statute.

A party may appeal from a favorable decree if he is not given all to which he is entitled or there is error or prejudice. But, as a usual thing, a decree in one's own favor is not appealable.

The analogies of the law do not permit one who has a verdict in his favor to except to an adverse ruling.

That an appeal must have objective other than the affirmation of the decree appealed from, is self-evident.

Appeals are, by the terms of the compensation act, limited in scope to questions of law.

"Poison" usually denotes something received into the system by the mouth or breath.

Occupational diseases are not within the terms of the compensation act.

The general rule, as to the trial of causes, is that the parties must present all their evidence, upon all issues pending, and cannot, as of right, have a trial divided.

Appeal from Superior Court in Equity of County of Penobscot. Petition by Lou Cain Perkins to recover compensation under the Workmen's Compensation Act for death of her husband, employee.

From decree entered on a decision of the Industrial Accident Commission, respondents and claimant appeal. Appeals dismissed. Decree below affirmed. Case fully appears in the opinion.

Montgomery & Gillmor, for petitioner (claimant).

James E. Mitchell, for respondents (employer).

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

DUNN, C. J. The Industrial Accident Commission, when this case was before it, one member only sitting, appears to have decided that the effect of sufficient competent evidence had been to establish every affirmative proposition except that of the widowhood of the claimant. In compensation cases, it may be assumed, speaking broadly, that, at the time of a workman's accident, his wife was dependent upon him for support. R. S., Chap. 55, Sec. 2, Par. VIII.

The decree which, at the instance of the respondents, a justice of the Superior Court, by statute direction, signed and entered, gave efficacy to the decision of the Commission, and to the proceeding itself, thence on, formulation and direction as in equity. R. S., same chapter, Sec. 40.

The respondents filed an appeal.

With regard to appeals, the equity practice act, of enactment in 1881, (P. L. 1881, Chap. 68,) and of inclusion in every statutes revision since that time, is, in its opening sentence, of this tenor:

"From all final decrees of such justice, an appeal lies to the next term of the law court." R. S., (1930) Chap. 91, Sec. 53.

In probate cases, the right of appeal is given to "any person aggrieved." R. S., Chap. 75, Sec. 31.

In actions at law, exceptions are limited to "parties aggrieved." R. S., Chap. 91, Sec. 24.

The literal import of the equity act notwithstanding, an appeal cannot, within the spirit of that act, be presented by a party not aggrieved, any more than it could be by a stranger to the record. A thing within the letter is not within the statute if contrary to the intention of it. *Holmes* v. *Paris*, 75 Me., 559. The real meaning of the statute is to be ascertained and declared, even though it seems

to conflict with the words of the statute. *Landers* v. *Smith*, 78 Me., 212, 3 A., 463. All laws should receive a sensible construction, *Carrigan* v. *Stillwell*, 99 Me., 434, 59 A., 683.

There are instances where a party may appeal from a favorable decree, as, for instance, where he is not given all to which he is entitled, or, otherwise, there is error or prejudice. But, as a usual thing, a decree in one's own favor is not appealable.

Mr. Daniell, in his work on the subject of pleading and practice, states:

"Where a party feels himself aggrieved by a decree or order of the Court, there are three modes by which he may seek to have it either reversed or varied . . ." Daniell's Chancery Pleading and Practice (6th Ed.) Vol. 2, Page *1459.

The analogies of the law do not permit one who has a verdict in his favor to except to an adverse ruling. *Hayden* v. *Stone*, 112 Mass., 346.

In the case at bar, the decree, in denying compensation, was not injurious to respondents, or either of them, and did no prejudice to substantial rights.

The finding, which preceded the decree, that claimant did not, at the threshold of her case, prove her standing, affected the merit of the controversy, and was for the Commission to decide. R. S., Chap. 55, Sec. 36. It was, however, of no matter to respondents upon what finding the decree was based. *Smith* v. *Dickinson*, 140 Mass., 171, 3 N. E., 40.

That an appeal must have objective other than the affirmation of the decree appealed from, is self-evident. *Green* v. *Blackwell*, 32 N. J. E., 768.

The instant appeal, being unauthorized, must be dismissed.

Next, the claimant moved the entry, on the Commission's finding, of a decree; this was done. Then, feeling herself aggrieved, she made an appeal.

Appeals are, by the terms of the compensation act, limited in scope to questions of law. *Mailman's Case*, 118 Me., 172, 106 A., 606.

In her petition for compensation, the claimant alleged herself to be the widow of David L. Perkins, an employee who, on November 28, 1934, in and because of his employment, that of a house painter,

sustained, through "contact with and thereby infection from lead poison," accidental injury, which resulted, less than three weeks afterwards, in his death.

Poison usually denotes something received into the system by the mouth or breath. Occupational diseases are not within the terms of the compensation act. *Brodin's Case*, 124 Me., 162, 126 A., 829; *Dillingham's Case*, 127 Me., 245, 142 A., 865.

The employer, and his insurance carrier, in the case before the Commission, filed a joint answer. The answer contained three denials; these no rhetoric can improve, no casuistry obscure. The first denied "each and every allegation in the petition." The second denied accidental injury. The third repeated, in essence, the phrasing of the first.

On call of the case, counsel for petitioner objected the answer. He asserted, by way of spoken words, that the adjuster, a representative of the insurance company, who, alone, in behalf of both respondents, had signed the answer, might not properly do so.

Counsel for the opposite side inquired if there would be any question of his authority to answer. Reply was "No."

Thereupon was filed what the printed case refers to as an amended, additional answer.

This answer insisted the competency of the original answer; it then made its denials, the ninth or last in these words:

> "9. They specifically deny each and every allegation contained in said petition and specifications and call for proof of these allegations."

Besides, there was this averment:

> "10. They specifically allege that said David L. Perkins died from unknown causes probably, however, from lead poisoning of long standing contracted over a long period of years as an occupational disease in his employ as a painter, and, therefore, not to be considered under the Workmen's Compensation law of the State of Maine as accidental death:"

The answer concluded with prayer that the petition be dismissed.

So stood the case, preparatory to hearing.

In the hearing, not a witness was sworn; no evidence was offered.

The Commission member sitting says:

> "Neither party, although afforded ample opportunity, presented any witnesses to be sworn for examination.
>
> "The petitioner's attorney, Mr. Montgomery, adduced the following: he called the Commissioner's attention to the Employer's First Report of Injury, and to the attending physician's report in the case, both on file in the Industrial Accident Commission's file. Therefore, the question is, as to whether or not these two reports . . . are to be properly considered as evidence, without the formality of the said reports being formally offered in evidence by either party."

The Commission held the report "proper for consideration as evidence without being formally introduced in evidence."

There was no prejudice thereby to any right of the claimant. She seeks, in this aspect, no reversal; she asks no affirmative relief; but, on the contrary, that the case stay in the state in which it is, except that it be sent down for determination of whether she survived her husband.

At the hearing before the Commission, widowhood was, on the pleadings, squarely in issue.

No evidence tended to support such allegation.

And the stage of the record, when, following the trial, the Commission delayed rendering decision until it should have examined and considered the questions involved, was not caused by any act of the adverse party.

The general rule, as to the trial of causes, is that the parties must present all their evidence, upon all issues pending, and cannot, as of right, have a trial divided. *Langley* v. *Conlan*, 212 Mass., 135, 139, 98 N. E., 1064.

There is citation, in plaintiff's brief, of the case of *Mary E. House*, 122 Me., 566, 120 A., 183. In that case, marriage was, without an answer having been filed, in evidence. What was there unsuccessfully undertaken, was to show that, without cause, a wife was not living with her husband. The case was remanded for the filing

of an answer, and, following that, for evidence, for and against, if living apart from the husband had been justifiable. R. S., Chap. 55, Sec. 2, Par. VIII.

Here, the allegations to support the case, and the denials interposed, fully set forth what was to be tried and determined. R. S., Chap. 55, Sec. 36.

This appeal, too, is dismissed.

Appeals dismissed.
Decree below affirmed.

D. LEO DONOVAN AND ELIZABETH D. DONOVAN

vs.

ALMON H. SWEETSER.

Androscoggin. Opinion, January 31, 1938.

MORTGAGES. EXCEPTIONS.

The mortgagee is not required to notify the mortgagor of entry for purpose of foreclosure, other than by recording.

Provisions of Sec. 7, Chap. 104 of the Revised Statutes provide "the receipt of income from the mortgaged premises, by the mortgagee or his assigns while in possession thereof shall not constitute a waiver of the foreclosure proceedings of the mortgage on such premises."

On motion for new trial and exceptions. Action of forcible entry and detainer, begun more than a year after peaceable entry to foreclose, by grantee of rights of the mortgagee. Motion and exceptions overruled. Case fully appears in the opinion.

Ralph W. Crockett, for plaintiffs.

Berman & Berman (Lewiston, Maine), for defendant.

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

BARNES, J. This action of forcible entry and detainer, begun in the Auburn Municipal Court, tried on appeal to the Superior Court, is here on exceptions and motion for new trial by plaintiffs.

Defendant, on January 4, 1935, was living with his wife, at 43 James Street, Auburn, on a place, of which he had a deed, and the People's Savings Bank, of Lewiston, his mortgage, on which there was then due practically the amount of the mortgage note, given February 6, 1930.

On said January 4, 1935, a breach of the conditions of the mortgage then existing, the bank, by one of its officials, with its attorney and witnesses, entered the house, at the invitation of Mrs. Sweetser, wife of the defendant, and the bank official told her in substance that they were entering peaceably to foreclose and take possession, and that the Sweetsers might remain in the house at a rental of six dollars per week.

Mrs. Sweetser informed the official that she would report the "incident" to her husband.

The proceedings were in compliance with R. S., Chap. 104, Sec. 3, Par. III.

Section 4 of said chapter provides that possession so obtained, "and continued for one year, forever forecloses the right of redemption."

On the following day the proper certificate was duly recorded in the Registry of Deeds of the county.

It is not required of the mortgagee to notify the mortgagor of entry for purpose of foreclosure, other than by recording, as was done in this case. *Davis* v. *Rodgers*, 64 Me., 159, 162; *Holbrook* v. *Greene*, 98 Me., 171, 56 A., 659.

Defendant lived on the place until March 9, 1937, and made many payments, usually of small amounts, to a collector for the bank, or to the mortgagee at its banking rooms, for more than two years after entry.

Receipts for the payments were given to Mrs. Sweetser at the house, and to defendant or his wife at the bank, as they together or severally made payments. Such receipts invariably bore the notation, "For rent at 43 James St." or "On acct. of Rent," defendant's counsel agreeing, of record, "that the receipts will read all alike."

For more than five years before entry nothing had been paid on the principal, and only slight payments toward the interest, and during the sixteen weeks from January 4, 1935 to August 7, of that year only $42 was paid.

On the latter date a check for $50, known as the Governor Brann check, was received by the bank and credited against overdue rent. This check, payable to defendant, came by mail to the bank's counsel.

Counsel called defendant to his office, secured his endorsement, and at the trial testified as follows, "He endorsed it, and I told him it would apply to his back rent. Nothing was said by him directly or indirectly as to its being applied to the principal or the amount due on the mortgage."

Such record as the bank made of receipts of money from defendant subsequent to date of entry were under the heading "rent."

No receipt was given for the Governor Brann check, but it was credited as "rent."

At some date in 1935, the $6 payments being in arrears, process was instituted to dispossess defendant; but, as defendant testified in cross-examination, he agreed if that suit was dropped he would pay as he did before, and the bank record shows credit, beginning January 9, 1936, in the amount of $7, and continuing at that figure, or in multiples thereof intermittently, but never to approach the amount due as interest, up to February 26, 1937, the first notation being "Rent 1 wk. $7.00," with no payment meanwhile of $6 or multiple thereof.

Another occurrence tending to shed light on the relation between the bank and defendant was an attempt on defendant's part to secure a loan from a Home Owner's Loan Corporation. (Federal Act of July 22, 1932, and amendments.)

The bank offered every aid in its power to this end, but the attempt was dropped about "a year and a half" after date of entry.

Plaintiffs' contention rests on the sound principle of law that possession of the mortgagor, under an agreement to pay rent, after valid entry for foreclosure, is possession of the mortgagee, and the further proposition, equally sound, that such payment as will waive a foreclosure begun must be received by the mortgagee as payment on the indebtedness secured by the mortgage, since, by our statute

"the receipt of income from the mortgaged premises, by the mortgagee or his assigns while in possession thereof shall not constitute a waiver of the foreclosure proceedings of the mortgage on such premises," Section 7 of said chapter 104.

Defendant claims that he never paid or agreed to pay rent after entry, and hence that the possession taken by the bank at entry was not continued for a year as required in forclosure by the method adopted.

Secondly, defendant claims that the foreclosure, begun by entry was waived because the mortgagee within a year after entry accepted payment, or payments, to be applied to the mortgage indebtedness.

These are questions of fact, obviously within the province of a jury, and a jury finding for defendant on either claim, if based on credible testimony and valid inferences from such testimony, is not now assailable.

The jury elected to believe defendant's testimony and concluded that the bank waived foreclosure.

There is not sufficient showing of ignorance, fraud, bias or favoritism in the finding to justify overthrow of the verdict.

Two exceptions to refusal of the presiding Justice to give to the jury requested instructions were argued at the hearing, the first reading as follows: "The payment of rent by the defendant to the People's Savings Bank and the acceptance of rent receipts therefor, together with the occupancy of the premises by the defendant, were sufficient to constitute the relation of landlord and tenant between the parties."

In his charge the Justice had instructed the jury fully and correctly upon the point in question, and he was not required to restate it in the words suggested. Further, to have so charged the jury would, in this case have taken away from that organ of the court its proper function, in a case where the facts were in dispute.

So this exception fails.

The other requested instruction relied upon ends with these words: "All that was necessary to effect a foreclosure was an entry by the mortgagee, acting through its proper representative, peaceably, openly and unopposed, in the presence of two witnesses with a certificate thereof duly sworn to and duly recorded."

Proof of the doing of the acts prescribed for entry to foreclose, and registration of a proper and complete certificate of foreclosure may constitute entry for purposes of foreclosure; entry and registration, without more, do not effect foreclosure.

The second exception fails, and the entry must be

Motion denied.
Exceptions overruled.

STATE OF MAINE *vs.* PHILIP PARENTO.

Aroostook. Opinion, February 7, 1938.

CONSPIRACY. EVIDENCE.

Common-law conspiracy is a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means.

Conspiracy is the gist of the indictment, and though nothing be done in prosecution of it, it is a complete and consummate offense, of itself.

The carrying out, or attempt to carry out the object of the conspiracy, may be alleged in aggravation of the offense, and given in evidence to prove the conspiracy.

Overt acts are laid merely as evidence of the principal charges.

Passive cognizance of a conspiracy is not sufficient to make a co-conspirator, but if there be active cooperation existing, the time when each party enters into the combination is unessential.

In conspiracy, as with other common-law crimes, it is necessary that criminal intent be shown.

Conspiracies need not be established by direct evidence of the acts charged, but may and generally must be proved by a number of indefinite acts, conditions and circumstances.

The general rule as to sufficiency of proof by circumstantial evidence obtains in criminal conspiracy as in other crimes.

Circumstantial evidence, in a criminal case, must exclude every other hypothesis than that of guilt and it is not sufficient that the circumstances are all consistent with defendant's guilt, and raise a strong probability of it; they must also exclude beyond a reasonable doubt the hypothesis of his innocence and be incapable of explanation upon any other reasonable hypothesis than that of his guilt.

On appeal from denial of motion for new trial. Case is that of conspiracy tried before a jury. Verdict guilty. Motion to presiding Justice for new trial filed. Motion denied. Respondent appealed. Appeal sustained. New trial ordered. Case fully appears in the opinion.

George B. Barnes, County Attorney for State.

Albert F. Cook,

Herschel Shaw, for respondent.

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

HUDSON, J. The respondent, indicted with one John Walker for conspiracy (Walker has not been tried), appeals from the ruling of the presiding Justice refusing to set aside the jury's verdict of guilty. It is not necessary to recite the lengthy indictment. The County Attorney states its gist, saying: (they) "conspired and agreed together . . . that they would represent to Chasse and Ward that they had connections with the Judge of the Federal Court in Bangor through an attorney at law who practiced law in Bangor and who was a nephew of the Judge and that they could 'fix' Chasse's and Ward's cases for them for a consideration."

We have defined common-law conspiracy to be a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Cross et al.* v. *Peters*, 1 Me., 376, 388; *State* v. *Bartlett et al.*, 30 Me., 132, 134; *State* v. *Mayberry et al.*, 48 Me., 218, 235; *Franklin* v. *Erickson et al.*, 128 Me., 181, 182, 146 A., 437.

We also have statutory conspiracy.

"If two or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or property of another, . . . or to commit a crime punishable by imprisonment in the state prison, they are guilty of a conspiracy." Chap. 138, Sec. 26, R. S. 1930.

The language of this indictment may be said to cover conspiracy both at common law and by statute.

"The conspiracy is the gist of the indictment, and though nothing be done in prosecution of it, it is a complete and consummate offence, of itself." *State* v. *Ripley et al.*, 31 Me., 386, 388.

". . . the gravamen of conspiracy is 'combination,' 'concerted action' and 'unlawful purpose.'" *State* v. *Vetrano et al.*, 121 Me., 368, 375.

"If the conspirators carry out, or attempt to carry out the object of the conspiracy, that fact may be alleged in aggravation of the offence, and given in evidence to prove the conspiracy." *State* v. *Mayberry*, supra, page 238.

". . . overt acts are laid merely as evidence of the principal charges." *State* v. *Murray et al.*, 15 Me., 100, 103.

Mr. Wharton says:

"Joint evil intent is necessary to constitute the offence. 'The confederation must be corrupt. This is implied in the meaning of the term "conspiracy."' And mere passive cognizance of a conspiracy is not sufficient to make a co-conspirator. There must be active cooperation, and when this exists the period when each party enters into the combination is unessential." Wharton's Criminal Law, 12th Ed., Vol. 2, Sec. 1608, page 1865.

"But it needs something more than a proof of mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy. . . . There must be a concurrence in the common design. And we may also hold that mere sympathy with a conspiracy not exhibiting itself in overt acts does not make a

person a co-conspirator." Wharton, *supra*, Sec. 1671, page 1943.

"In the case of conspiracy, as with other common law crimes, it is necessary that criminal intent be shown." *Commonwealth* v. *Benesch et al.*, 290 Mass., 125, 194 N. E., 905.

A Federal officer arrested Chasse and Ward at Fort Fairfield for an alleged violation of the United States Liquor Tax Laws and ordered them to appear before the Federal Court in Bangor. Immediately Chasse attempted to get a conveyance for himself and Ward to that city, a distance of many miles. Arrangements first were made with one Campbell, but they were not carried out. Then Chasse telephoned Parento at Caribou, only to learn that he had no automobile. Walker, an owner of one, happened to be present during this telephone conversation and so, it being available, the respondent told Chasse that they would come to Fort Fairfield and take them to Bangor. It was decided to go that night. It took the respondent and Walker approximately three quarters of an hour to go to Fort Fairfield and the State contends that during that drive, or immediately before it, the conspiracy was conceived.

Ward knew neither the respondent, nor Walker, but Chasse, while unacquainted with Walker, had known the respondent for some twelve years and early in their acquaintanceship had worked for him for some four months. Since then their contacts had been few. Parento was well acquainted in Bangor, where Walker, a fight promoter, had his headquarters. There Chasse and Ward were practically strangers.

Upon their arrival in Fort Fairfield from Caribou, Walker was introduced to Chasse and asked him where he wanted to go and was told, "I got to go to Bangor." "What for?" he asked, and Chasse told him. Walker added: "I will fix you up." He then telephoned to Bangor and later said, "Boys, get ready. Going down to-night." They called at a filling station in Fort Fairfield for gas and oil. There the respondent (driver of the car because of the owner's eye trouble), attended to its supply. Walker asked Chasse and Ward to go into the filling station with him and there, not in the presence of the respondent, he received $50 from each. It was also there (according to Chasse's testimony) that Walker, still not in the presence of

the respondent, said that he would have to get them a lawyer in Bangor, that he "might fix it up himself" but he didn't dare,— "some account relation Judge and one thing and another . . . ."

Then the four resumed their journey to Bangor, where they arrived between three and four o'clock in the morning. Walker left them, while the other three stayed together at a hotel. Later that morning he brought to their hotel and introduced to them a Bangor lawyer and a bondsman. The services of the lawyer were secured, who represented Chasse and Ward before the Bail Commissioner that afternoon, when they furnished bail and were bound over to the November Term of the District Court. At the hotel Walker told them it was necessary for them to pay him more money. The attorney was present and heard this statement but not Parento. Chasse then gave Walker $100 and Ward $70. Ward wired home for additional money but it did not arrive before they started back that afternoon. While in Bangor, Ward made several trips to the telegraph office and at least once the respondent took him in the automobile, of which he was the driver on the whole trip. Of the money received, Walker paid the lawyer $25 and the bondsman $50. Chasse and Ward were told, both by the attorney and Walker, that it would be necessary for them to return to the Federal Court in November to defend the actions, which are still pending.

On their return to Fort Fairfield, they went to the telegraph office and the money wired to Bangor, and not there received by Ward, was paid to Ward, who of it gave Walker $30, but not in Parento's presence. Later that night, Walker collected $50 more from Ward. The total amount paid by Chasse and Ward to him, it is not denied (for it is not claimed that anything was paid by them to the respondent), was $305.

Two months later, Chasse and Ward had Walker arrested and most of the money paid to him was returned, he promising to pay the balance later. It is significant that no attempt was made either by Chasse or Ward to get the respondent to pay anything, although the evidence showed that he was accessible and could have paid, had demand been made of him.

At the time of the trial, Ward was dead. Chasse was the State's principal witness. A study of his evidence fails to reveal that he directly implicated this respondent as a conspirator.

Upon inquiry by the County Attorney as to whether in Bangor, or while driving home, Walker and the respondent talked about the Federal cases, Chasse said: "Walker talking" and that Parento did not say anything. "He drove the car."

These questions and answers appear in Chasse's testimony:

"Q. Did he (meaning Walker) tell you then that he would employ you a lawyer? Did he tell you there at the filling station he would get a lawyer for you?
A. Yes, sir.
Q. Did he tell you he would arrange bail for you?
A. Well, he says he will fix it up.
Q. So then, you and Mr. Ward each gave Mr. Walker, at that time, $50 apiece?
A. Yes.
Q. And Mr. Parento's name wasn't mentioned at all?
A. No."

* * * *

"Q. During all the time did Mr. Parento drive the car?
A. Yes, sir.
Q. Did he say anything to you or Mr. Ward—anything about paying him any money,—Mr. Parento?
A. No. . . ."

* * * *

"Q. You had asked him to take you down there because you knew that he was familiar with Bangor?
A. Yes.
Q. And he was a friend of yours?
A. Yes."

* * * *

"Q. Did Mr. Parento tell you that he could fix your case, down in Bangor, if you would give him money?
A. Not Phil. Walker."

* * * *

"Q. Now, at that time, did Mr. Walker say anything about having to have any money for Mr. Parento?

A. He said 'I have got to have some money' just so he will be down to go to work.
Q. Did he mention Mr. Parento's name?
A. No."

* * * *

"Q. And Mr. Parento's name wasn't mentioned at all?
A. No."

* * * *

"Q. During that time,—the trip back,—did Mr. Walker say anything about paying any money to Mr. Parento?
A. No, I didn't hear him say it.
Q. Did Mr. Parento say anything to you about having any of the money?
A. No."

Admittedly, except for an alleged admission (not confession), the respondent's conviction was secured wholly on circumstantial evidence. There was total lack of direct proof of a conspiracy. Still, "Conspiracies need not be established by direct evidence of the acts charged, but may and generally must be proved by a number of indefinite acts, conditions and circumstances. . . ." *State* v. *Vetrano*, supra, page 376.

The general rule as to sufficiency of proof by circumstantial evidence obtains in criminal conspiracy as in other crimes. 12 C. J., Sec. 233, page 639; *Nestor Johnson Mfg. Co.* v. *Goldblatt*, 265 Ill. App., 188; *Commonwealth* v. *Bardolph et al.*, 192 A., 916 (Pa.); *Rosenblum* v. *Rosenblum et al.*, 181 A., 583 (Pa.). In the Bardolph case, the court quoted from an earlier Pennsylvania case as follows (see page 920):

> "An unlawful combination, like any other substantive fact, must be established by sufficient evidence. Where it is direct and positive, the question of sufficiency is answered. The jury may then pass on the credibility of the witnesses. But, when a charge of crime is sought to be sustained by circumstantial evidence, the hypothesis of guilt should flow from the facts and circumstances proved, and be consistent with them all. The evidence must be such as to exclude to a moral certainty

every hypothesis but that of guilt of the offense imputed; the facts and circumstances must not only be consistent with and point to the guilt of the accused, but they must be inconsistent with his innocence."

In dealing generally with proof of guilt by circumstantial evidence, Justice Whitehouse in the leading case of *State* v. *Richards*, 85 Me., 252, 254, 27 A., 122, 123, said:

"But before it is deemed sufficient to warrant conviction in a criminal case (no exception is made as to a criminal conspiracy) its accuracy and soundness must be negatively tested by inquiring whether it excludes every other hypothesis than than of guilt. It is not sufficient that the circumstances are all consistent with the defendant's guilt, and raise a strong probability of it; they must also exclude beyond a reasonable doubt the hypothesis of his innocence and be incapable of explanation upon any other reasonable hypothesis than that of his guilt."

Other pertinent principles of law may be restated.

"The humane presumption of the law is against guilt and though a conspiracy must ordinarily be proved by circumstantial evidence, yet it is not to be forgotten that the charge of conspiracy is easily made, ... Mere suspicion, possibility of guilty connection, is not to be received as proof in such a case. . . ." *Benford* v. *Sanner*, 80 Am. Dec., 545.

"On the other hand, conspiracies can not be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy." 12 C. J., Sec. 231, pages 638, 639; *People* v. *Long*, 93 Pac., 387; *Glass* v. *Commonwealth*, 61 S. W. (2nd), 629 (Ky.).

"Her coming in company with the others, while well calculated to excite suspicion, was no evidence that she knew or suspected that they, or either of them, had any design to steal. Her so coming in was consistent with her entire innocency, and being so was not proof of guilt." *Ormsby* v. *People of the State of New York*, 53 N. Y., 472, 475.

Do the facts claimed to have been proven by the State "exclude beyond a reasonable doubt the hypothesis of" this respondent's "innocence" and are they "incapable of explanation upon any other reasonable hypothesis than that of his guilt?" *State* v. *Richards*, supra.

Equally consistent with the respondent's innocence as his guilt were the particular circumstances relied upon by the State, viz., the procuring of Walker's automobile and the driving of it by Parento; friendship between the latter and Chasse; Parento's familiarity with Bangor and acquaintance with a Bangor attorney but not the one employed by Walker; an opportunity to enter into a conspiracy in the time it took to drive from Caribou to Fort Fairfield; the collection of money by Walker from Chasse and Ward in Fort Fairfield, and later in Bangor and Fort Fairfield (not in any way participated in by this respondent); the respondent being with Chasse and Ward in Bangor while "Walker absented himself"; statements by Walker not in the respondent's presence and the conveyance of Ward by the respondent to the telegraph offices in Fort Fairfield and Bangor.

The State contends that the alleged conspirators agreed that the overt acts should be performed only by Walker, but of this the record is entirely devoid of proof. Neither is there sound reason for the making of such an agreement. The respondent as a friend of Chasse's, one would expect, would be active rather than passive, had he been an actual conspirator.

A Federal officer testified that upon being accused by an Assistant United States District Attorney the respondent admitted that Walker and he "split" money received by Walker from Chasse and Ward and that this admission was made in the presence of a probation officer, Chasse, Ward and the Bangor attorney. Of the alleged admission there was no testimony excepting that of the Federal officer. Chasse did not so testify. The Bangor attorney testified that he had no recollection of any such admission. At most it was not a confession but, if made, only an admission of a fact, equally as consistent with innocence as guilt. It simply admitted the splitting of money received for lawful purposes, viz., transportation and arrangement of bail. Considering the long distance from Fort Fairfield to Bangor, the necessary legitimate expenditure of

money, the time required for the trip, the employment and payment of services of an attorney, the securing and purchase of bail (it might have become necessary to furnish cash bail), the amount paid was not so great as to arouse more than suspicion.

Other facts pointed toward innocence, viz.: The actual employment of an attorney of character to represent Chasse and Ward in the Federal Court and conduct their cases therein; none of the attorney's conversations and dealings had with Parento; Walker's demand of additional money from Chasse and Ward in a hotel in the presence of a third party, a reputable attorney; the attorney's later letter to Chasse asking a payment of fifty dollars for future services — (he did not communicate either with the respondent or Walker); lack of evidence of any incriminating conversations between the respondent and Chasse, Ward or Walker; no evidence, however little, upon the part of Chasse or any other State witness implicating the respondent to show what it was intended he should do illegally for money paid or to be paid; no testimony showing that the Federal cases were ever talked over by the respondent and Chasse or Ward while in Bangor or on the trip to and from Bangor; the forced return of the money from Walker alone, even with the assistance of a criminal warrant, and no attempt being made to compel the respondent to pay any of it to Chasse or Ward, although he had the ability so to do if he had received any of it and were criminally liable; Walker's wife coming all the way from Biddeford to Fort Fairfield to furnish the money and make it possible for him to return practically all of it to Chasse and Ward. If the respondent were implicated in a conspiracy with Walker and the money had been paid to him for their joint benefit, the respondent having received his part, it is hardly conceivable that Walker would not at least have attempted to get the respondent to contribute his part to be returned or at least to make up Walker's deficiency. Other circumstances might be mentioned tending to prove the respondent's innocence but it is unnecessary.

Certainly a conspiracy to commit a criminal offense, and especially one whose purpose is to interfere with the prosecution of crime, is most reprehensible and should be severely condemned by the court, but it is equally important that one so accused shall have full benefit of all rights accorded to him by law, the least of which is not

that presumption of innocence until proven guilty beyond a reasonable doubt by legally sufficient evidence.

Neither the alleged admission nor the circumstantial evidence submitted to the jury was sufficient to warrant its verdict.

Appeal sustained.
New trial ordered.

FRANK E. KNEELAND, PETITIONER

vs.

HODGDON C. BUZZELL, ADM'R.

ESTATE OF AMANDA H. KNEELAND, DECEASED.

Waldo. Opinion, February 9, 1938.

EXECUTORS AND ADMINISTRATORS.

The Superior Court has no authority to set aside all action by the Probate Court and institute administration de novo.

On exceptions. Petitioner filed petition in Superior Court for County of Waldo to remove administrator. Petition, on motion of defendant, dismissed. Exceptions filed by petitioner. Exceptions overruled. Case fully appears in the opinion.

Fred W. Brown, for petitioner.

Carleton Doak, for defendant.

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

BARNES, J. Amanda H. Kneeland, late of Searsport, died intestate, on May 18, 1932, petitioner, her son, and two other heirs surviving.

July, 1932, in the Probate Court of Waldo County, petitioner asked for administration and letters were issued to defendant, who qualified and proceeded to settle the estate.

Docket entries of the Superior Court of that county record entry of petitions, dismissed in 1935 and 1936, and the present petition, dated October 13, 1936, likewise dismissed, on defendant's motion at the April Term, 1937.

To this dismissal petitioner filed his "bill of exceptions," and the same was allowed.

We have before us no bill of exceptions, in form to demand treatment.

But in the reasons for dismissal presented by defendant are several that justify the dismissal.

Defendant challenges the jurisdiction of the Superior Court to entertain the petition.

After reciting his difficulties, in and out of court, since he filed petition for administration of his mother's estate, petitioner concludes with a prayer, "that the present administrator be removed and that the entire administration of this estate be re-opened to the end that he may be afforded an opportunity to present before a jury his claim for compensation for care of this decedent during the long and tedious illness preceding her death, and which care was attended by much sacrifice and expense on the part of himself and family."

He thus requested the Superior Court to set aside all action of the Court of Probate, that he may proceed anew with administration.

The Superior Court, in dismissing the petition, in effect disclaimed jurisdiction; and we find it had not jurisdiction to proceed in the matter.

The first Legislature of Maine, by Chapter 51, established and defined the jurisdiction of Probate Courts, and to remove all doubt and uncertainty, at its next session amended the statute of 1821, "by an act of a single section expressed in the positive, unqualified, peremptory language following: The estates of all persons deceased shall be settled in the probate court of the county where the deceased was last an inhabitant, unless the interest of the judge of probate in such estates, as heir, legatee, creditor or debtor shall

exceed the sum of one hundred dollars, any law to the contrary notwithstanding." *Marston et al., petitioners*, 79 Me., 25, 34, 8 A., 87, 89.

Thus what had before by implication been deemed the grant of original jurisdiction to settle estates of deceased inhabitants solely in the Probate Courts became enacted law.

After a long period of years, in revision of the statutes, the language of the Act of 1822 was dropped from the statutes, its expression being no longer needed to support the earlier implication.

"The superior court is the supreme court of probate, and has appellate jurisdiction in all matters determinable by the several judges of probate." R. S. 1930, Chap. 75, Sec. 31.

It has, however, original jurisdiction to appoint an administrator when a Judge of Probate shall refuse or unreasonably delay such appointment (R. S., Chapter 76, Section 21), a condition not existing in the case at bar.

It is assumed that petitioner failed to avail himself of rights to appeal from decrees of the Judge of Probate.

He has, as it would seem, concluded that the Superior Court, has authority to set aside all action by the Probate Court and institute administration *de novo*.

Such action the Superior Court has no authority to take.

Exceptions overruled.

ETHEL M. LEAVENS *vs.* METROPOLITAN LIFE INSURANCE CO.

Androscoggin. Opinion, February 16, 1938.

INSURANCE. REFERENCE AND REFEREES.

The question of whether an employee is on a leave of absence, laid off or discharged, is one of fact and depends upon the intention of the employer as evidenced by all of its servants' acts and declarations.

Findings of Referees on question of fact supported by any evidence are not open to review.

In construing a group policy of insurance and the effect of a discharge of an employee without his knowledge, the phrase "termination of employment" appearing in the policy must be construed as meaning "a termination of which the employee had knowledge or notice."

In contracts susceptible of two conflicting constructions, that which accords with good faith and fair-dealing between the parties must be adopted.

The conversion privilege in a group policy of insurance indicates that the makers of the contract intended that the employees insured thereunder should have knowledge of the termination of their employment.

On exceptions. Action of assumpsit tried before Referees; reference being had under Rule of Court with right of exceptions as to questions of law reserved. Case comes forward on exceptions to the acceptance of the report in the Superior Court. Exceptions overruled. Case fully appears in the opinion.

John G. Marshall, for plaintiff.

Skelton & Mahon, for defendant.

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

STURGIS, J. This is an action of assumpsit brought by the widow of Irving D. Leavens as beneficiary named in a certificate held by the deceased under a group policy of insurance No. 6371G issued on April 6, 1932, to his employer, the Burnham & Morrill Company of Portland by the Metropolitan Life Insurance Company. The case having been referred under Rule of Court with right of exceptions as to questions of law reserved, comes forward on exceptions to the acceptance of the report in the Superior Court.

Under the terms of the group policy and the certificate issued thereunder, the employee was insured for TWENTY-FIVE HUNDRED dollars payable to the beneficiary of record upon receipt of due notice and proof in writing of the death of the assured while insured and surrender of the certificate. And it was expressly provided that:

"In case of the termination of the employment of the Employee for any reason whatsoever, all of his said insurance

shall immediately cease, but the Employee shall be entitled to have issued to him by the Company, without evidence of insurability, and upon application made to the Company within thirty-one days after such termination, and upon payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then-attained age (nearest birthday), a policy of Life Insurance in any one of the forms customarily issued by the Company, except Term Insurance, in an amount not exceeding the amount of his protection under the said Group Policy at the time of such termination."

The group policy contained the following additional clause:

"Lay-off or leave of absence of two (2) months or less shall not be considered, and retirement on pension shall not be considered, a termination of employment within the meaning of this Policy unless notification to the contrary shall have been given by the Employer to the Company within thirty-one (31) days after the date when such lay-off, leave of absence or retirement shall have commenced."

The insurance became effective as to the employee only upon his written application and he was given the right to change the beneficiary named therein at will. Although the employer paid and was responsible for the premiums, all insured employees were required to make weekly contributions thereto which were withheld from their weekly wages or charged to their accounts.

The transcript of the evidence discloses that on February 12, 1936, the decedent Leavens, who had been for several years employed by Burnham & Morrill Company as an electrician, injured a finger of his right hand and went home for the rest of the day. He reported at the factory the following morning, however, and continued to work regularly until February 17, 1936. On that day, Leavens' immediate superior, finding him not at work and apparently somewhat under the influence of liquor, advised him to go home and he left the shop. That afternoon, his wife came to the plant and was informed and reported to her husband that he was not discharged but when he felt better and was able could come

back. There is evidence that his injured finger inconvenienced the employee at least until February 24, 1936, but he was at no time fully incapacitated for work. He did not come back, however, and on March 20, 1936 following, died.

On Febuary 29, 1936, the office force of the Burnham & Morrill Company struck the employee's name off the payroll. The clerk in charge of that record inquired of the master mechanic concerning Leavens' absence from his work, received the reply, "Well, as far as I am concerned, he is all through" and upon inquiry was directed by the superintendent to cancel the employee's insurance. This information being communicated to the clerk in charge, Leavens' insurance card was transferred to the inactive file and notice sent to the agent of the insurer that he was discharged as of that date. This notice, however, bore date of March 10, 1936, and presumably was neither made nor sent until that time, and by stipulation made at the trial it was agreed that it reached the insurer on March 13, 1936. As to when it was acted upon at the home office and insurance upon the decedent's life actually cancelled does not appear. We only learn from the record that the premium for the year ending April 6, 1936, including the *pro rata* charge for this employee's coverage, had been already paid in advance, and at some unknown time the employer received a *pro rata* credit for the purported cancellation as of February 29, 1936. It does definitely appear that neither the employee nor anyone in his behalf was ever notified that he had been discharged or that his insurance under the group policy had been cancelled.

Some of the facts incident to this purported termination of the decedent's employment are significant. It had been and continued the invariable practice of the employer to notify all employees when they were discharged and they were usually allowed at least a week's pay thereafter. This the responsible officers and clerks admit was the only case known where a discharge was attempted without the employee being informed and knowing of it. Again, the decedent's work was distributed among other employees already on the payroll and no one was hired to fill his place. It also appears by direct admission that the superintendent of the factory who had actual charge of this man's employment, when as he says he simply

took the decedent's name from the payroll, intended and expected to reinstate him when he came back, at least on assurances that he would not "drink any more on the job."

It is stipulated and not in controversy that the plaintiff in this action is the widow of the deceased employee and the beneficiary named in his certificate, notice and proof of his death were duly made, and the group policy was in full force and effect when he died. The only question in issue is whether the employment of the decedent was terminated and his insurance discontinued at the time of his death.

Upon the facts which have been recited and others in accord therewith found in the evidence, the Referees reported:

> "that at the time of the decease of the insured, Irving D. Leavens, he was within the meaning of the terms of the policy, an employee of Burnham & Morrill Company and was entitled to the benefits of the insurance contract, and upon his death as stipulated by the parties, the amount payable to his beneficiary was $2500, with interest from the date of the writ, April 22, 1936, to the date of final judgment, together with costs of court to be taxed by the Clerk."

We are of opinion that the finding was fully warranted and objections filed thereto show no reversible error.

The record leaves no doubt that on February 17, 1936, the deceased employee was expressly given a temporary leave of absence and, accepting his wife's statement as true, through her was given permission to stay home until he felt better. No claim was ever made that he was notified directly or indirectly that this leave of absence was terminated. The striking of his name from the payroll on February 29, 1936, with all attendant facts and circumstances, is susceptible of the inference that it was in fact intended as a layoff rather than a final termination of his employment. Contrary to the contention of counsel for the insurer, there is in this case a very definite question of whether the employee at the time of his death was on a leave of absence, laid off or discharged. That is a question of fact depending upon the intention of the employer as evidenced by all of its servants' acts and declarations. *Zeigler* v. *Equitable Life Assurance Co.*, 219 Iowa, 872, 259 N. W., 769; *Szczygielski* v.

Travelers Ins. Co., (Penna.) 174 A., 662; *Ozanich* v. *Metropolitan Life Ins. Co.*, (Penna.) 180 A., 67; *Cogsdill* v. *Metropolitan Life Ins. Co.*, 158 S. C., 371, 155 S. E., 747. It can not be held that a finding by the Referees in this case that the employee was on leave of absence or laid off and not discharged when he died, was entirely unsupported by the evidence. If their report can be construed as embodying that finding it is not open to review. *Hawkins* v. *Theaters Co.*, 132 Me., 1, 164 A., 628; *Jordan* v. *Hilbert*, 131 Me., 56, 158 A., 853; *Hovey* v. *Bell*, 112 Me., 192, 91 A., 844.

Apparently, however, the Referees based their conclusion that there had been no termination of the employment of the deceased in part at least on the failure of the employer to give him notice of his discharge and applied the rule laid down in the somewhat recent case of *Emerick* v. *Connecticut General Life Ins. Co.*, 120 Conn., 60, 179 A., 335, 338, in which in construing a group policy of insurance and the effect of a discharge of an employee without his knowledge, it was held that the phrase "termination of employment" appearing in that policy as in the one here under consideration must be construed as meaning "a termination of which the employee had knowledge or notice." We are convinced that the rule laid down in that case may be safely adopted as the law of this jurisdiction.

The group policy here in controversy, as there, is not a non-contributory contract of insurance taken out by the employer as a gratuity and without cost or expense to the employees. They become insured only upon their written applications which are made a part of the contract, and they pay a portion of the premiums. By the terms of the policy, a right is conferred upon them on termination of their employment to receive, without evidence of insurability on application made within thirty-one days after such termination and payment of appropriate premium, a policy of life insurance, other than term insurance, in the amount of the protection they enjoy under the group policy. This is a real benefit assured to the employee and by no means a negligible item of the consideration for which his premium contributions are paid. To hold that the employer and the insurer executed the insurance contract with the intention that the conversion privilege assured to the employee could be destroyed without his knowledge at the will of

the employer, thus stripping him, it may be, of the power to obtain any life insurance at a time when he is disabled or advanced in years and no longer insurable, is to read into the policy, we think, an unfair and unjust provision which is neither expressed nor necessarily implied. Settled rules require that, in contracts susceptible of two conflicting constructions, that which accords with good faith and fair-dealing between the parties must be adopted. *Brown* v. *Bishop*, 105 Me., 272, 74 A., 724; *Ackley & Co.* v. *Hunter-Benn & Co's. Company*, 166 Ala., 295, 307, 51 So., 964; *Simon* v. *Etgen*, 213 N. Y., 589, 595, 107 N. E., 1066. We, too, are convinced that the inclusion of the conversion privilege such as is found here in a group policy indicates that the makers of the contract intended that the employees insured thereunder should have knowledge of the termination of their employment. This view is supported not only in *Emerick* v. *Connecticut General Life Ins. Co.*, supra, but also in *Ozanich* v. *Metropolitan Life Ins. Co.*, supra.

We are fully aware that in some jurisdictions group insurance policies and certificates issued thereunder apparently have not been so construed. A careful study of the cases cited does not persuade us, however, that they should be followed here. In the main, they are controlled by essentially different facts. In principle, none in point are convincing. The citations include *Colter* v. *Travelers Ins. Co.*, 270 Mass., 424, 170 N. E., 407; *Beecey* v. *Travelers Ins. Co.*, 267 Mass., 135, 166 N. E., 571; *Kowalski* v. *Aetna Life Ins. Co.*, 266 Mass., 255, 165 N. E., 476; *Cutledge* v. *Aetna Life Ins. Co.*, 53 Ga. App., 473, 186 S. E., 208; *Curd* v. *Travelers Ins. Co.*, 51 Ga. App., 306, 180 S. E., 249; *Magee* v. *Equitable Life Ins. Co.*, 62 N. D., 614, 244 N. W., 518; *Thull* v. *Equitable Life Assur. Soc.*, 40 Ohio App., 486, 178 N. E., 850; *Aetna Life Ins. Co.* v. *Lembright*, 32 Ohio App., 10, 166 N. E., 586.

The defendant insurer presses strongly in its brief that the beneficiary's decedent abandoned his employment and showed by his acts that he did not consider himself employed at the time his name was stricken off the payroll. Assuming as we must that this point was raised before the Referees, the record indicates that it was decided in favor of the beneficiary on conflicting evidence. Error in the acceptance of the report can not be predicated here on the finding on that issue.

The defendant insurer makes no point that if the decedent was granted a leave of absence not considered a termination of employment within the meaning of the group policy it was revoked and notice to the contrary given to the insurer within thirty-one days after its commencement. If this were not so, such a claim could not avail the insurer on this review. No objection having been directed to this point at *nisi prius*, it is not open here on this bill of exception. Rule XXI; *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171.

Being convinced for the reasons stated that no error is shown in the findings or rulings of the Referees to whom this case was submitted, the exceptions to the acceptance of their report are not sustained.

Exceptions overruled.

PORTER S. ELLIOTT *vs.* LOUIS MONTGOMERY.

Penobscot. Opinion, February 25, 1938.

NEGLIGENCE. PROXIMATE CAUSE.

Admission of proof of violation of a statute or ordinance raises a presumption and is prima facie evidence of negligence, but it is necessary to go farther and show that the negligence thus presumed to exist, was in fact a proximate cause of the accident.

The issue of proximate cause is one of fact, not of law, unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act of which complaint is made.

There must be some evidence of causal connection between the act of the defendant, as prohibited by the ordinance, and the happening of the accident.

One is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable.

On exceptions. Action for personal injuries sustained by plaintiff while riding as a gratuitous passenger on a truck. On motion by de-

fendant, non-suit granted. Exceptions. Exceptions overruled. Case fully appears in the opinion.

Stern & Stern, for plaintiff.

David W. Fuller,

George F. Eaton, for defendant.

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

MANSER, J. On exceptions to the granting of a non-suit. The action is for personal injuries sustained by the plaintiff while riding as a gratuitous passenger on a truck. While negligence of the operator of the truck is not imputable to the plaintiff, it is incumbent upon the plaintiff, in order to make out a case entitling him to go to the jury, to show prima facie that he was himself in the exercise of due care; that no want of such care proximately contributed to the accident; and that the defendant was guilty of negligence which was a proximate cause of the accident.

The plaintiff is a police officer in Bangor. On November 19, 1936 he was on traffic duty for the protection of children leaving their school building at eleven A.M. His next assignment was at another school a quarter of a mile away, where the session ended somewhat later. He solicited a ride on a Chevrolet bakery truck. There being pastry goods in the front seat beside the driver, the plaintiff stood on the right-hand running board. Driving along Center Street, a straight cement highway about thirty feet wide with an unobstructed view, the operator and the plaintiff both saw an oil truck parked with its left side to the curb, and facing toward them. As the operator approached the standing truck, he suddenly turned his vehicle to the left and as suddenly swung back to the right so that his machine came into collision with the defendant's truck. The plaintiff was thrown, or jumped, from the running board and sustained the injuries complained of.

The Court is of opinion that the testimony with relation to due care or contributory negligence on the part of the plaintiff, considered in the most favorable view of the facts and of all reasonable inferences therefrom, was sufficient to warrant submission to the jury upon those issues.

The other essential element to recovery which must be shown, is negligence on the part of the defendant as a proximate cause.

Upon this proposition plaintiff relies on proof that the oil truck was parked on the left-hand side of the street in violation of a municipal ordinance of the following tenor: "No vehicle shall stop with its left side to the curb." The plaintiff does not claim that there is any prohibition against parking by the side of the curb provided the vehicle is stationed with its right side to the curb.

Admission of proof of violation of a statute or ordinance raises a presumption and is prima facie evidence of negligence. *Nadeau* v. *Perkins*, 135 Me., 215, 193 A., 877. It is necessary to go farther, however, and show that the negligence thus presumed to exist, was in fact a proximate cause of the accident.

It is true that the "issue of proximate cause is also one of fact, not of law, and is to be submitted to the jury under proper instructions unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act of which complaint is made." *Nicholas* v. *Folsom*, 119 Me., 176, 110 A., 68, 69, and cases there cited.

There must be some evidence of causal connection between the parking of the truck, as prohibited by the ordinance, and the happening of the accident. *Kimball* v. *Davis*, 117 Me., 187, 103 A., 154; *Lane* v. *Atlantic Works*, 111 Mass., 136.

We have here a truck parked in the day-time, in full view of travellers, at the side of a street thirty feet wide and leaving at least twenty-three feet for travel.

It occupied the same space as it would have if headed in the opposite direction. Does this, in and of itself, constitute a peril to travellers? The circumstances always must be considered.

In *Nadeau* v. *Perkins*, supra, a truck had been left standing unattended without lights at night on a through way in the right-of-way of approaching vehicles and in violation of the statute. Thus standing, though inert, it might well be the proximate cause of an accident.

In *Cobb* v. *Power & Light Co.*, 117 Me., 455, 104 A., 844, 847, the plaintiff's car was improperly registered, and it was contended that lack of proper registration was a bar to recovery.

The Court said:

"Such violation (of the registration statute) may, in certain cases be evidence of negligence but it is not conclusive. The application of this governing rule to the case at bar is obvious. The non-registration had no causal connection with the accident whatever. It no more contributed to the collision in this case than did the color of the car."

The annotator in 70 A. L. R., 1021, sums up the situation in these words:

"Of course, the standing of an automobile on the wrong side of the street or highway is a factor which must be considered in its relation to other matters, such as whether it is daylight or dark, whether the street or highway is a frequented one or otherwise, whether there are lights on the car, and whether the parking or stopping was unavoidable. And the questions of negligence, contributory negligence, and proximate cause must, of course, ordinarily be determined from all of the circumstances, and not from the mere fact of standing on the wrong side of the street or highway."

But the plaintiff here goes further and says there is a factor or element in this case, arising in consequence of the improper parking, and which supplies the causal connection. He says that, by reason of being parked at the curb on the left side, the vertical windshield at the front of the defendant's truck reflected the rays of the sun into the eyes of the operator of the approaching truck so that he was momentarily blinded and that this would not have happened if the truck had been parked facing in the opposite direction. The defense challenges any such claim as inherently incredible and physically impossible; that it is contradicted by the operation of natural laws under the established facts, having reference to the course of the street, the time of day, the altitude of the sun, the vertical windshield, the angle of reflection and other incidental elements.

Whether it could have happened or not is, in the view of the Court, unnecessary of decision.

We will assume that it did happen. Should an operator, parking his truck in the day-time, be bound to anticipate that a ray of

light reflected from his windshield would cause an approaching motorist to lose control of his car and run into his standing vehicle?

In *Falk* v. *Finkelman*, 268 Mass., 524, 168 N. E., 89, 90, the Court said:

> "One is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable."

Under the circumstances of that case, it was held that:

> "The defendant violated no legal duty owed the plaintiff. The unlawful occupation of the street by the defendant's car was simply a condition and not a contributing cause of the accident."

So in the instant case, the untoward event was extremely unlikely from the cause assigned or asserted by the plaintiff. No such result could reasonably have been anticipated from the violation of the ordinance.

The non-suit was properly ordered.

Exceptions overruled.

MARGARET WATSON *vs.* WILLIAM J. FAHEY.

Androscoggin. Opinion, February 26, 1938.

PHYSICIANS AND SURGEONS. NEGLIGENCE.

The presence of an appliance on the body of a patient while she was unconscious on an operating table in a hospital, which appliance caused a burn to the body of the patient, is quite as likely to have been due to the fault of others, as to any act, either of commission or omission, of the surgeon.

The doctrine of respondeat superior *does not apply in an action against surgeon for injuries to patient burned by hot "pack-off," laid on a patient's ab-*

domen without defendant's knowledge while she was on operating table in hospital owned by a corporation which employed anesthetist and nurses.

On report. Action by plaintiff to recover from defendant, a surgeon, damages for injuries sustained, alleged to have been caused by the placing of a hot "pack-off" on plaintiff's abdomen while she was undergoing a surgical operation. Judgment should go for defendant. Case is so decided. Case fully appears in the opinion.

Cook, Hutchinson, Pierce & Connell, for plaintiff.

Locke, Campbell & Reid, for defendant.

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

DUNN, C. J. This case was withdrawn from the jury, and, with the consent of the parties, is presented for final determination on a report of the legally admissible evidence, in respect to which the defendant introduced only certain of the exhibits.

On May 15, 1935, defendant, a surgeon, operated on plaintiff, a widow in middle life, as his private patient, in the Central Maine General Hospital, owned by a corporation and located in Lewiston in this state. The operation was divided into two principal parts, one vaginal and the other abdominal. The patient assenting, the hospital was selected, and she was taken there, that the facilities of the institution, inclusive of its anesthetist and its nurses, might be, wholly at her individual expense, available.

This suit is on the theory that, had defendant, in operating, exercised due care, he would have known, or tantamount thereto, ought to have known, of the presence on the plaintiff's left chest and breast, for no purpose, but to resultant harm, of a "pack-off."

The pack-off consisted of gauze, about five yards in length, folded on itself to the approximate size of six by nine inches, enclosed in a cloth bag; the whole had been saturated in excessively hot water.

Pack-offs are used, for illustration, in walling the intestine, and keeping the abdominal cavity, as an operating field, clear. It seems to be conceded that, in connection with the particular type of operation performed, they are, as a usual thing, unnecessary.

The counts in the declaration in the writ, if evidentially supported, would allow these contentions: (1) the cause of action arose from injury directly ascribable to the negligence of the defendant; (2) he, as principal or master, should answer for the damage done by his agents or servants.

From the evidence, a jury could properly infer that, while the plaintiff was yet on the operating table, and insensible with ether, the pack-off, bag and all, was laid on top of alternating layers of towels and sheets then already on her abdomen. That thereby the woman was burned is not seriously in question.

The testimony as disclosed by the printed case is without conflict.

There is nothing warranting a finding that the defendant placed the pack-off on his patient's person. Nor is there any showing that, in the exercise of that degree of care and skill required of him, with constant guard against possible complexities, he could have discovered the pack-off. Its application does not appear to have been known to him until his patient was back in her own hospital room, when the fact that she had been burned was called to his attention.

The presence of the appliance is quite as likely to have been due to the fault of others, as to any act, either of commission or of omission, of the defendant. Conjecture affords no proof. *Emery* v. *Fisher*, 128 Me., 453, 148 A., 677.

Strikingly similar to this in essential principles is *Guell* v. *Tenney*, 262 Mass., 54, 159 N. E., 451.

In that case, one of tort against a surgeon who, at a private hospital, operated for appendicitis, and, allegedly, did not remove a sponge before closing the bodily incision made, the opinion says:

> "The nurses who were present at the operation were employed by the hospital. There was no evidence to show that any of the persons present at the operation were servants or agents of the defendant . . . It may fairly be inferred that, in the performance of an operation of this character in a hospital, nurses are commonly present to assist the operating surgeon."
>
> "As there was no evidence that the nurses or other persons present and assisting were servants or employees of the de-

fendant, he cannot be held responsible for" any negligence on their part.

The thesis of the plaintiff is too broad. The doctrine of *respondeat superior* does not apply. Judgment should go for defendant.

The case is so decided.

MOE I. KATZ ET AL.

vs.

NEW ENGLAND FUEL OIL COMPANY ET AL.

Cumberland. Opinion, March 4, 1938.

EQUITY. APPEALS.

In equity, the record, for the purpose of appeal, consists of the bill and all the pleadings.

Appeals from interlocutory decrees, in equity, must await the final decree.

Demurrers, by dilatory pleas, must be settled preliminary to a final adjudication.

On appeal. This is a case in equity brought forward on appeal by plaintiffs and one of the defendants, i.e., New England Fuel Oil Company, from a decree sustaining demurrer and dismissing the bill generally. Appeals dismissed without prejudice to plaintiffs. Case fully appears in the opinion.

Robinson & Richardson,
Bernard Hershkopf, for plaintiffs.
Wallace Hawkins,
Freeman & Freeman,
Verrill, Hale, Booth & Ives, for defendants.

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

DUNN, C. J. This equity case is forward on appeal by plaintiffs, from a decree which, a demurrer previously interposed by one of two defendants, i.e., New England Fuel Oil Company, an artificial being under Maine incorporation laws, having been overruled, and its second demurrer sustained, dismissed the bill generally.

This company appealed.

The other defendant is the New England Fuel Oil Corporation, a Nevada organization. It is not a party to this appeal.

Plaintiffs, co-partners under the name of Katz Brothers, alleged that the Nevada corporation had an authorized capital stock of $25,000, divided into 50,000 shares, each of the par value of fifty cents, all issued and outstanding. They averred themselves the holders of 2640 of such shares, ownership of most antedating to March, 1933.

There is in the bill, averment that demand, made by the plaintiffs, on the directors of their corporation (Nevada), as assignee of a Massachusetts company, to enforce against the Maine concern, on the thesis of liability both jointly and severally, contractually, on its part and that of the Magnolia Petroleum Company, a Texas joint-stock association, a cause of action for a large amount of royalty oil undelivered from Mexican wells, was baselessly refused. No relief is sought respecting the Magnolia company.

Assertion, to recur to the bill, was positive that a renewal within plaintiffs' corporation, of any reasonable method to procure redress therein would, because of adverse domination of its directors, as well as of the corporation itself, by the majority shareholders, be an idle ceremony. Hence, this derivative suit to protect corporate property and interests.

The quest, on the authority of plaintiffs' pleading, and the brief and oral argument of their counsel, is for justice for the Nevada company.

Docket entries disclose that this corporation appeared and answered to the bill. Apparently it has taken no other step.

The answer is not included in the record on appeal.

The first demurrer set up but one ground, that the bill failed to charge that the conduct of the directors of the Nevada company was fraudulent or collusive, *ultra vires*, or a breach of trust.

The second demurrer was inserted in the answer of the Maine company. Plaintiffs moved that the demurrer be dismissed. The motion was denied. Whether, the first demurrer having been overruled, there might competently be a second, need not now be decided.

The second demurrer specified six distinct grounds. These may be briefly summarized, as follows: (a) that the bill disclosed no obligation on the part of the Maine company; (b) that it failed to allege any notice or demand for the delivery of the oil claimed; (c) that it did not plead any request by the plaintiffs that the Nevada company bring suit against the Maine company; (d) that it did not allege the capacity of certain oil leases; (e) that it did not show any equity in the plaintiffs' stockholders, and no irreparable injury to them; and (f) that it set forth no cause of action against the Maine company, nor any right in the plaintiffs to equitable relief.

The court below passed only on the first ground of the demurrer. It held that the provision of the agreement relied on concerned remedies rather than rights, and was alone the obligation of the Magnolia company.

For anything in the printed case, the cause of the Nevada corporation has never been heard; that defendant has had no opportunity to present the merits for judicial determination.

Even so, were its answer in the record,—were its pleadings before this Court,—there might be reason to deal with the cause as to both defendants. *Stephenson* v. *Davis*, 56 Me., 73.

In the cited case, three of four defendants demurred. Their demurrer, which went to jurisdiction apparent from the bill, was sustained. The fourth defendant took advantage, by plea, of a want of jurisdiction; the ground relied on was outside the bill, which was dismissed as to him, also. *Stephenson* v. *Davis*, supra.

The present suit was instituted, not for purely individual rights, but by stockholders, in their representative capacity, for their corporation, which they named a defendant.

That corporation, it is readily conceivable, may desire a hearing on material allegations of fact in the bill. Its answer may deny all facts alleged, or any such fact. It may desire hearing in reference to the possible allowance of costs. Conversely, it may, notwithstand-

ing its position in the bill, and on the docket, favor the proceeding.

In equity, the record, for the purpose of appeal, consists of the bill and all the pleadings. Whitehouse, Equity (1st Ed.), Sec. 626.

The demurrers were dilatory pleas. Settling them was, obviously, preliminary to a final adjudication.

Appeals from interlocutory decrees, within which class this appeal falls, must await the final decree. R. S., Chap. 91, Sec. 55.

The cause is not properly before this Court; appeal was prematurely brought. It is dismissed, but without prejudice to plaintiffs.

It is so ordered.

DARLING AUTOMOBILE COMPANY

vs.

FRED E. HALL, GEORGIA HALL, AND L. S. BEAN COMPANY.

THE JAMES BAILEY COMPANY

vs.

FRED E. HALL, GEORGIA HALL, AND L. S. BEAN COMPANY.

Aroostook. Opinion, March 8, 1938.

EQUITY.

A statutory creditor's bill brought to reach and apply, in payment of debt, must allege that the complainant is a creditor, the principal defendant a debtor having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it can not be reached by common-law process against the debtor, and the property is held by some third person who may be considered an equitable trustee of the debtor. These allegations are jurisdictional.

If the necessary allegations are lacking, the error is fatal in every stage of the cause and can not be cured by consent of the parties. When inspection of the

pleadings makes it manifest that it has no jurisdiction, it becomes the duty of the court to stay proceedings and dismiss the action.

Allegations in equity, solely on information, raise no issue and are fatally defective.

A complainant in bill in equity brought primarily for relief and incidentally for discovery can not have discovery if he is not entitled to relief.

A complainant in a bill in equity takes nothing in his allegations on information which are not traversed, and Chancery Rule XXVII does not apply to allegations not well pleaded.

The answer of a defendant, although under oath, is not evidence for either party unless called for by the bill.

Direct evidence, although sufficient to support a bill, is useless without proper allegations in the pleadings.

On appeal. Bills in equity in which complainants primarily seek to reach and apply to the payment of their claims the right, title and interest which the defendant, Fred E. Hall, has in certain moneys, notes and automobiles in the possession of the defendant, L. S. Bean Company, and incidentally discover the status of any claims the defendant, Georgia Hall, makes to this and other property. On oral motions by the defendants the bills were dismissed for lack of evidence. Complainants appealed. Appeals sustained and the cases remanded for entry of decrees dismissing the bills without prejudice. So ordered. Cases fully appear in the opinion.

Pendleton & Rogers,
Seth May, for plaintiffs.
Weick & Blanchard,
George B. Barnes, for defendants.

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

STURGIS, J. In these bills in equity, the complainants primarily seek to reach and apply to the payment of their claims the right, title and interest which the defendant Fred E. Hall has in certain moneys, notes and automobiles now in the possession of the defendant L. S. Bean Company and incidentally discover the status of any claims the defendant Georgia Hall makes to this and other

property. All answers are under oath, and to those made severally by Fred E. Hall and Georgia Hall replications are filed. At the hearing before the sitting Justice, the suits being tried together, when the complainants rested their cases, on oral motions by the defendants the bills were dismissed for lack of evidence and appropriate decrees signed and entered. The complainants appeal.

These are statutory creditors' bills brought to reach and apply in payment of the complainants' debts "any property, right, title, or interest, legal or equitable, of a debtor, or debtors, which cannot be come at to be attached on writ, or taken on execution in a suit at law,*." R. S., Chap. 91, Sec. 36, Par. XI. The proceeding is in the nature of an equitable trustee process and if a creditor would bring himself within the purview of the statute, he must allege that the complainant is a creditor, the principal defendant a debtor having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it can not be reached by common-law process against the debtor, and the property is held by some third person who may be considered an equitable trustee of the debtor. *Donnell* v. *Railroad Co.*, 73 Me., 567; *Lord* v. *Collins*, 79 Me., 227, 9 A., 611; *Tarbox* v. *Palmer*, 110 Me., 436, 441, 86 A., 847. These allegations are jurisdictional. *Lakin and Gould* v. *Chartered Company*, 111 Me., 561, 90 A., 427. If lacking, as in all other suits in equity, the error is fatal in every stage of the cause and can not be cured by consent of the parties. When inspection of the pleadings makes it manifest that it has no jurisdiction, it becomes the duty of the court to stay proceedings and dismiss the action. *Chalmers* v. *Hack*, 19 Me., 124; *Chase* v. *Palmer*, 25 Me., 341; *Hill* v. *Moors*, 224 Mass., 163, 112 N. E., 641; Whitehouse Eq. Prac. (1st Ed.), Sec. 193; 15 C. J., 852.

Tested by the foregoing rules, the bills are insufficient. Each sets forth only that the "plaintiff is informed" that the defendant L. S. Bean Company has in its possession certain properties of the defendant Fred E. Hall which can not be reached by legal process. There is no positive averment that such is a fact. And the allegations as to the claim of Georgia Hall to the property of her husband Fred E. Hall are of like tenor and made solely on information. Such allegations in equity raise no issue and are fatally defective.

Robinson v. *Robinson*, 73 Me., 170, 177; *Messer* v. *Storer*, 79 Me., 512, 11 A., 275; *Bailey* v. *Worster*, 103 Me., 170, 68 A., 698; Whitehouse Eq. Prac. (1st Ed.), Sec. 208.

Nor can the bills be maintained for discovery only. They are brought primarily for relief and incidentally for discovery. Under such bills, if the complainant is not entitled to relief, he can not have discovery. *Coombs* v. *Warren*, 17 Me., 404, 409; *Emery* v. *Bidwell*, 140 Mass., 271, 3 N. E., 24; Whitehouse Eq. Prac. (1st Ed.), Sec. 115.

It is unnecessary to consider at length the proof adduced in support of the bills. The complainants take nothing in their allegations on information which are not traversed. They were not well pleaded and Chancery Rule XXVII does not apply. *Bailey* v. *Worster*, supra. Nor are the answers of the defendants, although under oath, evidence for either party. The bills do not call for answers upon oath and, although verified, they do not operate as evidence even as to facts stated responsive to the bills, but like ordinary pleadings point out the issues to be determined by evidence. R. S., Chap. 91, Sec. 47; *Clay* v. *Towle*, 78 Me., 86, 2 A., 852; *Leathers* v. *Stewart*, 108 Me., 96, 101, 79 A., 16; Whitehouse Eq. Prac. (1st Ed.), Sec. 390. As to the direct evidence offered, assuming it to be sufficient to sustain the bills, it is useless without proper allegations in the pleadings. Evidence without allegation is as futile as allegation without evidence. *Scudder* v. *Young*, 25 Me., 153; *Merrill* v. *Washburn*, 83 Me., 189, 22 A., 118; *Glover* v. *Jones*, 95 Me., 303, 307, 49 A., 1104; *Portland Terminal Co. and Railroad Co.* v. *Railroad*, 127 Me., 428, 144 A., 390.

Although these proceedings must be stayed, the record discloses that there may be equities between the parties which ought to be determined and adjusted and the complainants should not here be finally barred from bringing equitable trustee process. It seems best, however, to require them to begin anew. The appeals are, therefore, sustained and the cases remanded for entry of decrees dismissing the bills without prejudice.

So ordered.

NORMAN I. GALLAGHER

vs.

AROOSTOOK FEDERATION OF FARMERS.

Aroostook. Opinion, March 10, 1938.

EQUITY. CHATTEL MORTGAGES.

Decisions have pointed out that the trend of legislation plainly shows it is not intended to confer equity jurisdiction for redemption of chattel mortgages except in particular cases where the statutory methods are insufficient to give complete remedy.

More care, attention and fidelity are required of a factor than a mere agent.

To warrant a court of equity in assuming jurisdiction where fiduciary relations exist, it must appear that an accounting is necessary to determine the amount due, and that defendant has been intrusted with plaintiff's property; and the fact that there is an adequate remedy at law has been held not to deprive equity of jurisdiction.

A mortgagee of chattels is entitled to possession before default in the absence of any express or implied stipulation to the contrary. Such stipulation, however, need not be in writing. It can be proved by parol.

On appeal. A bill in equity to determine the rights of the parties under a chattel mortgage. Defendant appeals from decree of sitting Justice in equity. Appeal sustained as to question of storage only. Decree below modified accordingly. Case fully appears in the opinion.

Pattangall, Williamson & Birkenwald,
Pendleton & Rogers, for plaintiff.
O. L. Keyes,
David Solman, for defendant.

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

MANSER, J. The case comes up on appeal from decree of a single Justice sitting in equity. The bill sets out a chattel mortgage given by the plaintiff to the defendant on May 7, 1936 for $7193.00 and accruing indebtedness, upon farm equipment and upon a crop of potatoes to be raised during the then coming season; the taking possession by the mortgagee of the potato crop as harvested and before any default against the protest of the mortgagor; a charge of $922.50 for storage of potatoes by the mortgagee and a denial of liability therefor; foreclosure proceedings begun on December 2, 1936; written agreement to extend the period of redemption; written agreements authorizing and requiring the mortgagee to sell at specific times a sufficient quantity of potatoes to pay the amount due on the mortgage; failure of the mortgagee to sell the potatoes in accordance with such authorization and direction; allegation that, if such sale had been made, the mortgage would have been fully satisfied; further allegation that the mortgagor and mortgagee could not agree as to the amount due and that the rights of the parties could be determined only upon an accounting.

The answer of the defendant admits taking possession of the potatoes as alleged, and that their value at the time was sufficient to pay the indebtedness under the mortgage, but asserts the unwillingness of the plaintiff as mortgagor to agree to a sale at the prices then prevailing as excuse for failure to make such sale; assertion of the right to reimbursement for storage and assent to the necessity of an accounting and the plaintiff's prayer for the same.

The Court is confronted in the first instance with a question as to whether the case as presented is one in which it was proper to take jurisdiction. The specific grant of equity powers given in R. S., Chap. 91, Sec. 36, includes:

> "For the foreclosure of mortgages of real and personal property, and for redemption of estates mortgaged."

By a line of decisions, however, it has been pointed out that the trend of legislation plainly showed it was not intended to confer equity jurisdiction on the subject except in particular cases where the statutory methods were insufficient to give complete remedy. *Rockland* v. *Water Co.*, 86 Me., 55 at 59, 29 A., 935; *Chase* v.

Palmer, 25 Me., 341; *Titcomb* v. *McAllister*, 77 Me., 357; *Loggie* v. *Chandler*, 95 Me., 220, 49 A., 1059, 1062; *Drake* v. *Nickerson*, 123 Me., 11, 121 A., 86; *Harvey* v. *Anacone*, 134 Me., 245, 184 A., 889.

In the instant case, however, there is a charge of failure on the part of the defendant to comply with the terms of separate written agreements concerning the subject matter of the mortgage, dispute between the parties as to liability for storage expense, the fact that on March 27, 1937 the mortgage had not been actually paid in cash, but that if the stock remaining in the possession of the mortgagee had been sold as required by the agreement, more than enough to liquidate the indebtedness would have been realized.

The defendant was more than a mere agent. Its relationship was that of a factor, which requires great care, attention and fidelity. *Greely* v. *Bartlett*, 1 Me., 172 at 178.

> "To warrant a court of equity in assuming jurisdiction where fiduciary relations exist it must appear that an accounting is necessary to determine the amount due, and that defendant has been intrusted with plaintiff's property and is bound to show his dealings therewith; but it is not essential that the accounts be mutual or complicated, or that discovery be necessary or sought; and the fact that there is an adequate remedy at law, as by an action for damages for breach of trust, or by process at law for the examination of books, has been held not to deprive equity of jurisdiction." 1 C. J. S., Accounting, Sec. 19.

Thus, while our Court in *Loggie* v. *Chandler*, supra, stated the principle that it "would not entertain a bill in equity to redeem from a chattel mortgage unless facts are stated making it apparent that the mode specifically provided by the statute will not fully protect the mortgagor's rights" yet, as it pointed out, "of course there may be in some case peculiar facts and circumstances in the nature of the property,—the character of the condition,—the conduct of the mortgagee, or perhaps in the accidents or misfortunes of the mortgagor, or in other respects, that would render it necessary for a court of equity to intervene to protect the con-

tractual or statutory rights of the mortgagor or his assigns. Such facts and circumstances may give to the court jurisdiction in equity."

Although willingness of both parties to the bill to acknowledge jurisdiction is not the criterion, the case presented here is one in which equity should not hesitate to give its aid. *Webb* v. *Fuller*, 77 Me., 568, 1 A., 737; *McKim* v. *Odom*, 12 Me., 94 at 106–7.

The evidence clearly shows that both parties intended and expected the potato crop to be sold and the proceeds applied in liquidation of the mortgage. 2000 barrels were sold and $5750.00 received therefor by the mortgagee.

In the mortgage itself is a provision that upon default the mortgagee shall have the right to take possession and sell the mortgaged property. Such power of sale has been upheld by our Court in *Consolidated Rendering Co.* v. *Stewart*, 132 Me., 139, 168 A., 100.

On February 25, 1937 the mortgagor constituted the mortgagee "his sole selling agent with full and unrestricted authority to sell, transfer and convey title to said potatoes until said Aroostook Federation of Farmers has received the full amount due it from said Norman I. Gallagher." Definite quantities were to be sold before prescribed dates, and the balance remaining not later than March 27, 1937.

The presiding Justice found that no oral modification was made by the parties in the terms of the specific instructions and authority to sell. He further found that the defendant must be charged with the value of the stock on hand March 27, 1937 and that it was the duty of the defendant to sell the stock, a perishable crop, at the market price within a reasonable time thereafter, fixing that time as April 2. The market price during this period was ascertained and made a part of the record, and the court found that the sum which should have been realized from the stock, added to the amount already received from that sold, liquidated the mortgage in full and left due to the plaintiff $1884.39. In reaching this result, the presiding Justice disallowed the charge for storage.

The potatoes remaining on hand were sold by the mortgagee at different times up to June 9, 1937 and the actual amount received

therefore is not in dispute. If the storage charge had been allowed, the total amount actually received from sale of the potatoes would leave remaining due to the mortgagee the sum of $1370.00

The parties are in agreement as to the possession by the defendant of the potatoes and its duty and authority to sell and account. The dispute between them as to the period during which such sale should be made was one of fact and the record amply supports the finding upon this point. Neither is it denied that the amount for which the crop should have been sold within the required period was correctly determined.

There remains the question of whether or not the storage charge was justifiable. The finding with regard to this item was as follows: "storage claimed is not allowed, no agreement on the part of the complainant being proved."

The charges made by the defendant for storage paid were as follows: A. & P. warehouse 4550 bbls. @ $.15 per bbl., $682.50, C. P. warehouse 1600 bbls. @ $.15 per bbl., $240.00. It may be inferred that these charges are for the use of bins for the season and are not subject to fluctuation dependent upon the time when storage begins or ends. This, however, is not found as a fact. The potatoes were placed in storage between September 15 and October 1. About 2500 bbls. were removed on or before March 27. The plaintiff stipulated in his mortgage that after default the defendant was authorized to take possession and sell, reimbursing itself for all expenses in so doing. The mortgage was in default on December 2 when foreclosure proceedings were instituted. There can be no denial of the right to charge for storage from that time.

A mortgagee of chattels is entitled to possession before default in the absence of any express or implied stipulation to the contrary. Such stipulation, however, need not be in writing. It can be proved by parol. *Pierce* v. *Stevens*, 30 Me., 184; *Ramsdell* v. *Tewksbury*, 73 Me., 197; *Jones* v. *Cobb*, 84 Me., 153, 24 A., 798; *Gilpatrick* v. *Chamberlain*, 121 Me., 561, 118 A., 481.

In the present case sufficient evidence exists to warrant the conclusion that there was implicit in the situation an understanding that the mortgagor should retain possession until default. This comes from similar dealings between the parties for the preceding four years when possession was retained by the mortgagor, his rec-

ognized adequate facilities for storage for which he was paying rent, and the statement of the treasurer of the defendant company that no change in arrangements was indicated to the mortgagor and "so fas as he knew in the spring, he probably had great reason to believe he would store his potatoes in his own house." The defendant being entitled to possession from December 2, and to all reasonable and actual expenses in caring for the potatoes from that time, the proper amount for storage must be allowed. As it does not appear of record what such amount would be, it must be determined by the sitting Justice. Upon this point only the entry must be

Appeal sustained.
Decree below modified accordingly.

CHARLES LOTHROP *vs.* BROOKLAWN CO.

AND

UNITED STATES FIDELITY AND GUARANTY COMPANY.

Cumberland. Opinion, March 10, 1938.

WORKMEN'S COMPENSATION ACT.

The finding of fact by the Industrial Accident Commission can not be disturbed on appeal.

On appeal. Appellant appeals from decree in favor of petitioner under the Workmen's Compensation Act. Appeal dismissed. Decree affirmed. Court below to fix employee's expenses on appeal. Case fully appears in the opinion.

Reginald H. Harris, for applicant.

Porter Thompson, for appellants.

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

MANSER, J. This is an appeal from decree in favor of petitioner under the Workmen's Compensation Act. The petitioner was injured on June 4, 1936 and totally disabled until June 29, 1936 when he returned to work. Compensation was paid under an agreement approved by the Industrial Accident Commission, which provided that it was not a final settlement and would not prevent further claim. The accident was caused to the petitioner from being struck in the forehead by the point of a shovel and resulted in a lacerated wound and some brain concussion.

In the present proceeding, the petitioner claimed intermittent periods of disability from October 1936 to September 20, 1937, a total of approximately eighty days. During the period of disability for which compensation was awarded in the first instance, the petitioner suffered from headaches, dizziness and nausea. He complains of the same difficulties, together with disturbed vision during the subsequent periods. The symptoms were all subjective, and in defense it is argued that they were non-existent or were attributable to hysteria, and were not shown to be the result of the original accident. There was a past history of good health of the petitioner for a period of eight years, and no evidence of malingering. The commissioner found that the disability existed and was the result of the accident, and therefore compensable. This was a finding of fact and there is no reason or authority for disturbing it. *Kilpinen's Case*, 133 Me., 183, 175 A., 314, and cases there cited.

Appeal dismissed. Decree affirmed. Court below to fix employee's expenses on appeal.

LOUIS NISSENBAUM, PLAINTIFF IN ERROR

vs.

STATE OF MAINE.

Penobscot. Opinion, March 25, 1938.

WRITS OF ERROR. CRIMINAL LAW. EVIDENCE.

Except where conviction is for an offense punishable by life imprisonment, writs of error issue, either from the Superior Court or the Supreme Judicial Court, in criminal as well as in civil cases, as of course.

Writs of error operate to delay the execution of sentence only in instances where allowed by a justice of the court "with an express order to stay all proceedings thereon."

The offense of receiving stolen goods is a distinct and substantive crime in itself, and is not merely accessorial to the principal one of larceny.

A writ of error stands by itself like any other common-law action and is the proper remedy for obtaining a correction of errors on the record. Such writs lie, for errors in law, only for defects evident upon the face of the record.

A writ of error presents nothing to a court of errors but a transcript of the record and what is not incorporated into the record constitutes no part of it.

A transcript of the record is the only competent evidence.

What is technically called the record is, essentially, the certified transcript of the written extension by the clerk of the court of the precise history of the original proceeding from its beginning to its termination.

In indictments for felonies, clerks shall make extended records of the process, proceedings, judgment and sentence.

The sentence is the judgment of the court in a criminal case where there is a conviction.

The record, after the caption, should consist of the indictment properly indorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court.

A record is understood to be conclusive evidence, but whether it is or is not a record is a matter of evidence, and may be proved like other facts.

On writ of error. Plaintiff in error seeks to obtain a correction of the sentence or judgment on account of mistake or error in law after having been committed in execution of a sentence imposed after a plea of guilty. Writ of error dismissed. Case fully appears in the opinion.

Michael Pilot,

Shirley Berger, for plaintiff in error.

John Quinn, County Attorney for State, for defendant in error.

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

DUNN, C. J. At the April, 1937, term of the Superior Court, within and for the County of Penobscot, one Louis Nissenbaum was indicted for receiving goods which, to the knowledge of the accused, had been feloniously stolen. On arraignment, he pleaded guilty, and was sentenced to state's prison for not less, as a minimum term, than one year, nor longer, in maximum, than one and one-half years. The convict was committed in execution of sentence.

In vacation, next after the term of court at which he had been sentenced, Nissenbaum brought a writ of error, returnable to that court's September Term, to obtain a correction of the sentence or judgment, on account of mistake or error in law. The form of the writ, and the proceedings thereon are prescribed by statute. R. S., Chap. 116.

Except where conviction is for an offense punishable by life imprisonment, writs of error issue, either from the Superior Court or the Supreme Judicial Court, in criminal as well as in civil cases, as of course. R. S., *supra.* A writ of error is a writ of right. *Levant* v. *County Commissioners,* 67 Me., 429, 433. Those writs operate to delay the execution of sentence only in instances where allowed by a justice of the court, "with an express order to stay all proceedings thereon." R. S., *supra.* Sec. 12.

Subsequent to the suing out of the writ, further execution of the sentence was ordered stayed "until judgment on said writ of error."

On habeas corpus, the plaintiff in error was let to bail.

The assignment in the writ of errors was, in substance, that the plaintiff in error, intaker, after the taking and carrying away in simple larceny, of copper wire, brass, lead and felt, of the aggregate value of $14.60, had, before sentence was imposed on the thief, "restored and made satisfaction to the party injured . . . . for the full value of the property," only to be refused.

Statute provision is that, where restoration of, or full satisfaction for, property stolen, shall have been made, the guilty receiver shall not be condemned to the state prison. R. S., Chap. 131, Sec. 12. The offense of receiving is a distinct and substantive crime in itself, and is not merely accessorial to the principal one of larceny. *Commonwealth* v. *Barry,* 116 Mass., 1.

The county attorney appeared, of docket entry, for the State as defendant in error.

On the case being called for trial, plaintiff in error introduced a single witness, as later also did the defendant, under reciprocal stipulation that, of the facts or occurrences in respect to which they might testify, only such as, in the estimate of the court, should come within legal admissibility, might weigh.

There was no restoration of the stolen articles to the owner.

In gist, the testimony for the plaintiff was this:

The attorney for the now plaintiff in error (at that time respondent,) went to the manager of the mills of the corporation, the Penobscot Chemical Fibre Company, owner of the pilfered junk, and said, in effect: You may have my check for the stuff as the indictment lays its value. The check was declined. The trial court judge was informed of this before pronouncing sentence.

The manager, on the authority of his own testimony, replied that, while the check would be but partial restitution, yet basic reason for declining was that the case was in the hands of the court; hence, no action would be had independent of conference with the county attorney.

The parties consenting, the case was, at the close of all the evidence, (mutual recital as to testimony preserved,) reported to this Court to decide finally.

The testimony had no place.

A writ of error, in our practice, stands by itself like any other

common-law action. *Morrill* v. *Buker*, 92 Me., 389, 42 A., 796. It is the proper remedy for obtaining a correction of errors on the record. *Sayward* v. *Emery*, 1 Greenl., 291. Such writs lie, for errors in law, only for defects evident upon the face of the record. *McArthur* v. *Starrett*, 43 Me., 345; *Lewiston, etc., Co.* v. *Merrill*, 78 Me., 107, 2 A., 882.

"Nothing is presented by the writ of error to a court of errors but a transcript of the record." Shepley, C. J., in *Valentine* v. *Norton*, 30 Me., 194. What is not incorporated into the record constitutes no part of it. *Valentine* v. *Norton*, supra. A transcript of the record is the only competent evidence. *Thompson* v. *Mason*, 92 Me., 98, 42 A., 314.

A writ of error is based upon the record facts alone; facts outside the record are immaterial. *Galeo* v. *State*, 107 Me., 474, 78 A., 867; *Welch* v. *State*, 120 Me., 294, 113 A., 737.

What is technically called the record is, essentially, the certified transcript of the written extension by the clerk of the court of the precise history of the original proceeding from its beginning to its termination. *Wood* v. *Leach*, 69 Me., 555; *Tyler* v. *Erskine*, 78 Me., 91, 2 A., 845; *Atkinson* v. *People's Bank*, 85 Me., 368, 27 A., 255. A record is a memorial of judicial proceedings. *State* v. *Houlehan*, 109 Me., 281, 83 A., 1106.

At common law the record of a judgment was as the judgment roll. Freeman on Judgments, Sec. 75.

Under the ancient authorities, the word "record" signified a roll of parchment. But in our country, paper has universally supplanted parchment as the material for the record. *Nugent* v. *Powell*, 4 Wyo., 173, 20 L. R. A., 199.

In indictments for felonies, clerks shall make extended records of the process, proceedings, judgment and sentence. R. S., Chap. 93, Sec. 11. The sentence is the judgment of the court in a criminal case where there is a conviction. *State* v. *Stickney*, 108 Me., 136, 79 A., 370.

After the caption stating the time and place of holding the court, the record should consist of the indictment properly indorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court. This, in general, is all the record

need state. *McKinney* v. *People*, 7 Ill., 552, quoted with approval in *United States* v. *Taylor*, 147 U. S., 695, 37 Law Ed., 335.

Remarks made by counsel are dehors the record. *Fulmer* v. *Commonwealth*, 97 Pa. St., 503.

Counsel for plaintiff in error quotes from reported decisions in a somewhat different vein.

Statements not special, or particular, are subject to qualifications. Expressions must be considered in the light of the issues determined. *Perkins* v. *Transport Corporation*, (Mich.) 247 N. W., 759.

A record is understood to be conclusive evidence, but whether it is or is not a record is a matter of evidence, and may be proved like other facts. *Brier* v. *Woodbury*, 1 Pick., 362.

Certainly this writ of error cannot be maintained.

All is right on the original record. *Weston* v. *Palmer*, 51 Me., 73, 74.

The writ of error should be dismissed.

Writ of error dismissed.

LETA M. TIBBETTS *vs.* SHELDON T. HARBACH.

MERRITT G. TIBBETTS *vs.* SHELDON T. HARBACH.

MARLENE J. TIBBETTS,
BY FATHER AND NEXT FRIEND, MERRITT G. TIBBETTS

vs.

SHELDON T. HARBACH.

Waldo. Opinion, April 15, 1938.

NEGLIGENCE. MOTOR VEHICLES. R. S., CHAP. 29, SEC. 74.

An automobile driver is bound to use his eyes, and to see seasonably that which is open and apparent and govern himself suitably, and in no event, driv-

ing over a strange highway without knowledge of the intersecting roads, is he justified in driving as if none existed.

A person operating a motor vehicle is bound by her own acts and omissions, and if she is guilty of negligence proximately contributing to the accident, it is imputed to her four-year-old daughter riding with her and who was obviously incapable of exercising care for her own safety.

Contributory negligence on the part of a wife is imputed to her husband in an action by him to recover for medical and hospital bills incurred in his wife's behalf and for the loss of her consortium.

A husband may recover for damages to his automobile against a third person negligently damaging the car regardless of the wife's contributory negligence, if the wife is using her husband's car by his express or implied permission for her own purpose and as his bailee. The rule is otherwise, however, if the wife is an agent of her husband.

Violation of R. S., Chap. 29, Sec. 74, pertaining to driver of vehicle intending to turn to the left at an intersection, is prima facie evidence of negligence, but the violation is merely evidence to be considered with all other attending facts in determining whether the disobedient driver exercised due care in the operation of his vehicle under the circumstances.

Regardless of the nature and extent of the violation, causal connection between it and the accident must be established, and unless it was a contributing proximate cause, evidence of its commission is of no probative value and must be disregarded.

It is not negligence for a mother, in case of an emergency, to drop the steering wheel of an automobile which she is driving to protect an infant daughter from the jeopardy in which she was placed by an oncoming automobile.

In the case at bar, the Court holds that where the constant and customary flow of travel with the acquiescence of public officers has established two well-defined diverging ways in and out of an intersection accompanied by a practical nonuser of the triangle between, the forking roads become separate ways and R. S., Chap. 29, Sec. 74 must be interpreted accordingly, and that the medial lines as used in said statute shall mean through the center of the forking roads rather than the triangle between the forks.

On report. Actions of negligence arising out of an automobile accident. Reported to Law Court for final determination. In *Leta M. Tibbetts* v. *Harbach*: Judgment for the plaintiff for damages as assessed; In *Merritt G. Tibbetts* v. *Harbach*: Judgment for the plaintiff for $1356.58; In *Marlene J. Tibbetts, by next friend,* v.

Harbach: Judgment for the plaintiff for $100.00. Cases fully appear in the opinion.

Locke, Campbell & Reid,
Peter Mills, for plaintiffs.
William B. Mahoney,
John B. Thomes, for defendant.

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

STURGIS, J. These actions of negligence arising out of an automobile accident were tried together at *nisi prius* and by agreement of the parties reported to the Law Court for final determination.

The state highway between Belfast and Augusta designated Route 3, at East Palermo, is intersected on its southerly side by the South Liberty road, so-called, which comes in at practically a right angle but does not cross the main highway. Route 3 is a black road eighteen feet wide with gravel shoulders which, some little distance west of East Palermo, crosses an iron bridge, turns rather sharply to the left, rises in an upgrade for several hundred feet until it reaches the South Liberty road, and then as it continues on is practically level. The brow of this hill obstructs the view ahead of travellers from either direction, and those coming from the east can not see traffic coming up the opposite grade until they draw near the intersection. The South Liberty road as it joins Route 3 broadens out into a wide mouth which is all gravel surfaced but is worn by travel into two forks or roads curving to the east and west, the outer limit of the west fork being marked by white posts and that of the east fork extending to the terrace of the lawn of an abutting owner. Each fork is wide enough for two vehicles to conveniently and safely travel abreast. At the time of this accident, the triangle formed by the diverging roads was clearly apparent and its bounds well defined. The gravel on its sides had been rolled into ridges eight to twelve inches high in places and the ruts there formed and on the opposite inside of the curves were well worn. The evidence tends to show that public travel through this intersection seldom if ever passed over the triangle.

The undisputed evidence in these cases is that at about half past

five in the afternoon of September 1, 1936, Mrs. Leta M. Tibbetts, accompanied by her four-year-old daughter Marlene J. Tibbetts, drove her husband's Ford automobile along the right-hand lane of Route 3 from the direction of Belfast and, approaching the East Palermo intersection into which she intended to enter, slowed her car down to about ten miles an hour, extended her hand out of the window signalling for a left turn, and seeing no car approaching in any direction swung diagonally across the white line which marked the center of the main highway at that point and attempted to drive off Route 3 into the east fork of the South Liberty road. Her statement is, and it appears to be entitled to credence, that having driven beyond the medial line of the east fork which she was about to enter, and having crossed the entire left lane of the black road so that the front wheels of her automobile were out on the gravel shoulder, suddenly seeing the defendant coming at a high rate of speed up Route 3 over the brow of the hill and directly towards her, she drove ahead less than a car length and, realizing that a collision was imminent, dropped the steering wheel and clasped the child in her arms. The weight of the evidence indicates that her car was in the east fork of the South Liberty road and its front end about nine feet from the macadam when it was struck on its right front side and driven back along the shoulder of Route 3 at least twenty-eight feet. Mrs. Tibbetts was grievously injured about the head and face, suffering a hemorrhage of the left eye, deep and extended lacerations of the chin, broken jaw bones and displaced teeth, and multiple minor cuts and abrasions. Her infant daughter was bruised more or less and shaken up but not permanently injured. Her husband's automobile was badly damaged.

The defendant Sheldon T. Harbach, a young clergyman residing in Detroit but vacationing at his former home in Barrington, Rhode Island, was driving his mother Floy L. Harbach through Maine and down to Ellsworth. He testifies that as he crossed the iron bridge on Route 3 below the East Palermo hill, he was driving his Chevrolet at a speed of about forty-five miles an hour, going up the grade accelerated his car so as to hold that speed, and as he reached a point where he could see over the brow noticed the Tibbetts car, then in the middle of the highway, slowly approaching from the opposite direction and one hundred and fifty feet or more

away. He admits that, although he immediately saw that the oncoming car was turning diagonally across the highway to the left and directly across his path, he neither applied his brakes nor turned into the unobstructed lane to the left, but bearing to the right with his car partly on the shoulder of the black road drove straight ahead at about the same speed of forty-five miles an hour, only turning sharply to the right as the automobiles came together. He testifies that he did not know of or observe the intersection ahead of him and admits that he did not think to put his brakes on. His mother, who was riding with him, confirms his admission that when the oncoming car was first seen, or immediately thereafter, it was "diagonally across the middle of the road," recalls that her son bore to the right, but has no other knowledge as to his operation of the automobile or the facts attending the collision. She did not notice the intersecting road.

Giving due weight to all facts proved in his defense, the evidence leaves little or no room for doubt that had the defendant, after seeing the plaintiffs' approaching automobile obviously turning to the left across the road, kept a proper lookout and taken the movements of the car into consideration, opportunity for him to have avoided the accident would have been ample. If he had thought to apply his brakes and slow down his car, which he admits he did not, or had swung to the left and to the rear of the oncoming automobile and allowed it to pass ahead of him, it is clear that the collision would not have occurred. "His impulsive act in attempting to drive his (car) in front of the automobile, was without relation to the proper theory and practice of the control of motor vehicles in like situations." *Eaton* v. *Ambrose*, 133 Me., 458, 180 A., 363, 365. Nor does the defendant's ignorance of the existence of the intersection excuse his conduct. Photographic exhibits in the cases show that the mouth of the intersection is plainly visible to traffic approaching from the west and the turn into it from that direction, although not marked by printed signs, is clearly indicated by a curving line of white posts. An automobile driver is bound to use his eyes, and to see seasonably that which is open and apparent and govern himself suitably. *Callahan* v. *Bridges Sons*, 128 Me., 346, 147 A., 423; *Banks* v. *Adams et al.*, 135 Me., 270, 195 A., 206. In no event, driving over a strange highway without knowledge of the

intersecting roads, is he justified in driving as if none existed. *Dansky* v. *Kotimaki*, 125 Me., 72, 75, 130 A., 871.

The controlling issue in these cases, however, is whether the plaintiff Leta M. Tibbetts was guilty of contributory negligence which is imputable to her infant daughter and her husband barring them and her from recovery. She is undoubtedly bound by her own acts and omissions, and if she is guilty of negligence proximately contributing to this accident, it is imputed to her child who was riding with her and obviously incapable of exercising care for its own safety. *Gravel* v. *LeBlanc*, 131 Me., 325, 162 A., 789; *Hasty* v. *Power Company*, 125 Me., 229, 132 A., 521; *Morgan* v. *Aroostook Valley R. R. Co.*, 115 Me., 171, 98 A., 628. So, too, the law imputes her contributory negligence, if there was such, to her husband, the plaintiff Merritt G. Tibbetts, in his action to recover for medical and hospital bills incurred in his wife's behalf and for the loss of her consortium. If she was not free from negligence contributing proximately to her injuries, he can here have no recovery for these items of damage. *Gile* v. *Gas & Electric Co.*, 132 Me., 168, 168 A., 553. As to the damages to his automobile, it is well settled that, if the wife is using her husband's car by his express or implied permission for her own purpose and as his bailee, he may recover against a third person negligently damaging the car, regardless of the contributory negligence of his wife. In such a case, the contributory negligence of the bailee is not imputed to the bailor. *Robinson* v. *Warren*, 129 Me., 172, 151 A., 10; *Bedell* v. *Railway Co.*, 133 Me., 268, 177 A., 237; 4 Blashfield Encyc. of Automobile Law, Sec. 2862. The rule is otherwise, however, if it may be found in these cases that Leta M. Tibbetts at the time of the accident was operating the automobile as the agent of her husband. It is a universal rule that the contributory negligence of an agent or servant acting within the scope of his employment is imputed to the principal or master. *Dansky* v. *Kotimaki*, supra; *Yarnold* v. *Bowers*, 186 Mass., 396, 71 N. E., 799; *Kennedy* v. *Alton, etc. Tract. Co.*, 180 Ill. A., 146; 45 Corpus Juris 1025 and cases cited.

The defendant first contends that the plaintiff Leta M. Tibbetts was guilty of contributory negligence by reason of her disobedience of the rule of the road prohibiting cutting corners at road intersections. The statutory regulation, R. S., Chap. 29, Sec. 74, pro-

vides that the driver of a vehicle on the public ways in this state, when intending to turn to the left at an intersection

> "shall approach such intersection in the lane for traffic to the right of and nearest to the center line of the way, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.
>
> "For the purpose of this section the center of the intersection shall mean the meeting point of the medial lines of the ways intersecting one another."

Proof of violation of this rule of the road is prima facie evidence of negligence, but there are many situations which may overcome and dispel the presumption which arises. In the last analysis, the violation is merely evidence to be considered with all other attending facts in determining whether the disobedient driver exercised due care in the operation of his vehicle under the circumstances. *Nadeau* v. *Perkins*, 135 Me., 215, 193 A., 877; *Field* v. *Webber*, 132 Me., 236, 169 A., 732; *Rouse* v. *Scott*, 132 Me., 22, 164 A., 872; *Bolduc* v. *Garcelon*, 127 Me., 482, 144 A., 395; *Dansky* v. *Kotimaki*, supra. Regardless of the nature and extent of the violation, however, causal connection between it and the accident must be established. Unless it was a contributing proximate cause, evidence of its commission is of no probative value and must be disregarded. *Elliott* v. *Montgomery*, 135 Me., 372, 197 A., 322; *Nadeau* v. *Perkins*, supra; *Field* v. *Webber*, supra; *Neal* v. *Rendall*, 98 Me., 69, 56 A., 209; 4 Blashfield Encyc. of Automobile Law, Sec. 2591.

The application of the highway intersection rule to the facts in these cases raises a question which is as yet undecided in this state. The South Liberty road, as stated, at its intersection with the state highway divides into two forks with a triangle between. The medial line of the main road passes through the apex of the triangle and the middle of its base, and extended finds its meeting point with the medial line of the state highway some little distance westerly from the point where the plaintiff Leta M. Tibbetts turned her car to the left. She, however, passed well beyond the medial line of the east fork of the South Liberty road before she turned from the right lane and across the center line of the state highway and continued

on into the intersection. As forcefully as counsel for the defendant presses his contention that the intersection of the medial line of the main South Liberty road and that of the state highway marked the point where the left turn should have been made, his opponent for the plaintiffs argues that a reasonable and sound construction of the statute in such a situation allowed a left turn around the center line of the east fork as here made. The constructions put upon similar highway intersection regulations by other courts are submitted by counsel on the briefs and indicate the trend of judicial opinion of the proper application of such rules at forked intersections.

In *Day* v. *Pauly*, 186 Wis., 189, 202 N. W., 363, relied upon by the defense, there was a Y entrance from an intersecting street into a main thoroughfare, all concrete and not constructed as or by user developed into a definite two-way entrance. On such facts, it was held that a driver cutting the corner and not passing to the right of the intersection in violation of a rule of the road was presumed to be negligent and guilty of contributory negligence if his act was the proximate cause of the injury complained of.

But in *Weiberg* v. *Kellogg*, 188 Wis., 97, 205 N. W., 896, it appearing that the authorities in charge of public roads had acquiesced in the use of two diverging travelled tracks across an intersection and had practically abandoned the triangle formed between the tracks, it was held that such acquiescence might be deemed an abandonment of the triangle and the center of the intersection referred to in the rule of the road requiring travellers turning to the left to pass to the right thereof has reference to the medial line of each diverging travelled road. In distinguishing its earlier opinion in *Day* v. *Pauly*, supra, that court emphasizes the fact that in this case the triangle did not constitute the travelled or beaten track and was not maintained as such, but was apparently abandoned both by travellers and public authorities.

In *Karpeles* v. *Livery Company*, 198 Ala., 449, 73 So., 642, it was said that the object of an ordinance requiring travellers in turning to keep to the right or the left of an intersection as the case may be is to keep vehicles moving at all times as far as practicable with the current of travel. And it appearing that the defendant in making a left turn passed at a lawful rate of speed to the left of the

center of the intersection of the streets as laid out but to the right of the intersection of the streets as defined by their customary use, it was held that it could not be said that the driver by that course did no better serve the purpose and the rule of due care prescribed by the ordinance.

In *Falk* v. *Carlton*, 270 Mass., 213, 170 N. E., 51, the question raised here as to the application of this rule of the road at forking intersections came up for consideration. Extended citation from this opinion seems profitable:

> "The accident occurred near the point in East Street in Sharon where it divides and, by one travelled way passing to the right and by another passing to the left of a triangular grass plot at the intersection, runs into Bay Street. The defendant turned from Bay Street into East Street by using the travelled way first met at his left. He did not drive on along the side of the triangle on Bay Street until he reached the further travelled path into East Street before making his turn. He used a method of turning from Bay Street commonly in use by travellers approaching East Street from the direction in which he was going. There were shrubs growing on the triangular plot and by the sides of the travelled paths of East Street.
>
> "There was no error in instructing the jury that it was not negligence, as matter of law, for him to drive to the left of the grass plot as he did. There was no evidence that the plot formed part of East Street; *but, even if it did,* we think it could not be said that as matter of law he was required to pass a travelled way leading to the broad travelled part of East Street in order to go beyond the centre of the intersection of East and Bay Streets and then turn sharply to his left to enter by the further way. Whether his conduct was negligent depended upon the entire circumstances at the time, and was matter of fact for a jury. Such triangular junctions are not uncommon; and a traveller who wishes to enter from his left is not bound as matter of law to keep on to the further roadway. In many cases he may be ignorant that a second entrance exists.

G. L. c. 90, sec. 14, (see present amended form in St. 1925, c. 305) is not to be interpreted to require such action."

We are of opinion that the construction placed upon intersection regulations in these cases should be applied to R. S., Chap. 29, Sec. 74. "Triangular junctions are not (more) uncommon" in Maine than elsewhere, and in the absence of express legislative mandate to the contrary, it seems proper to hold that if the constant and customary flow of travel with the acquiesence of public officers has established two well-defined diverging ways in and out of an intersection accompanied by a practical nonuser of the triangle between, the forking roads become separate ways and the statute must be interpreted accordingly. It can not be presumed that the legislature intended the anomalous, inconvenient and absurd consequence which would otherwise result. *Carrigan* v. *Stillwell*, 99 Me., 434, 437, 59 A., 683.

In the instant case, it is true that the triangle between the two ways in and out of the South Liberty road at the time of this accident was not grown up to grass or bushes, although there is evidence that at some prior time a thin growth of grass had sprung up. It was, however, well defined with the gravel on its sides rolled up into shoulders eight to twelve inches high and had been practically abandoned for public travel. The grading and gravelling of the forks to their outer limits and a continued failure to level out the shoulders and fill the ruts at the sides of the triangle is some proof of official acquiesence in the customary user of the two ways. We are of opinion that the triangle was so defined and the diverging ways at its sides clearly established that the plaintiff Leta M. Tibbetts, in these actions, was not required as a matter of law to pass beyond the medial line of the main South Liberty road before turning from the state highway. In determining whether she was guilty of negligence, her conduct in turning left beyond the medial line of the east fork of the road is merely a fact to be considered with all the other facts and circumstances incident to the collision.

As triers of fact, the members of this Court do not think that the plaintiff Leta M. Tibbetts can be charged on this record with contributory negligence. As already stated, she slowed down her car, properly signalled her intention to turn, looked to the front and to

the rear for approaching traffic, and with apparently a clear road, started the turn, all with due regard for the meeting point of the medial lines of the highway and the intersecting fork. The defendant's automobile came into view from below the brow of the hill suddenly and at high speed and, as already pointed out, its operation thereafter made a collision inevitable and, as far as Leta M. Tibbetts was concerned, unavoidable. It is not at all clear that her impulsive act in taking her hands from the wheel and clasping her infant child to her in any way changed the situation. Her act must be viewed as an attempt to protect her infant daughter from the jeopardy in which it was placed by the oncoming automobile. The law will not charge this mother with negligence in dropping the steering wheel of her automobile in the emergency which here arose. *Hatch* v. *Globe Laundry Co.*, 132 Me., 379, 171 A., 387.

The plaintiffs are severally entitled to compensation for the injuries and losses they have suffered through the defendant's negligence. Considered out of order, Merritt G. Tibbetts shows items of expense, including the physician's and hospital charges for his wife's care and treatment, as also the estimated cost of further necessary dental surgery. He includes moneys paid for household services while his wife was incapacitated and incidental miscellaneous disbursements. The damage to his automobile claimed is based on the repair bill which seems to be reasonable. Taking all these items into consideration, together with the loss of his wife's services and consortium, we find that an award of $1356.58 will fairly compensate him for his damages. An allowance of $100.00 to the child Marlene J. Tibbetts appears on the record to be just compensation.

We are convinced, however, that there is insufficient evidence in the report to enable this Court to justly assess the damages which the plaintiff Leta M. Tibbetts is entitled to recover in her action. The evidence tends to support her claim that she is permanently disfigured by scars and in her facial contour and expression, but this is not portrayed by photographic exhibits nor can it be accurately visualized and weighed from the testimony of those who have observed her condition. So important an element of damage should be passed upon by a jury. Here, the case can only be re-

manded for assessment of damages and for the entry of judgment for the plaintiff Leta M. Tibbetts for the amount thereof.

In *Leta M. Tibbetts* v. *Sheldon T. Harbach*, the case is remanded for the assessment of damages and the entry of:

Judgment for the plaintiff for damages as assessed.

In *Merritt G. Tibbetts* v. *Sheldon T. Harbach*, the case is remanded for the entry of:

Judgment for the plaintiff for $1356.58.

In *Marlene J. Tibbetts, by next friend* v. *Sheldon T. Harbach*, the case is remanded for the entry of:

Judgment for the plaintiff for $100.00.

FREEPORT SULPHUR COMPANY *vs.* PORTLAND GAS LIGHT COMPANY.

MAINE CENTRAL RAILROAD COMPANY

vs.

PORTLAND GAS LIGHT COMPANY.

PORTLAND TERMINAL COMPANY *vs.* PORTLAND GAS LIGHT COMPANY.

TEXAS GULF SULPHUR COMPANY *vs.* PORTLAND GAS LIGHT COMPANY.

Cumberland. Opinion, April 15, 1938.

EVIDENCE.

There is nothing for a jury to consider when its decision can only be based on conjecture.

On exceptions. Actions of tort tried together before a jury. On motion, a directed verdict was granted defendant in each case. Exceptions filed by the several plaintiffs. Exceptions overruled. Cases fully appear in the opinion.

Cook, Hutchinson, Pierce & Connell,
Single & Tyler, for plaintiffs.
Bradley, Linnell, Nulty & Brown,
Carl C. Jones,
Carroll N. Perkins, for defendants.

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

THAXTER, J. These actions of tort which were tried together are before us on exceptions to the direction of a verdict for the defendant in each case.

The defendant is charged with responsibility for a fire which destroyed a wharf and equipment thereon of the Portland Terminal Company all valued at $271,877.53, freight cars with the contents thereof of the Maine Central Railroad Company valued at $17,019.98, sulphur belonging to the Freeport Sulphur Company valued at $23,500.00, and sulphur belonging to the Texas Gulf Sulphur Company valued at $22,427.79. The freight cars were standing on the wharf or near thereto at the time of the fire and the sulphur had been unloaded and was awaiting reshipment.

The defendant manufactures gas and distributes it in Portland and vicinity and is charged with having permitted to escape into the harbor from its premises, which are situated on the water-front about 1000 feet westerly from the wharf of the Terminal Company, large quantities of oil, gas waste and other materials of an inflammable nature, which became ignited on the water or flats under the wharf and destroyed the property in question.

The declaration in each case in one count alleges that the defendant negligently and in violation of a municipal ordinance permitted such oil and waste to be discharged into the harbor and that it became ignited and burned the wharf and other property; in another count the allegations are to the same effect except that it is charged that the defendant knew or in the exercise of reasonable

care should have known that a fire might take place. In each count there is an allegation that such condition constituted a public and private nuisance. There is also the usual allegation of the plaintiffs' due care.

The Portland Terminal Company operates a railroad terminal in Portland. Wharf No. 1, which was burned, was built of piles and extended along the Portland side of the harbor for a distance of 900 feet, the westerly end being a short distance easterly of the bridge connecting Portland and South Portland. Westerly just above the bridge was Wharf No. 2, and just above that was the property of the defendant, the Portland Gas Light Company. The distance was approximately 1000 feet from the westerly tower on Wharf No. 1 to the easterly line of the property of the defendant. At low tide about a half the area under the wharf was bare. At the northerly end of the wharf was a sea-wall and at high tide all of the flats as far back as the wall were covered with water. On the wharf were sulphur sheds, tracks, and four unloading towers or cranes which moved easterly and westerly along the front on the tracks. The engines for these cranes were operated by steam from boilers in the towers, and each tower had a chute from which ashes and cinders could be dropped from the fire-boxes through holes in the wharf to the water or flats below. Easterly is what is known as Deake's Wharf, on the westerly side of which and in the dock between it and the Terminal Company wharf was tied up on September 16, 1929, the day of the fire, a schooner named the *Elizabeth Bandi.* Alongside the Terminal Company wharf was the steamer *Plymouth* which had been discharging coal.

The defendant manufactured two kinds of gas, coal gas and water gas. The amount of water gas manufactured was small and it was only produced to supply peak demands. From the manufacture of the coal gas certain by-products were obtained, coke, a small amount of ammonia, and coal tar. In the manufacture of the water gas there was a small amount of water gas tar. As a matter of fact less than a tank car of this was produced in the period from August, 1928, to the time of the fire. The only substances which could have escaped from the plant of the Gas Company to cause the fire were these tar products or the oil which was on hand for the manufacture of the water gas. The water gas tar was stored in

what was known as No. 3 Holder Tank which had a capacity of approximately 400,000 gallons; and the evidence indicates that there was a very small amount of tar in this during the year preceding the fire, probably less than 10,000 gallons at any one time. There was no pipe from this holder to the water. Deliveries of this tar were made into tank cars by placing a temporary pipe over the top of the holder and pumping the tar into them. This holder was located some 450 feet from the water-front. The coal gas tar was produced in the retort house where the gas itself was manufactured. The gas went into storage holders, the coal gas tar ran from the retort house through a pipe suspended about thirty feet above the ground to a receiving well located beneath the ground about 400 feet from the water-front. This well had a capacity of approximately 125,000 gallons. The tar was pumped from this well into the tar storage well which had a capacity of 387,000 gallons. This was located in the same area as the receiving well. There was a pipe running to the wharf from this well from which the tar was pumped into tank steamers. The last shipment prior to the fire was on September 4th; and there is no evidence that tar had been pumped through this pipe prior to the fire since that date. The only other product on the defendant's premises which could in any way have caused the fire, if it had escaped into the harbor, was the oil used to manufacture the water gas. This oil was stored in four tanks. No pipe led from these to the water-front and there is no evidence that any of this oil escaped. There were a number of catch basins on the defendant's property which led into sewers which emptied into the harbor.

The fire started shortly after four o'clock in the afternoon of September 16, 1929. It apparently originated underneath the wharf, shot up between the steamer *Plymouth* and the piling, and in a very short space of time the entire structure with the buildings on it, the hoisting towers, and the bridge and upperworks of the steamer, were a mass of flame. Great clouds of black, billowing smoke rolled shoreward fanned by a gentle southwesterly breeze.

The plaintiffs had the burden of proving in the first place their own due care, secondly that oil, sludge, or tar on the water was a contributing cause of the fire, and thirdly that this oil, sludge, or tar escaped from the premises of the defendant through negligence.

We can not hold that as a matter of law there was any want of due care on the part of any of the plaintiffs. Likewise a jury would have been warranted in finding that the fire was caused by the ignition of oil floating on the water or covering the flats underneath the wharf. It is difficult to account for the rapid spread of the fire on any other theory. It is apparently conceded that on the day of the fire a large area of the harbor was covered with a heavy, oily substance. It stuck to the piles of the wharves as the tide receded; it was so heavy in spots as to support particles of coal which were dropped on it. It was in the dock between Deake's Wharf and the wharf of the Terminal Company. At the height of the fire a burning ember dropped in this dock and almost immediately flames spread over the surface of the water, seriously endangering the schooner which lay there. At least one of the pictures taken at the height of the fire shows flames running on the surface of the water in front of the wharf which was destroyed. A jury would have been perfectly justified in finding that the fire was caused by oil or by some inflammable substance on the water which became ignited, possibly by the dropping of hot coals from the hoisting towers.

But it is only by conjecture that we can connect the defendant with the escape of this oil. It may have come from the defendant's premises; it may have come from a number of other sources.

The contention of the plaintiffs is that large areas of this oil were found during the ebb of the tide in front of the defendant's property and that none of it extended above that point in a westerly direction. The inference is that, as the tide was flowing easterly, the only possible source of the oil was the defendant's premises. There is the testimony of one Thorndike that he saw a substance on the water in front of the defendant's property similar in all respects to water gas tar such as was produced at the plant of the Peaks Island Gas Company where he had worked some twenty years previously. Charles H. Powell, who was with him, says that it looked like road tar. There is also evidence from the draw tender on the railroad bridge, which at the time of the fire led from a point near the Gas Company's property on the Portland side of the harbor to the South Portland shore. This man testified that he had seen at various times an oily or tarry substance running down the retaining wall of the defendant's property into the harbor.

If the substance on the water could be identified as coal tar or water gas tar there might be something to the plaintiffs' claim. But from the plaintiffs' own witnesses the conclusion is irresistible that the witness Thorndike was mistaken in identifying this as tar. Samuel Kamerling, a chemist called by the plaintiffs, testified that he dropped samples of the tar residues obtained from the defendant's premises into water and that the substance sank leaving a thin film of oil on the surface. Walker W. Stevenson, another expert for the plaintiffs, testified that the tar product of the defendant would sink in water but that the light oils, which were a part of it, had a specific gravity lighter than water and would float. The testimony of the defendant's experts is exactly to the same effect. It seems to be conclusively established that tar products will sink; that petroleum products will float. When the tar drops into the water, the oils are apparently separated and remain on the surface; the rest sinks. This scientific fact seems to render utterly worthless the identification by Thorndike of this substance on the water as a tar residue. Possibly it may have collected dust from coal which was being unloaded; it may have had the appearance of tar; it may have smelled like tar; but it certainly was not tar.

What of the fact that Thorndike saw it in front of the defendant's premises? Thorndike went in his boat to a point just westerly of the South Portland bridge. This was about one o'clock. The tide had been ebbing for three hours and it continued to go out for about three hours more. Fore River, which forms the extreme upper end of Portland Harbor, extends for a mile or more above the bridge. At various points westerly beyond the defendant's property and along the shore were oil distributing plants. The tide had been flowing easterly for three hours at the rate of approximately a mile an hour. It is perfectly possible that the substance which Thorndike saw in front of the defendant's plant may have been the last portion of what had come down from far up in the inner harbor. That it was found near the defendant's property is of no importance in determining its source. It had been subject, for we do not know how long a time, to the restless currents surging in from the ocean and to the whims of the receding waters as the tide ebbed.

The plaintiffs have shown with great detail the various catch basins and pipes from which tar could have escaped from the prop-

erty of the defendant. But that this could have escaped is not proof that it did do so. In fact there is not a shred of direct evidence that any oil, or tar, or any other product ran out from its container and flowed over the ground and into the sewers. On the contrary, the testimony of every employee of the Gas Company who took the stand is to the effect that no such accident happened on the day of the fire or at any time immediately prior thereto.

The only other evidence bearing on this point is that of Walter Smith, the draw tender on the railroad bridge. He testified that on a number of occasions he had seen little rivulets running down the stone wall of the defendant's property and on these rivulets there was a blue scum which, spreading over the surface of the water, gave out many kinds of colors. The witness says: "It would show different colors as they glinted, like a diamond." This is a perfect description of the action of a small amount of oil which, spreading out over the water, gives forth iridescent hues as the sun's rays strike it from various angles. This scum, he said, would float down with the tide and then would float back again. Subsequently the witness said it looked and smelled like tar. But the description which he first gave was certainly not a description of tar. He stated on cross-examination that practically every day he saw oil on the surface of the harbor, but noticed nothing in particular on the day of the fire. The real weight to be given to his testimony is perhaps best summed up by himself: "Now that is a long time ago, and I am getting old, and I don't remember as well as though I was a young man." In so far as he says he saw tar on the surface of the water he is clearly mistaken. What he described could not have been tar any more than what Thorndike saw. It was oil. It is not at all improbable that he saw oily water dripping or running from the crevices in the retaining wall of the Gas Company. The harbor was often covered with oil as his own testimony shows. This was carried in with the tide under the wharves, through cracks and crevices, and into pools and hollows, and as the tide fell it ran out again. There is not the slightest suggestion from this witness that there was at any time any such outpouring of oil or tar from the premises of the defendant as the plaintiffs would have us believe.

The plaintiffs call attention to a supposed shortage in the amount of coal tar produced per ton of coal during the month of

September 1929 and a supposed shortage in the amount on hand. This might be corrobative of evidence, circumstantial or direct, that tar escaped into the harbor. In the absence of such evidence, it is not by itself proof that the tar did so escape. In any event, the defendant seems to have offered an explanation for the supposed shortage.

Taking the plaintiffs' own testimony in the light most favorable to them, it would be pure guesswork to assume that the great mass of oil which was floating on the surface of Portland Harbor on the day of the fire came from the plant of the defendant.

Opposed to the claim of the plaintiffs there is much testimony from witnesses for the defendant to indicate that this substance, whatever it may have been, did not come from the defendant's plant.

At six o'clock in the morning of the day of the fire great masses of thick oil were seen in front of the Portland Yacht Club, which is approximately half a mile easterly of the defendant's premises. At seven o'clock the third officer of the *Plymouth* saw it near his steamer. At this time the tide had been running in for approximately three hours. The substance which was at the Yacht Club and around the steamer *Plymouth* at that time must, therefore, have come from the lower harbor and have drifted from east to west with the current. It clearly did not come from the Gas Company unless it had been carried down by the ebb tide during the early part of the night and had come back on the flood.

The only way by which through accident the tar could have flowed into the harbor would have been by an overflow from the tanks where it was stored and by its running from them into the catch basins, or by a defect in the tanks which would permit it to escape into the ground. In either case the trouble would have been known to the men in the plant; and numbers of them testified that no such accident took place. It would likewise have been possible to have had a leakage through the pipe connections in the process of loading the tank steamers, but the last boat which was loaded prior to the fire sailed on September fourth.

There is no evidence whatsoever that any oil or tar was seen escaping from the defendant's premises, unless the testimony of Walter Smith can be so construed. The plaintiffs' case is built on circumstantial evidence, the main link of which is that coal tar was

found on the surface of the water which could have been produced only by the defendant. The evidence is, however, conclusive that the substance on the water was not tar. When that link in the chain snaps, the whole case falls. There unquestionably was oil of some kind on the surface of the harbor on the day of the fire and that may have come from a number of different places. When we are forced into the realm of pure conjecture, there is nothing for a jury to consider. *Allen* v. *Maine Central Railroad Company*, 112 Me., 480, 92 A., 615.

Since the weight of the evidence does not sustain the proposition that the fire arose in consequence of the escape of oil or other substance from the premises of the defendant, the aspect of the allegation of nuisance, assuming, but not deciding, such phase of the rule, need not have consideration.

The direction of a verdict for the defendant was correct.

Exceptions overruled.

GEORGE CHAPMAN ET AL. *vs.* HECTOR J. CYR CO., INC.

Androscoggin. Opinion, April 25, 1938.

WORKMEN'S COMPENSATION ACT. DAMAGES.

Under the Workmen's Compensation Act, when transportation, or the means of transportation, to and from work, is furnished by the employer as an incident of the contract of employment, and the employee sustains injury in the course of such transportation, the injury sustained is "in the course of" the employment.

Under the Workmen's Compensation Act, when transportation is furnished by the employer, and the employee is injured while being transported, there is a causal relationship between the employment and the accident causing injury, and the accident, under these circumstances, rises "out of the employment."

Degree of dependency of parents, under Workmen's Compensation Act, who sought compensation for death of son is to be determined as the facts may have been at the time of the accident causing death.

The alleged dependents of deceased employee who had cross-appealed from decree awarding compensation on the ground that award was inadequate, were not entitled to expenses incurred in proceedings on appeal where Supreme Court found that award was not inadequate.

A Workmen's Compensation case. Appeals by the petitioners and the respondents to a decree awarding compensation under the Workmen's Compensation Act. Appeals dismissed. Decree affirmed. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for petitioners.

Robinson & Richardson, for respondent.

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

MANSER, J. This case comes up on appeals by the petitioners and the respondents to a decree awarding compensation under the Workmen's Compensation Act. Carold L. Chapman was in the employ of Hector J. Cyr Co., Inc. The employer was engaged in constructing a cement bridge across the Androscoggin River between Lisbon Falls and Durham. The employee was engaged as a fireman on the Durham side of the river, and worked from 11:30 at night until 7:30 in the morning. He lived in Lisbon Falls and ordinarily used a truck supplied by himself to reach his place of employment. The Industrial Accident Commissioner found that on the night prior to January 2, 1937, Chapman started in his truck from his home but was prevented from reaching his destination by reason of the icy condition of the road on a steep hill in Durham. He did not work that night. Cyr, the foreman in charge of the job, then authorized the use of a boat by Chapman on the night of January 2 to cross the river. This Chapman attempted to do but was swept over the dam to his death. The facts so found, though in part controverted, are amply supported by the evidence. The findings and decision of the commissioner then continue thus:

> "In order to receive compensation under the law, the dependent's deceased must have received his injury by accident 'arising out of and in the course of his employment.' R. S., Chap. 55, Sec. 8. Ordinarily, a man injured on his way to work before arriving on the premises where the work is to be performed is not 'in the course of his employment.' *Paulauskis'*

Case, 126 Me., 32; *Kinslow's Case*, 126 Me., 157; *Ferreri's Case*, 126 Me., 381. And, if an injury does not arise 'in the course of' the employment, it cannot arise 'out of' the employment. *Wheeler's Case*, 131 Me., 91; *Fournier's Case*, 120 Me., 236. Transportation or the means of transportation to and from work may, however, be furnished by the employer as an incident of the contract of employment, in which case, an injury sustained in the course of such transportation, is sustained 'in the course of' the employment. Examples are to be found in *Fogg's Case*, 125 Me., 168; *Beers' Case*, 125 Me., 1; and *Littlefield's Case*, 126 Me., 159. This is as true of transportation on water as on land. *Heaney* v. *Carlin Construction Co.*, 269, N. Y., 93; *Onisk* v. *Knaust Bros.*, 225 App. Div., N. Y., 186, 232, N. Y. S., 541, affirmed without opinion, 250, N. Y., 569. . . .

"In the instant case, on the night of January 2nd, at least, transportation by row boat across the river from Lisbon Falls to Durham was an incident of the deceased's employment; and we find that he was 'in the course of his employment' when drowned. Obviously, there was a causal relationship between the employment and the unfortunate accident; hence, it is clear that the accident also arose 'out of the employment.' *Beers' Case*, 125 Me., 1."

We approve this statement of legal principles as applicable to the facts above recited.

The petitioners are the father and mother of the deceased employee. They come within the statutory definition of dependents but in the class where the degree of dependency is to be determined "as the fact may have been at the time of the accident." R. S., Chap. 55, Sec. 2, Par. VIII. Appeal is entered in their behalf as to the amount awarded to them. The record discloses, and the commissioner found, that the parents were elderly people living on a small farm in Lisbon owned by the father. The farm consisted of about twenty-five acres of cleared land with a few acres more of pasture and woodlot. Including the eight-room house and the barn, the property was valued from $2500.00 to $3000.00. It was unmortgaged. It provided a home and produced a portion of the food

supplies. The deceased son, who was an only child, lived with his parents when not away at work. He had been so absent about five months during the preceding year.

The commissioner determined that the support furnished by the deceased to both of his parents was equivalent to one-third of his earnings for the year prior to the accident. These earnings were found to have been $900.00. The contribution to both was fixed at $300.00 and for each this would be one-sixth, or $150.00. Compensation was computed in accordance with R. S., Chap. 55, Sec. 14, and amounted to $2.02 per week for each for a period of three hundred weeks.

Counsel rightly assumes that the evidence showed the son earned $390.00 in cash while away from home. This would leave an allowance for work done on the farm for the seven months' period of approximately $500.00. During that time, the son had invested time, labor and money with a view to raising chickens. He had paid out $140.00 for young chicks and had purchased some equipment, all from his current earnings. Money returns therefrom had but recently commenced. This was an investment which might ultimately inure to the benefit of the whole family, but it can not be reckoned as a part of the actual support furnished the parents during the year.

Counsel for the petitioners, however, stressed the findings in *Dumond's Case*, 125 Me., 313, 133 A., 736, where the Court, in reviewing the facts there shown, adopted a computation of $22.00 per week for farm labor. It is trite to say that each case must be decided upon its own facts, yet emphasis seems at times to be required. The cases are not parallel. In the Dumond case, the property purchased at the suggestion of the son was a potato farm in Aroostook County, intended as a business venture, which cost $18,000.00, and where work was done on a commercial scale. Labor on such a farm and labor on a small place which produces nothing for the market, are not comparable. The commissioner's findings were well considered and fair to all parties in interest.

The Court is of opinion that the petitioners are not entitled to allowance for expenses incurred in these proceedings on appeal.

The mandate will be

Appeals dismissed.
Decree affirmed.

CITY OF ROCKLAND *vs.* INHABITANTS OF TOWN OF LINCOLNVILLE.

Knox. Opinion, April 27, 1938.

PAUPERS AND PAUPER SETTLEMENT. P. L. 1935, CHAP. 186.

The obligation of towns, regarding the relief of the poor, originates in statutory enactment, and not from contract, express or implied.

Under Chap. 186 *of the P. L. of* 1935, *legitimate children have the settlement of their father, if he has any in the state.*

The legislature can alter as well as enact statutes, as respects paupers and the liability of towns to provide for them.

The rights of parties are not to be governed by statutes which are repealed.

On agreed statement of facts. An action to recover pauper supplies by the city of Rockland against the town of Lincolnville for supplies furnished minor paupers whose deceased father, at the time of his death, had a right of support in the defendant town. The court held that when the instant cause of action accrued, the three children had, under their natural father, derivatively, their settlement in Lincolnville. In accordance with the report, the case is remanded to the Superior Court for determination of the amount due from the defendant town to the plaintiff city. It is so ordered. Case fully appears in the opinion.

Charles T. Smalley, for plaintiff.

Montgomery & Gillmor, for defendant.

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

DUNN, C. J. Three children, all legitimate, and infants under the age of twenty-one years, whose own father was dead, and who were living with their mother and stepfather in the home of the latter, in the city of Rockland, were, on January 31, 1936, so com-

pletely destitute of property as to require assistance by the public.

Their distress was relieved by the city.

In this action to recover for supplies, controversy here narrows, on facts agreed, to whether or not the minor paupers are chargeable to the town of Lincolnville.

Their father, on his removal from that town, in October, 1925, had, from it, in case of need, a right of support, which he apparently never invoked. He died January 18, 1929.

At the time of his death, he and his family lived in Rockland. The three children were then of his household.

The obligation of towns, regarding the relief of the poor, originates in statutory enactment, and not from contract, express or implied. *Augusta* v. *Waterville*, 106 Me., 394, 76 A., 707; *Auburn* v. *Farmington*, 133 Me., 213, 175 A., 475.

By the original poor laws, passed in 1821, (Chap. CXXII), when Maine commenced to legislate, and on to 1933, generally, the pauper settlement of a legitimate minor child was that of its father. The settlement remained even after the father's death. *Fairfield* v. *Canaan*, 7 Me., 90; *Presque Isle* v. *Caribou*, 122 Me., 269, 119 A., 584.

In 1933, P. L., Chap. 203, Sec. 2, the text of the statute was amended. The amendment, in relevancy to present issue, made the controlling section, (R. S., Chap. 33, Section 1, subd. II,) to read as follows:

> "II. Settlement of children. 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. 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. Children or stepchildren shall not have the settlement of their father or stepfather, acquired after they become of age and have capacity to acquire one. . . ."

Two years later, the section, as amended, was further amended. P. L. 1935, Chap. 186. This, becoming effective July 6, 1935, left the section, (R. S., *supra*,) reading, as it still reads:

"II. 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 the capacity to acquire one. . . ."

Edward Drinkwater's widow married again. Her second husband had no settlement in Maine. On her remarriage, in 1929, the children whose settlement is now in question became the stepchildren of the new husband. *Guilford* v. *Monson*, 134 Me., 261, 185 A., 517.

The statute, as amended in 1933, may not, however, be considered to apply in this case.

If the amendment effected a change in the settlement of the children, such change had come to an end. P. L. 1935, *supra.* Operating prospectively only, the 1935 law affected no vested right. *Appleton* v. *Belfast*, 67 Me., 579, 581.

The legislature can alter as well as enact statutes, as respects paupers and the liability of towns to provide for them. *Appleton* v. *Belfast*, supra; *Rangeley* v. *Bowdoin*, 77 Me., 592, 1A., 892.

The pauper supplies in suit were not furnished while the amendment as to stepchildren was in force, but more than six months after. The rights of parties are not to be governed by statutes which are repealed. *Ellis* v. *Whittier*, 37 Me., 548.

When the instant cause of action accrued, the three children had, under their natural father, derivatively, their settlement in Lincolnville.

In accordance with the report, the case is remanded to the Superior Court for determination of the amount due from the defendant town to the plaintiff city.

It is so ordered.

STATE OF MAINE *vs.* FERNE BECKWITH,

WHOSE FULL, TRUE AND CORRECT NAME IS TO YOUR GRAND JURORS UNKNOWN.

Penobscot. Opinion, April 27, 1938.

ARSON. CRIMINAL PLEADINGS. WORDS AND PHRASES.

Solicitation of a felony is an indictable offense at common law regardless of whether the solicitation is of effect or the crime advocated in fact committed.

In criminal prosecutions, the description of the offense in the complaint or indictment must be certain, positive and complete, and in charging an attempt to commit a crime, which is akin to soliciting the same to be done, it is necessary to allege and set out with reasonable certainty the particular offense attempted.

The word "house" in a legal sense is not limited to a structure designed for human habitation but may mean any building, edifice or structure inclosed with walls and covered, regardless of the fact of human habitancy.

Neither the term "house" nor "a certain building, to wit, a house," without more than an allegation of undefined occupancy, describes a dwelling-house or a building occupied in part for dwelling or lodging-house purposes, the burning of which is statutory arson under Sec. 1, *Chap.* 130, *R. S., as amended.*

Counts in an indictment alleging that defendant solicited another person to burn a "house" or "a certain building, to wit, a house," occupied by defendant, the house would be presumed, by the weight of authority to belong to the defendant. Under these circumstances the counts in the indictment are defective as they do not allege that the respondent solicited the burning of the house or building of another.

It is a crime to set fire to one's own dwelling-house or building occupied in part for dwelling or lodging-house purposes, according to provisions of R. S., Chap. 130, *Sec.* 1, *as amended.*

On report and stipulation. In this case respondent is indicted for soliciting a person to burn a certain house occupied by respondent and owned by another person. The Court finds the first, second, fourth and fifth counts of the indictment as improperly pleaded,

but the third count is proper pleading. In accordance with the stipulation of the certificate by which the case is sent forward on report, it must stand for trial in the Superior Court on the third count in the indictment. The other counts should be stricken out. Case remanded for trial on the third count of the indictment. Case fully appears in the opinion.

John Quinn, County Attorney for the State.

Locke, Campbell & Reid, for respondent.

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

STURGIS, J. At a term of the Superior Court holden at Bangor in the County of Penobscot on the first Tuesday of January, A. D. 1937, the Grand Jury returned an indictment charging the respondent, Ferne Beckwith, with soliciting Margaret Barrett to burn a certain house of one Flora Rowe, the same being situated in Newport, Maine, on State Highway numbered Seven, known as or by the name of "Fernwood Inn" and then and there occupied by the respondent. In four counts of the indictment, the character of the respondent's occupancy of "Fernwood Inn" is alleged generally only, neither its nature nor extent being set forth. In the third count, it is alleged that the respondent occupied the building as a dwelling-house. In no count does it appear by what right or title she had her occupancy.

At the September Term, 1937, the respondent filed a motion to quash the indictment on the ground "that the facts alleged therein are, in each count and in all counts, insufficient to constitute an indictable offense," and upon hearing an attempt was made to report the case to the Law Court for decision. Returned to the Trial Court for insufficiency of the certificate, it now comes forward with the consent of the parties to the report and the stipulation that "if the indictment fails to allege the commission of an offense, a *nolle prosequi* shall be entered; otherwise case to stand for trial below."

As the case develops, the learned and extended argument of counsel for the respondent that the indictment does not sufficiently allege an attempt to commit arson or statutory burning need not

be considered. As the State's attorney admits, the offense charged is solicitation of a felony, an indictable offense at common law regardless of whether the solicitation is of effect or the crime advocated in fact committed. *State* v. *Ames*, 64 Me., 386; *Rex* v. *Higgins*, 2 East, 5; *Commonwealth* v. *Randolph*, 146, Penna. St., 83, 23 A., 388; *State* v. *Avery*, 7 Conn., 266; *State* v. *Donovan*, 28 Del., 40, 90 A., 220; *Commonwealth* v. *Flagg*, 135 Mass., 545; *State* v. *Sullivan*, 110 Mo. App., 75, 87, 84 S. W., 105; *People* v. *Bush*, 4 Hill. (N. Y.), 135; *State* v. *Boyd*, 86 N. J. L., 75, 79, 91 A., 586; *State* v. *Bowers*, 35 S. C., 262, 266, 14 S. E., 488; *Rudolph* v. *State*, 128 Wis., 222, 228, 107 N. W., 466; *State* v. *Keyes*, 8 Vt., 57; 2 Bishop's New Crim. Law, Sec. 20; 16 Corpus Juris 117; 1 Bishop's New Crim. Law, 768.

Statutory arson and kindred crimes are made felonies by Chapter 130 of the Revised Statutes as amended by Chapter 71, P. L. 1935. *Section* 1 as amended defines statutory arson as follows:

> "Whoever wilfully and maliciously sets fire to or causes fire to be set to the dwelling-house or any building, occupied in part for dwelling or lodging-house purposes and belonging wholly or in part to himself, his wife or to another, . . . shall be punished by imprisonment for not less than 1 year, nor more than 20 years."

Section 2 as amended prohibits the wilful and malicious setting fire to enumerated public buildings or to any store, shop, office, barn or stable of the wife of the accused, or of another, within the curtilage of a dwelling-house so that such dwelling-house is thereby endangered, and if the building is burned in the night-time the punishment is imprisonment for any term of years, but if the offense is committed in the day-time, or without the curtilage of and without endangering a dwelling-house, imprisonment shall be for not less than one year nor more than ten years.

Section 3 as amended reads:

> "Whoever wilfully and maliciously burns any building of his wife or of another, not mentioned in the preceding section, . . . shall be punished by imprisonment for not less than 1 year, nor more than 10 years."

It is the constitutional right of all persons accused of crime to know without going beyond the record the nature and cause of the accusation and to insist that the facts alleged to constitute a crime shall be stated in the complaint or indictment with that reasonable degree of fullness, certainty and precision requisite to enable them to meet the exact charge against them and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense. In criminal prosecutions, the description of the offense in the complaint or indictment must be certain, positive and complete. *State* v. *Strout*, 132 Me., 134, 167 A., 859; *State* v. *Crouse*, 117 Me., 363, 104 A., 525; *State* v. *Mace*, 76 Me., 64; *State* v. *Learned*, 47 Me., 426; *State* v. *Moran*, 40 Me., 129; Const. of Maine, Art. 1, Sec. 6. It is accordingly held that in charging an attempt to commit a crime, which is akin to soliciting the same to be done, and by some authorities deemed inclusive of it, it is necessary to allege and set out with reasonable certainty the particular offense attempted. *State* v. *Doran*, 99 Me., 329, 59 A., 440. Neither reason nor authority can be found for relaxing the strictness of this requirement when the indictment is for solicitation. A person accused of that offense is entitled to know the specific felony which it is alleged he solicited.

In the first, second, fourth and fifth counts of the indictment in this case, the respondent is charged with soliciting a named person to burn the "house" or "a certain building, to wit, a house" of one Flora Rowe, in each count described as occupied by the respondent and known as "Fernwood Inn." The uncertainty and incompleteness of these charges are apparent. The word "house" in a legal sense is not limited to a structure designed for human habitation but may mean any building, edifice or structure inclosed with walls and covered, regardless of the fact of human habitancy. It may be a private or a public house. 4 Words & Phrases (1st Ser.) 3351; 30 Corpus Juris 472; 4 Am. Jur. Arson, Par. 15. Neither the term "house" nor "a certain building, to wit, a house," without more than a allegation of undefined occupancy, describes a dwelling-house or a building occupied in part for dwelling or lodging-house purposes, the burning of which under the circumstances there enumerated is statutory arson. Sec. 1, Chap. 130, R. S., as amended. In a statute of similar import, the word "house" was so

construed in *Commonwealth* v. *Smith*, 151 Mass., 491, 24 N. E., 677. If it was intended to indict the respondent for soliciting the setting fire to a building within the purview of *Section* 2 of the statute as amended, or of "any building of another" mentioned in the succeeding section, the respondent may well be in doubt as to which of these offenses she is charged with having solicited. They are separate and distinct felonies and the severity of the punishment prescribed differs greatly. The description of the house, to wit, the building to be burned upon the respondent's solicitation should have been sufficiently definite to fix the identity of the substantive offense charged within the rule of *State* v. *Crouse*, supra; *Commonwealth* v. *Hayden*, 150 Mass., 332, 23 N. E., 51; *Commonwealth* v. *Smith*, supra. Furthermore, both *Sections* 2 and 3 of the chapter as amended, in so far as they relate to the setting fire to or burning of buildings, prohibit and provide punishment only for the setting fire to or burning of the building of another. The four counts under consideration each and all allege that the "house" or "building, to wit, a house," the burning of which was solicited, was occupied by the respondent, by what right not appearing, but legally it must be assumed. By the weight of authority, under the law of arson the house belonged to the respondent, who occupied it, and the exact tenure or precise interest which she had is deemed immaterial. *State* v. *Keena*, 63 Conn., 329, 28 A., 522; *State* v. *Fish*, 27 N. J. L., 323; *Woodford* v. *People*, 62 N. Y., 117; *State* v. *Perry*, 74 S. C., 551, 54 S. E., 764; *State* v. *Hannett*, 54 Vt., 83; 5 Corpus Juris 553, n. 3; 6 C. J. S., 731. Under that doctrine, these counts do not allege that the respondent solicited the burning of the house or building of another. For the several reasons stated, these counts are defective.

The charge laid in the third count of the indictment is that "the said Ferne Beckwith, whose full, true and correct name is to your grand jurors unknown, of said Boston, in said Commonwealth of Massachusetts, on the said fourth day of August A.D. 1934, at said Newport, in said County of Penobscot, intending to procure and cause to wilfully and maliciously set fire to and to burn a certain house of one Flora Rowe, there situate in said Newport on State Highway numbered Seven, and then and there occupied by said Ferne Beckwith as a dwelling-house, and known as the "Fern-

wood Inn," did then and there feloniously, unlawfully, wilfully, maliciously, corruptly and wickedly did entice, solicit, and endeavor to persuade one Margaret Barrett, for the sum of one hundred dollars to be paid to her, the said Margaret Barrett by the said Ferne Beckwith, a certain house of one Flora Rowe, as aforesaid, there situate, feloniously, wilfully and maliciously to set fire to and the said house then and there, by such firing as aforesaid, feloniously, wilfully and maliciously to burn," with conclusion in the usual and prescribed form of criminal pleading. We are of opinion that the respondent is here charged with solicitation of an offense defined and prohibited by *Section* 1 of Chapter 130, R. S., as amended.

It was not arson at common law for a person to burn his own dwelling-house nor to procure it to be done by another, and the rule was the same under the earlier statutes which prohibited only the burning of the dwelling-house of another. *State* v. *Haynes*, 66 Me., 307; *Commonwealth* v. *Makely*, 131 Mass., 421; 5 Corpus Juris 557. See R. S. 1903, Chap. 120, Sec. 1 and prior revisions. The legislature, however, in Chap. 79, P. L. 1915 broadened the scope of the arson law and made it a crime to set fire to one's own dwelling-house or building occupied in part for dwelling or lodging-house purposes, and the pertinent provisions of that act appear in all subsequent and the current revision of the statutes. It is well to repeat that the law is:

> "Whoever wilfully and maliciously sets fire to or causes fire to be set to the dwelling-house or any building, occupied in part for dwelling or lodging-house purposes and belonging wholly or in part to himself, his wife, or to another . . . shall be punished by imprisonment," etc. R. S., Chap. 130, Sec. 1.

Despite the argument of counsel for the respondent, we see no ambiguity in this provision nor basis whatsoever for construing the statute as prohibiting only the setting fire to the dwelling-house or any building occupied in part for dwelling or lodging-house purposes of another. The express language of the statute is to the contrary. *State* v. *Meservie*, 121 Me., 564, 118 A., 482, is not in conflict with this view. The part of the statute there quoted was not accurately set forth. The opinion is not directed to the question of

whether the building burned belonged to the accused or another, but to whether a barn set on fire adjoined such a building. The case can not be interpreted as limiting statutory arson to the setting fire to and burning of the dwelling-house of another.

Nor can the respondent successfully attack the third count of the indictment for lack of legal adjectives defining her *mens rea*, or state of mind, both as to the solicitation and the substantive offense. It is alleged that she did feloniously, unlawfully, wilfully, maliciously, corruptly and wickedly solicit the person named, feloniously, wilfully and maliciously to set fire and to burn the house which she occupied as a dwelling. There is no lack of adjectivism in this pleading.

On the view of the law that the house occupied by the respondent as a dwelling-house belonged to her under the law of arson, in accordance with the authorities already cited in the consideration of the other counts in the indictment, if she solicited the burning of that building she was guilty of soliciting a felony defined by the statute. If the law were otherwise and it could be held that the house belonged to the owner of the fee, the respondent's offense would be none the less. Both cases are covered by the law.

In accordance with the stipulation of the certificate by which the case is sent forward on report, it must stand for trial in the Superior Court on the third count in the indictment. The other counts should be stricken out.

Case remanded for trial on the third count of the indictment.

INHABITANTS OF THE TOWN OF TURNER

vs.

CITY OF LEWISTON.

Androscoggin. Opinion, April 27, 1938.

PAUPERS AND PAUPER SETTLEMENT. STATUTES. P. L. 1935, CHAP. 91.

Under Chap. 91 of the P. L. of 1935, it is necessary for the town where pauper resides to give the town of his settlement notice when town of residence is providing school conveyance for children of pauper in order to establish right of compensation for school conveyance.

Pauper notices are given for the following reasons:

1. *To permit the Overseers of the town of settlement to take such measures as they deem expedient.*
2. *To lay foundation for future action.*
3. *To give information that the relief and expense will fall on the town notified.*
4. *To prevent accumulation of expense and permit removal of the pauper.*
5. *To fix the time when the cause of action accrues and the statute of limitations commences to run.*

The pauper notice statute is mandatory.

All statutes on one subject are to be viewed as one, and such a construction should be made as will as nearly as possible make all the statutes dealing with the one subject consistent and harmonious.

If pauper supplies are furnished and paid for after notice is given, then there can be no recovery for later supplies without the giving of a new notice.

On exceptions. This case is on exceptions to acceptance of report of Referee. The action is based on Chap. 91 of the P. L. of 1935 to obtain reimbursement for "extra expense" on account of school conveyance of children of a pauper. Exceptions sustained. Case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

Armand A. Dufresne, for defendant.

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

HUDSON, J. On defendant's exceptions to acceptance of report of Referee. The action ("on the case"), based on Chapter 91, P. L. 1935, is to obtain reimbursement for "extra expense" on account of school conveyance of children of John J. O'Connor, a World War veteran.

It is conceded that O'Connor, during the time involved, had his pauper settlement in the City of Lewiston, but actually resided in the Town of Turner. Since 1930 he and his family had been receiving pauper supplies from the town, for all of which the city had reimbursed it until April 16, 1936. On that date an agreement was made, whereby in the future the city "would pay the bills of the O'Connor family direct to the merchants furnishing groceries, clothing, provisions, etc., with the exception, if it was necessary to furnish immediate medical service the Town of Turner would pay the Doctor, and the City of Lewiston would reimburse the Town of Turner." When this agreement was made, Turner was conveying O'Connor's children without compensation and continued so to do until the reimbursement statute was enacted in 1935.

It also appears that in 1932, before the agreement was entered into, the town had sued the city for pauper supplies furnished the O'Connor family but not for conveyance. This action was settled.

Chapter 91 aforesaid, entitled "An Act Relating to Pauper Expense" and headed "Pauper expenses of town, regulated," reads:

> "Any city, town or plantation that has paupers, who reside in another city, town or plantation, who have children attending the public schools shall locate such paupers so that the city, town or plantation where they reside shall not be put to extra expense, for conveyance of children to primary or secondary schools; provided, however, that if the said city, town, or plantation does not so locate said paupers, the said city, town, or plantation shall reimburse the city, town, or plantation wherein the said paupers reside for the extra expense so caused."

The city did not "locate" the paupers as was its duty under the statute, and consequently the town was put to "extra expense." It

is admitted that the conveyance was necessary and that the charges made therefor were reasonable.

The city bases its exceptions on several grounds, only one of which, however, needs consideration.

It is not denied that the pauper notice, mentioned in Section 31 of Chapter 33, R. S. 1930, was not given. The town contends that it was not necessary. Was it? Did the legislature intend Chapter 91 should become part and parcel of the general statutory pauper law, requiring notice? The body of the statute shows plainly that it relates only to expense incurred for paupers; likewise its title and heading. True, it makes no mention of notice as a prerequisite to recovery. On its face it neither requires nor excuses it. But is it reasonable to believe that the framers of this Act, providing for reimbursement for conveyance as a pauper supply, intended to dispense with notice, a prerequisite to recovery for ordinary pauper supplies? We think not.

This Court has held that pauper notices are given for different reasons, as (1) to permit the Overseers of the town of settlement to take such measures as they deem expedient (*Inh. of Garland* v. *Inh. of Brewer*, 3 Me., 197, 199); (2) to lay foundation for future action (*Inh. of Holden* v. *Inh. of Glenburn*, 63 Me., 579, 580; *Town of Durham* v. *Town of Lisbon*, 126 Me., 429, 431, 139 A., 232; (3) to give information that the relief and expense will fall on the town notified (*Inh. of Kennebunkport* v. *Inh. of Buxton*, 26 Me., 61, 66; *Inh. of Cooper* v. *Inh. of Alexander*, 33 Me., 453, 454); and (4) to prevent accumulation of expense and permit removal of the pauper (*Inh. of Fayette* v. *Inh. of Livermore*, 62 Me., 229, 233).

It would seem that the town of settlement should be notified of an expense incurred or to be incurred for school conveyance (it having been constituted a recoverable pauper expenditure) as well as for any other pauper supply. With knowledge thus received, the town of settlement may take such measures as its Overseers deem best for its interests. It may adopt a program for the future. Expenses may be lessened. Removal of the pauper may be effected.

The giving of a pauper notice is important for another reason. By reference it fixes the time when the cause of action accrues and the statute of limitations commences to run. *Inh. of Veazie* v. *Inh.*

of Howland, 53 Me., 39, 44; also see *City of Bangor* v. *Inh. of Orneville,* 90 Me., 217, 222, 38 A., 153.

Chapter 91 contains no provision as to the statute of limitations. This tends to show that it was intended that the action for reimbursement for school conveyance should accrue as in other actions for pauper supplies and be governed by the same statute of limitations.

Also, the fact that Chapter 91 compels the location of the paupers in the town of actual residence by the town of settlement indicates an intention that the notice be given, else, in certain instances, the town of settlement might not have knowledge of its paupers' presence in the town of residence.

The pauper notice statute is mandatory. It says: "Overseers shall send a written notice . . . ." See Sec. 31, Chap. 33, R. S. 1930, Had such a radical change from usual practice been intended as to dispense with the giving of the notice, the legislature likely would have expressly excused it.

The subject of Chapter 91, P. L. 1935 and of Chapter 33, R. S. 1930, is the same, for both statutes relate to paupers, pauper settlements and expenses. All statutes on one subject are to be viewed as one and such a construction should be made as will as nearly as possible make all the statutes dealing with the one subject consistent and harmonious. *Smith* v. *Chase,* 71 Me., 164, 165; *Inh. of Guilford* v. *Inh. of Monson,* 134 Me., 261, 265, 185 A., 517.

Inh. of Rockport v. *Inh. of Searsmont,* 101 Me., 257, 63 A., 820, 822, seems to be of controlling effect. There, suit was brought to recover expenses incurred against the town of settlement for commitment of an insane person to the State Hospital at Augusta and for support therein. Recovery for such commitment and support was provided for in a statute (Sec. 24, Chap. 144, R. S. 1903) other than the general pauper statute and in it no mention of a pauper notice was made. The Court said:

> "While Chapter 144 is silent as to the requirements of any pauper notices, either in the original or the recommitment proceedings, yet we think the entire scheme of the chapter is based upon the theory that the expenses and support incurred under it are in the nature of pauper supplies. . . . We are therefore inclined to the opinion that the proceedings under R. S.

Chapter 144, with respect to expenses and support of a person committed to the asylum by the town committing and not the pauper residence of such person, comes within the purview of R. S., Chapter 27, with reference to the notice required by one town to another in case of furnishing pauper supplies."

To the same effect, see the same case when before the Law Court a second time. *Inh. of Rockport* v. *Inh. of Searsmont*, 103 Me., 495, 70 A., 444. Also *City of Bangor* v. *Inh. of Fairfield*, 46 Me., 558; *Inh. of Cooper* v. *Inh. of Alexander*, supra.

In *Inh. of Eastport* v. *Inh. of East Machias*, 40 Me., 280, it was taken for granted that the notice was necessary.

In *Inh. of Naples* v. *Inh. of Raymond*, 72 Me., 213, the Court stated that recovery might be had "provided the requisite notice is given," citing *Bangor* v. *Fairfield*, supra, and *Jay* v. *Carthage*, 48 Me., 353.

It is to be noted that the Referee in his report found and stated that "while this item of expense was not formerly a pauper charge, Chapter 91, of the Public Laws of 1935 brought it within the provisions of the pauper statutes," and then recommended judgment for the plaintiff in spite of the fact that no pauper notice was given. He held it was not necessary on account of the settlement of the 1932 suit above mentioned and the subsequent agreement.

But the agreement can not be construed as having anything whatever to do with school conveyance. It gave no authority to the Town of Turner to make any expenditure and obtain reimbursement therefor except as to immediate medical services. As a matter of fact, this agreement was entered into some three years before school conveyance was constituted a pauper supply.

As to the settlement of the 1932 suit, if a pauper notice were then actually given (and there is nothing in this record to show it), it does not aid the plaintiff, for the settlement of the suit rid that notice of all future effect. It is well settled that if pauper supplies are furnished and paid for after notice is given, then there can be no recovery for later supplies without the giving of a new notice. *Bangor* v. *Fairfield*, supra; *Eastport* v. *East Machias*, 40 Me., 280, 282; *Greene* v. *Taunton*, 1 Me., 228; *Gross* v. *Inh. of Jay*, 37 Me., 9, 11.

Exceptions sustained.

STATE OF MAINE *vs.* CHARLES A. QUIGLEY.

Kennebec. Opinion, April 29, 1938.

CRIMINAL LAW. INTENT. INSANITY. CRIMINAL PLEADING.

A loaded gun is a dangerous weapon, when used within striking distance from the victim.

When intent forms the gist of the offense it must be specifically proved.

Intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion or mental status, is manifested by external circumstances capable of proof.

The general presumption is that every man is normal and is possessed of ordinary faculties; such defenses as intoxication, insanity and aphasia are affirmative defenses, and the burden is on the defendant to establish them.

A simple plea of not guilty puts in issue the allegations in the indictment and as to them the prosecution has the affirmative.

A respondent pleading mental incapacity because of intoxication from voluntary use of drugs assumes the affirmative because of changing the issue and it is immaterial whether his plea is written or verbal.

Mental incapacity may be resorted to, as matter of defense, in connection with a plea of not guilty, but it is not and can not be a part of it.

The plea of mental incapacity to form and harbor an intent to kill and slay is, and of necessity must be, a plea of confession and avoidance, and does not meet any question propounded by the indictment, but raises one outside of it.

The question of mental incapacity to form and harbor an intent to kill and slay can never be raised, unless by the prisoner; and only in an affirmative allegation, such as carries with it the burden of proof.

Where intent to do a criminal act must be proven, the jury, if not satisfied of the presence of the specific intent, may find the respondent guilty of a lesser crime rather than not guilty.

The question of whether the presiding Justice gave a requested instruction, in the same or different language, is for the Law Court to determine.

When insanity of the accused is pleaded in defense, ability to distinguish between right and wrong is the test; when mental incapacity to entertain and act upon an intent to kill and slay is pleaded the mental state of the accused at the time he committed the act under investigation is the issue.

On exceptions by defendant. The defendant was indicted and tried in Kennebec County for assault upon his wife with intent to kill, then armed with a dangerous weapon. The only issue raised in defense was defendant's mental capacity to form and harbor the intent to kill, it being argued that by voluntary intoxication he had rendered himself unable to conceive and carry out the intent charged. Relying on this defense, at the proper time, respondent moved for a directed verdict in his favor; and to denial reserved an exception. At the close of the charge to the jury counsel requested an additional instruction. This the Justice declined to give, and exception followed. The exceptions and the case are found in the opinion of the Court. Exceptions overruled. Judgment for the State. Case fully appears in the opinion.

Francis A. Bate, County Attorney for the State.

Henry C. Sullivan,

Atwood C. Nelson, for respondent.

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

BARNES, J. This case comes up on exceptions.

The respondent, then forty-five years of age, living with his wife in the City of Augusta, was tried and convicted of assault upon his wife with intent to kill and slay, he then being armed with a dangerous weapon, a shotgun.

It is not denied that in the early evening of August 18, 1937, respondent shot his wife, as she ran from their bedroom, several shot from the gun penetrating her lower back and one leg. One earlier shot, discharged while both had hands on the gun, went through a wall-partition, and a third was fired through a window of the apartment. The apartment was in the second story of the house.

Summoned by telephone, two of the city police arrived at the home at seven-thirty or seven-thirty-five, saw Mrs. Quigley in the lower hall, bleeding from her wounds.

They telephoned for gas bombs, and after two more officers arrived, respondent called to them, "Come up, I haven't any gun," and they went upstairs to the bedroom, arrested the respondent, clothed him and conveyed him to police headquarters.

Mrs. Quigley was taken to a hospital and discharged after nine days.

At the trial the defense advanced was that through voluntary use of drugs respondent had gotten himself into such a state of mind that when he shot his wife he could not form or entertain an intent to kill and slay, as alleged in the indictment.

The assault is proved. A loaded gun is a dangerous weapon, when used within striking distance from the victim. *State* v. *Godfrey*, 17 Or., 300, 20 Pac., 625, Case Note to *Crow* v. *Texas*, 21 L. R. A. (N. S.) 497.

Where, as here, the intent forms the gist of the offense it must be specifically proved. *State* v. *Neal*, 37 Me., 468.

"In the commission of every crime there must be a union or joint operation of act and intention or criminal negligence. The intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion or mental status, is manifested by external circumstances capable of proof."

People v. *Connors et al.*, 253 Ill., 266; 97 N. E., 643.

"The general presumption is that every man is normal and is possessed of ordinary faculties; such defenses as intoxication, insanity, and aphasia (or a mind not conscious of its acts) are affirmative defenses, and the burden is on the defendant to establish them."

Commonwealth v. *Morrison*, 266 Pa., 223, 109 A., 878; *Territory* v. *Davis*, 2 Ariz., 59, 10 Pac., 359; *Clore* v. *State*, 26 Tex. App., 624, 10 S. W., 242; *Cleveland* v. *State*, 86 Ala., 1, 5 So., 426; *State* v. *Truitt Del. Gen. Sess.*, 1905, 62 A., 790; *Wilson* v. *State*, 60 N. J. L., 171, 37 A., 954; *State* v. *Letter*, 4 N. J., Misc. R., 395, 133 A., 46; *Com.* v. *Iacobino* (1935), 319 Pa., 65, 178 A., 823; *Booher* v. *State*, 156 Ind., 435, 54 L. R. A., 391, 60 N. E., 156; *People* v. *Lewis*, 36 Cal., 531; *United States* v. *King*, 34 Fed., 302.

Considering now the testimony produced before the jury, it appears that respondent, on the date of the alleged criminal act, was

afflicted with the disease known as shingles, from which he had been suffering, and for which he was treated by a doctor, for some ten days.

When his wife came home from a store, which she operated, at about seven in the evening, bringing to respondent a box of food, and called to him as she walked up the stairs, "Hello, dear," he came out of the study, entirely nude, made no answer, and she went into the bathroom. He was then in the bedroom, and as she passed in toward the dresser, respondent secured a gun from a closet and advanced toward his wife. She seized the barrel of the gun. One shot was fired, and she fled, respondent shooting her as she went through the doorway.

What then was his mental ability to form and act upon an intent to shoot his wife? The answer can only be gathered from his acts and sayings before and immediately after the shooting.

Intoxication from voluntary use of drugs is his defense.

"A simple plea of not guilty, puts in issue the allegations and only the allegations in the indictment, and as to them the prosecution has the affirmative. But if the accused would put in issue any other allegation, any question as to his capacity or responsibility, he must do it by an affirmative statement. If he puts in the plea of insanity (voluntary intoxication) he assumes the affirmative, he changes the issue. And it is immaterial whether it is in writing or merely verbal; in either case it just as effectually raises a new issue. It is true it may be resorted to in connection with the plea of not guilty, but it is not and can not be a part of it.

The plea of insanity (voluntary intoxication) is, and of necessity must be, a plea of confession and avoidance. It does not deny a single allegation in the indictment, but simply says, grant all these allegations to be true, that all these acts have been done, and still guilt does not follow, because the doer of them is not responsible therefor.

It does not meet any question propounded by the indictment, but raises one outside of it.

It is not a mere denial but a positive allegation. . . . When insanity (voluntary intoxication) is found, it does not show that the act was any less wilful, or deliberate, or intentional even; but it does show an excuse, an irresponsibility for what would otherwise have been criminal.

So here, as in other respects, the plea of insanity (voluntary intoxication) does not deny, but avoids; confesses this element as well as the others, but excuses. It would seem, then, that the question of insanity (voluntary intoxication) can never be raised, unless by the prisoner; and by him only in an affirmative allegation, such as carries with it the burden of proof."

State v. *Lawrence*, 57 Me., 574, 583; *State* v. *Kavanaugh*, 4 Pen. (Del.) 131, 53 A., 335; *State* v. *Bacon* (Del. 1920), 112 A., 682.

The four officers who first saw the respondent, at his house, a few minutes after the shooting, each heard respondent invite them upstairs and his statement that he had no gun then; observed him as he was being dressed.

One testified that "his eyes looked kind of wild and that he was nervous"; another officer, that he was not feeble, but walked unassisted to the bathroom where he took a pill.

Officer Dudley found the shotgun in the closet, with four loaded shells in the magazine, one in the barrel.

Officer Dowling dressed the respondent, and testified that, speaking of his wife, he said, "God damn her, she wouldn't get me a doctor." He, with Officer Tardiff, took the respondent to the police station, in a car, and testified that while riding, respondent said he "was going to ship McKay" (his doctor); and that he further said, "That wife of his took all those pills away from him."

Pressed for the exact expression the officer answered, "God damn her, she took those pills away too."

Deputy Chief Dickson, one of the four officers who first saw the respondent, after the shooting, testified that he returned to the police station, and that as he went into the room where Mr. Quigley was, the latter asked, "How's Jessie?" He said, "She is in the hospital," and that Quigley then said, "Oh, my God!"

Two officers returned at once to the Quigley apartment, and found it locked. It was opened for them, and searching they found an empty shotgun shell in a waste basket in the bathroom, and two empty shells in a waste basket in the living room, in each basket the shells were at the bottom and the baskets were about half filled with crumpled paper thrown therein.

The shells were 20-gauge, to fit the gun used, and when recovered by the officers "smelled of powder."

Dr. Curtis W. Dyer, a witness called by the defense, appears from the record to be the first person to see the prisoner at the station.

He came at the request of an officer at some time after eight o'clock. A fair statement of what the jury heard Dr. Dyer testify is that he found the prisoner groaning, observed the effect of shingles; the pupils of his eyes half dilated, eyes staring and bulging, no redness or inflammation, indicating, with other symptoms, that he was not under the influence of an opium derivative, meaning morphine, codein, or any of the opium salts. His speech was slow, coherent, but he was inclined to ramble in his conversation and go into other subjects than those inquired of: answers were "slow but well answered. I concluded that he was obviously under the influence of some sedative, probably barbital, not a pain-relieving drug; a soothing drug."

The doctor remained with the prisoner for about three quarters of an hour: asked him questions relative to his family life, leading to the shooting, and was told he "had repeatedly asked for medical attention that had been refused him, and had done so on this particular day."

The doctor considered him bewildered, but that he was then "capable of judging right from wrong." Asked by the court as to prisoner's comprehension of the nature and quality of his act, the doctor testified that when he was questioning him "there was no mental condition except that which would allow him to know right from wrong. . . . He was then a man with fair judgment . . . would (then) have understood the nature of the act and the quality of it."

Dr. R. L. McKay, also called by the defense, had been respondent's physician. He saw respondent and prescribed for him on August eight and ten before the assault, diagnosed the illness as shingles, and on the tenth of August prescribed and furnished twelve tablets, salcodeia, a quarter grain of codein, a derivative of morphine, but refused to give him a prescription for morphine, fearing he would take it too often. On that date his mind appeared to be fairly normal.

Two days later the doctor prescribed a like amount of the same tablets.

Testifying as to the appearance of respondent's eyes, Dr. McKay said, "Mr. Quigley's eyes have always been quite prominent. As I saw him on the tenth of August, I did not notice anything especially about the eyes."

Called by respondent, over the telephone on the afternoon of August fourteenth, the doctor said respondent asked for medicine to relieve pain, but none was prescribed.

He testified that barbital and salcodeia would depress the mental processes and slow up the functions of the body, would tend to produce incoherence in speech, drowsiness but not excitement, and restful sleep.

A local druggist testified that respondent had bought barbital.

Dr. Sherman testified that on the evening before the assault respondent approached him on the street asking for morphine, but was refused; and a friend who drove him home at about eleven P. M. of the seventeenth testified that he seemed to be under the influence of something, seemed quite feeble, groaning and complaining about pain.

Dr. Priest, called by respondent, on the fifteenth of August, examined him in his bedroom, found him suffering from a "rash," but apparently under the influence of a sedative or drug, a hypodermic needle lying on the table.

Respondent asked that the doctor get him some morphine, but was refused. He complained of loss of sleep, was not highly nervous.

Mr. Quigley stated his educational experience, attendance in school, college and graduation from a theological seminary; that he was for some years active in the ministry, still holding credentials authorizing him to preach; that he was forty-five years of age at time of trial; had been married four times, though one marriage was annulled.

On the morning after the assault, respondent was committed to the State Hospital, for determination of his sanity, and on the next Monday Dr. Tyson, the Superintendent of the hospital, examined him.

As Dr. Tyson testified, that examination showed respondent "to be a man of extraordinary intellectual ability." He then presented no conduct of disorder, was well oriented, possessed of an excellent memory, no emotional variations; seemed to have good understand-

ing of his situation. Dr. Tyson would not expect barbital to cause insanity. Respondent was discharged from the hospital on September fifteenth, following.

This statement of the testimony in the lower court is perhaps unduly extended, but the defense having relied on lack of mental capacity to harbor the intent which is the gist of the accusation, evidence of the mental state of the respondent was the only guide for the jury.

At the close of the evidence counsel for respondent moved for a directed verdict of not guilty.

This motion was overruled by the court and exception taken.

The ruling was right.

In this century the authorities agree that when in a criminal trial, where intent to do the criminal act charged must be proven, and insanity is not pleaded, but voluntary intoxication whether from alcohol or drugs, the jury, if not satisfied of the presence of the specific intent, may find the respondent guilty of a lesser crime rather than "not guilty."

To release this respondent would be to hold that there was not evidence sufficient to justify the jury in finding that, at the time of the shooting, respondent's mental capacity was insufficient to form an intent to kill his wife, and to maintain that intent until, acting upon it, he pointed the gun at her retreating form and discharged it.

This question is one of fact, and exclusively for the jury. Compare *State* v. *Lawrence*, 57 Me., 574; *State* v. *Gilman*, 69 Me., 163; *State* v. *Cady*, 82 Me., 426, 19 A., 908; *State* v. *Hersom*, 90 Me., 273, 38 A., 160; *State* v. *Knight*, 95 Me., 467, 50 A., 276. Careful study of the record convinces us that the verdict should not be disturbed. The first exception is overruled.

At the close of the charge to the jury, counsel for respondent requested an instruction in the following words:

"If he got himself into a condition through voluntary use of drugs so he did not know the difference between right and wrong, he would not have the specific intent required in the indictment."

It is stated in the bill of exceptions that no part of the charge of the presiding Justice gave the requested instruction in the same or different language.

That question is for this Court to determine, and the assertion in the bill of exceptions is to be tested here by comparison with the charge, which should have been printed in the bill. *Feltis* v. *Lincoln County Power Co.*, 120 Me., 101, 112 A., 906.

But, rather than to overrule the exception on this ground alone, it may be noted that on the issue as to whether respondent had so drugged himself as not to be capable of forming and acting on the specific intent essential in the perpetration of the crime charged, the wording of the requested instruction is not appropriate. As this Court said in 1901: "It is still held by an overwhelming weight of judicial authority that (it is) when the insanity of the accused is pleaded in defense" ability to distinguish between right and wrong is the test. *State* v. *Knight*, supra. . . .

In the case at bar, insanity is not the plea.

When it is attempted to prove the presence of insanity, madness, in early cases termed phrenzy, a test uniformly applied is to determine whether or not the one charged with doing a criminal act possessed, at the time of the act capacity to know the difference between right and wrong.

The instruction, as worded, throws no light on the problem presented to the jury by the defense, that the mental capacity of the respondent was not sufficient to form an intent to kill his wife.

On a similar indictment the following charge was held proper. "If it appears from the evidence that the prisoner was intoxicated at the time, and if you find that his state of intoxication was such that he had so far lost his intelligence, and his reason and faculties, that you have a reasonable doubt whether he was able to form and have a purpose to kill, or to know what he was doing, then you should find him not guilty of intent to kill." *State* v. *Fiske*, 63 Conn., 388, 28 A., 572; *State* v. *DiGuglielmo Del. Gen. Sessions* (1903), 55 A., 350; *State* v. *Diaz*, 76 Utah, 463, 290 Pac., 727.

The requested instruction was properly refused.

Exceptions overruled.
Judgment for the State.

PERCY Y. FOGG *vs.* TWIN TOWN CHEVROLET, INC.

Oxford. Opinion, April 29, 1938.

MORTGAGES. EQUITY. R. S. CHAP. 104, SECS. 15, 16.

A decree dismissing a bill brought under one section of the statutes does not determine the right to bring one under the other, but it does not, however, follow that a bill brought under one section may not be amended to come under the terms of the other.

The remedies to enforce a right of redemption are prescribed by R. S. 1930, *Chap.* 104, *Secs.* 15 *and* 16; *and a bill in equity to redeem from a mortgage will not be entertained unless these statutory provisions have been complied with.*

The distinction between rights and remedies is of real importance in determining whether a proposed amendment presents a new cause of action, the introduction of which the court is reluctant to permit after a hearing.

An amendment will ordinarily be allowed, if its aim is merely to seek an added remedy for an established right.

Equity has always been liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result.

Where the debtor has shown a readiness and a reasonable effort on his part to perform the legal duty required of him, and the failure to accomplish it is due to no fault of his own, but to the act of the other party putting it beyond his power, a forfeiture will not be permitted by the court.

A person purchasing an overdue note and mortgage, which is in fact already in process of foreclosure, receives no greater right than his assignor and is subject to any claim with respect thereto which could have been validly asserted against the assignor.

On report. A bill in equity to redeem certain real estate from a mortgage. Bill as originally drafted was brought under provisions of R. S. 1930, Chap. 104, Sec. 15, and the Law Court, at a previous hearing, ordered the bill to be left pending on the docket of the Supreme Judicial Court in the County of Oxford. Plaintiff filed motion to amend original bill. On report and stipulations. Case re-

manded for a decree in accordance with the opinion. So ordered. Case fully appears in the opinion.

Seth May, for plaintiff.

Clifford & Clifford, for defendant.

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

THAXTER, J. This bill in equity to redeem certain real estate from a mortgage is before the Court on report. As originally drafted it was brought under the provisions of R. S. 1930, Chap. 104, Sec. 15, which provides for an accounting to determine the balance due on a mortgage and for redemption on payment of the amount found to be due. This Court held that the plaintiff's proof did not bring him within the provisions of Sec. 15 because it did not appear that he had made demand for an accounting and that there had been an unreasonable refusal or neglect to render an account. It was also decided that the suit had not been filed within the time limited for bringing a bill under Sec. 15. *Fogg* v. *Twin Town Chevrolet, Inc.*, 135 Me., 260, 194 A., 609. The mandate of the Law Court did not, however, order that the bill should be dismissed, and it was left pending on the docket of the Supreme Judicial Court in the County of Oxford. In this stage of the case the plaintiff filed a motion to amend the bill by inserting an allegation that he had on August 8th, 1936, the day before the right of redemption would have expired, offered to tender the amount due on the mortgage to William H. Clifford, who was alleged at that time to have been the attorney of the defendant and authorized to receive such payment, and that on the refusal of such attorney to accept the same, the plaintiff had been unable to make tender to the officers of the corporation because, on that date and during the day following, they had intentionally absented themselves and had gone to parts unknown. The proffered amendments contain an allegation that the plaintiff is ready and willing to pay the amount which the court shall find to be due, and there is a prayer that he may be permitted to redeem on payment of such sum. The presiding Justice granted the motion to amend to which ruling an exception was taken. By consent of the parties and under a stipulation agreed to

by each side the case is reported to the Law Court to determine (1), whether such amendment is allowable; (2), whether the plaintiff is entitled to redeem under the provisions of R. S. 1930, Chap. 104, Sec. 16, under the terms of which he now claims his bill to have been brought; (3), if the plaintiff is entitled to redeem, whether he is entitled to a credit of $630.00 which is described in the stipulation; (4), if he is entitled to redeem, whether he is entitled to credit for rents and profits from the time the defendant took possession under the mortgage; and (5), if he is not entitled to such credits, how the amount due is to be determined.

The plaintiff has lost his right to redeem if he bases it on the provisions of Sec. 15, for the time within which he could maintain a bill under this section expired August 9, 1936. R. S. 1930, Chap. 104, Sec. 15; *Fogg* v. *Twin Town Chevrolet, Inc.*, supra. The bill was not filed until the next day. The limitation within which the bill may be maintained under Sec. 16 is one year from the date of tender. R. S. 1930, Chap. 104, Sec. 20. This expired August 9, 1937. If, therefore, the plaintiff may amend his bill as he seeks to do, he is not barred by reason of any statutory limitation.

A decree dismissing a bill brought under one section does not determine the right to bring one under the other. *Sweeney* v. *Shaw*, 134 Me., 475, 188 A., 211. It does not, however, follow that a bill brought under one section may not be amended to come under the terms of the other.

The remedies to enforce a right of redemption are prescribed by R. S. 1930, Chap. 104, Secs. 15 and 16; and a bill in equity to redeem from a mortgage will not be entertained unless these statutory provisions have been complied with. *Munro* v. *Barton*, 95 Me., 262, 49 A., 1069; *Fogg* v. *Twin Town Chevrolet, Inc.*, supra. Sec. 16 provides for redemption when the amount due on the mortgage has been paid or tendered. Sec. 15 authorizes a bill for an accounting and redemption if the mortgagee has unreasonably refused or neglected to render an account or has in any other way by his default prevented the plaintiff from performing or tendering performance.

Sec. 16 has its genesis in P. L. 1821, Chap. 29, which provided for redemption within three years after entry on payment by the one having the right to redeem of the amount due, or without such

payment if the mortgagee or those holding under him refused to accept a tender. On such a bill the court was empowered to enter judgment agreeably to equity and good conscience; and in case of a refusal by the mortgagee or his assigns to accept such sum as should be found to be due and to restore possession and to execute a release, the court was directed to enter judgment for the complainant to recover possession of the estate on the money being left in the custody of the court for the use of the party entitled to the same. This statutory provision made effective in Maine the procedure which had been followed prior to the separation from Massachusetts. It was soon found, however, that too great a burden was cast on the mortgagor or his assignee who was forced to determine at his peril the amount due on the mortgage. See *Tirrell* v. *Merrill*, 17 Mass., 117, 121.

Accordingly in 1837 the legislature authorized the court to entertain a bill for redemption, if brought within three years after entry, provided the holder of the equity offered to pay the sum found due, and provided the mortgagee or those claiming under him had on request refused or neglected to render a true account. The same enactment also authorized a bill to redeem on payment or tender of payment of the amount due on the mortgage whether entry had been made or not provided the suit was commenced within three years after such payment or tender of payment. P. L. 1837, Chap. 286. These same provisions appear in substance in the revision of the statutes of 1841. R. S. 1841, Chap. 125, Secs. 16 and 17. In the revision of 1857 we find the same clauses which we have today. R. S. 1857, Chap. 90, Secs. 13 and 14.

From the history of these enactments it appears that the legislature in 1821, almost coincident with the establishment of the judicial system in the state, gave to the mortgagor of real estate or to those claiming under him a remedy in equity to compel a reconveyance if the mortgage had been paid or the amount due tendered. This statute did not create a new right, but rather a remedy for the enforcement of an existing right. The statute of 1837 merely broadened this remedy so that, in case of a refusal to account, the mortgagee could be forced to do so and to reconvey on payment of the amount found to be due after such accounting. The distinction between rights and remedies is of real importance in determining whether a

proposed amendment presents a new cause of action, the introduction of which the court is reluctant to permit after a hearing. Whitehouse, Equity Pleading and Practice, 1st ed., sec. 411. An amendment will ordinarily be allowed, if its aim is merely to seek an added remedy for an established right. An excellent discussion of the subject may be found in *Anderson* v. *Wetter*, 103 Me., 257, 69 A., 105. See also *Milner* v. *Stanford*, 102 Ala., 277, 14 So., 644; *Gray* v. *Inhabitants of Everett*, 163 Mass., 77, 39 N. E., 774.

In equity amendments are even more freely allowed then at law. Whitehouse, Equity Pleading and Practice, 1st ed., page 441, note; and in analogy to the practice at law an amendment such as is here proposed can properly be allowed. *Perrin* v. *Keene*, 19 Me., 355; *State* v. *Folsom*, 26 Me., 209; *Holmes* v. *Robinson Manufacturing Company*, 60 Me., 201. Furthermore, equity has always been liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result. *Munro* v. *Barton*, supra; *Doe* v. *Littlefield*, 99 Me., 317, 59 A., 438.

Each of these last two cases involved a bill to redeem real estate from a mortgage. In the first, *Munro* v. *Barton*, the plaintiff failed to allege facts entitling her to redeem under either section of the statute. The court directed that the bill should be retained for amendment. As a reason for this the opinion says, 95 Me., 262, at pages 264, 265, 49 A., 1069: "Should the bill be dismissed without prejudice, it would be too late to bring a new bill, even though the plaintiff was able to prove a tender on her part, or demand and unreasonable refusal to account, or other default on the part of the defendant, prior to the commencement of this suit. If the facts are such as to support such an allegation, considering that the plaintiff is without remedy unless this bill can be sustained, the plaintiff should be permitted to amend by inserting the necessary allegations." The second case, *Doe* v. *Littlefield*, is to the same effect.

The authorities clearly indicate that the allowance of the amendment in this case was proper. No valid reason appears to justify a contrary ruling.

The defendant maintains that the plaintiff is not entitled to redeem, because the mortgage was not paid nor the amount due tendered to the mortgagee or those claiming under him as required by R. S. 1930, Chap. 104, Sec. 16, under which the bill as amended has now been brought.

On August 8, 1936 the plaintiff purchased the equity of redemption from the then owner, W. L. Stone, one of the two original mortgagors. It is not controverted that on August 1, 1936 the defendant through its attorney and director, William H. Clifford, had given to the attorney for Stone a statement showing a balance due on the mortgage of $2625.59. This attorney, Mr. May, had also been informed by the officials of the defendant company that the firm of Clifford & Clifford, of which William H. Clifford was a partner, had entire charge of the whole matter. After efforts to locate the officials of the company in order to make a tender, Mr. May on Saturday, August 8th, called Mr. Clifford, who was on his vacation, by telephone and informed him that the plaintiff was prepared to pay the balance due based on the figures previously given. Mr. Clifford said that it would be useless to make a tender to him because he did not feel that he was authorized to accept payment. In the short time remaining on Saturday and Sunday, August 8th and 9th, the plaintiff tried again to get in touch with the officers of the company but was unable to find them. The plaintiff did all that could reasonably be expected. He was entitled to rely on the statement made to his grantor by the officials of the defendant that Mr. Clifford was their representative. Whether the president and treasurer of the company had purposely absented themselves so that a tender could not be made is immaterial. The effect of their conduct was the same as if they had done so. Under the circumstances the necessity of a tender was excused. The plaintiff was not obliged to go through the idle ceremony of tendering to Mr. Clifford in view of his statement that he would not accept the money. To preserve his rights, the plaintiff was not required to do what would have been useless. *Stevens Mills Paper Company* v. *Myers*, 116 Me., 73, 100 A., 11. The language of the court in this case, 116 Me., page 75, 100 A., 11, is applicable here: "Where the debtor has shown a readiness and a reasonable effort on his part to perform the legal duty required of him, and the failure to accomplish it is due to no fault of his own, but to the act of the other party putting it beyond his power, a forfeiture will not be permitted by the court."

It was unnecessary for the plaintiff to keep his tender good by depositing the money in court. The statute under which this proceeding is brought does not require such payment, nor is it neces-

sary in order to settle the rights of the parties; for a decree in equity can make the reconveyance by the defendant contingent on the payment of the amount due. Furthermore the original enactment of 1821 apparently contemplated the payment of money into court prior to the entry of final decree and not as a condition precedent to the bringing of the bill. P. L. 1821, Chap. 39, Sec. 2.

Is the plaintiff entitled to an accounting on Sec. 16 or is he bound by the amount claimed by the defendant to be due, which the plaintiff was ready to tender?

Though it is true that under the enactment of 1821 the one holding the equity of redemption was obliged at his peril to tender or offer to tender at least the amount due, yet that statute provided that if more should be paid than was justly due, the person receiving the same should be held to account for the excess. P. L. 1821, Chap. 39, Sec. 6. Furthermore it is apparent from Sec. 2 of the same act that under appropriate circumstances an accounting was contemplated. Sec. 23 of our present law, which unquestionably has reference to proceedings under Sec. 16, provides similarly for an accounting of rents and profits and for a refund of any excess which the mortgagee or those claiming under him may have received. It is therefore clear that from 1821 to the present time an accounting under Sec. 16 is authorized as incidental to the relief there provided for. That Sec. 15 also gives to the holder of the equity of redemption a right to an accounting does not modify in any way the procedure under Sec. 16.

We therefore come to the determination of the amount due on the mortgage, on the payment of which the plaintiff is entitled to a reconveyance.

The defendant purchased an overdue note and mortgage, which was in fact already in process of foreclosure. Under such circumstances it received no greater right than its assignor had and was subject to any claim with respect thereto which could have been validly asserted against the assignor. *Sprague* v. *Graham*, 29 Me., 160; Jones on Mortgages, 8th ed., sec. 1066; 41 C. J., 697.

It is stipulated that the amount claimed by the defendant as due on the mortgage on January 5, 1937 is $2402.23. The amount admitted by the plaintiff as due on that date is $1726.71. The difference between these involves the application of certain rental

payments and an allowance for rents and profits, the amounts of which are not in dispute.

On October 18, 1933 the mortgagors leased the premises to the defendant for two years from November 1, 1933 at a rental of $30.00 per month. About six months later McDaniels, one of the mortgagors, quitclaimed his interest to his co-owner. This rent, under an agreement between the parties and the Conservator of the Casco Mercantile Trust Company, which was the owner of the mortgage, was to be paid to the bank and to be credited on the mortgage. On October 8, 1935, two months after publication of notice of foreclosure, the Conservator assigned the note and mortgage to the defendant. To the date of that assignment there had been paid to the Conservator $690.00 in rentals but only $60.00 of these had been credited on the mortgage note in accordance with the agreement. The balance of $630.00 was credited on an unsecured indebtedness to the bank. Unquestionably in accordance with the terms of the stipulation which has been filed, the mortgagors, Stone and McDaniels, and Stone, who bought out the interest of his co-owner, were entitled to have the rental payments credited on the mortgage note. To this extent the note had been paid. On October 8, 1935, on buying the mortgage from the bank, the defendant took it subject to the right of the mortgagor, Stone, to a credit of $630.00, and the plaintiff, on buying the equity from Stone, had the same right which Stone had to such credit. The defendant not only took the overdue note subject to equities, *Sprague* v. *Graham*, supra, but had actual knowledge of the agreement with respect to the credit of the rentals. From October 8, 1935 the defendant was in the position of a mortgagee in possession and is obliged to account for the rents and profits which in this case we think can fairly be assessed at $30.00 per month.

As the parties agree, that on this interpretation of their rights the amount due on the mortgage on January 5, 1937 was $1726.71, we hold that the plaintiff is entitled to redeem the property on the payment of this amount plus interest thereon at six per cent from January 5, 1937 to the date of redemption, less a sum equivalent to the rent at $30.00 per month from that time to the date of redemption.

The case is remanded for a decree in accordance with this opinion. *So ordered.*

MOE I. KATZ ET AL.

vs.

NEW ENGLAND FUEL OIL COMPANY ET AL.

Cumberland. Opinion, May 6, 1938.

CORPORATIONS. PLEADING AND PRACTICE.

To authorize a corporation stockholder to sue in his own behalf, or for himself and others similarly situated who may choose to join, the default of directors invested with the general management of the business of the corporation must be clear.

A demurrer, in which there was joinder, tests the face of the bill, or any exhibit, in point of law; and if the bill, as presented, does not manifest occasion for the interference of a court of equity, it may be dismissed on demurrer.

Appeal opens the whole case for rehearing and upon the appeal the Court must determine the correctness of the decree below.

The first maxim of construction, and that upon which rest all the rules, is that, so far as the law will permit, the apparent intent of the contracting parties shall be regarded. Operation and intent are to be ascertained from the purpose of the parties; their meaning and understanding as shown by the language they used, applied to the subject-matter.

On appeal. Defendant filed demurrer to plaintiffs' bill in equity. Demurrer sustained and plaintiffs' bill dismissed. Plaintiffs appealed. Appeal dismissed. Decree below affirmed, with additional costs. Case fully appears in the opinion.

Robinson & Richardson,
Bernard Hershkopf, for plaintiffs.
Wallace Hawkins,
Freeman & Freeman,
Verrill, Hale, Booth & Ives, for defendants.

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

DUNN, C. J. This case was here previously. In the decision at that time, plaintiffs' appeal was dismissed, but without prejudice,

for prematurity. *Katz et al.* v. *New England Fuel Oil Company et al.*, 135 Me., 379, 197 A., 401.

The cause is now presented on a completed record, inclusive of the answer of the New England Fuel Oil Corporation, a Nevada incorporation, the acts of whose officers have allegedly operated adversely to the interests of the organization and its stockholders. *Wells* v. *Dane*, 101 Me., 67, 63 A., 324.

To authorize a corporation stockholder to sue in his own behalf, or, as here, for himself and others similarly situated who may choose to join, the default of directors invested with the general management of the business of the corporation must be clear. *Hersey* v. *Veazie*, 24 Me., 9; *Ulmer* v. *Real Estate Company*, 93 Me., 324, 45 A., 40; *Trask* v. *Chase*, 107 Me., 137, 77 A., 698; *Hyams* v. *Old Dominion Company*, 113 Me., 294, 93 A., 747; *Bates Street Shirt Company* v. *Waite*, 130 Me., 352, 156 A., 293.

The plaintiffs allege that application by them to the directors of their corporation, to institute action in its own name, for the recovery of what counsel term undelivered royalty oil, was refused, and that any further reasonable effort within the corporation would, because of the hostile domination of majority stockholders, be thwarted.

The demurrer of the defendant, New England Fuel Oil Company, a State of Maine corporation, (it filed, also, plea and answer,) admits, for the purpose of considering the integrity of the bill, the truth of all factual allegations which, in sufficiency of pleading, the bill avers. *Bailey* v. *Merchants Insurance Company*, 110 Me., 348, 86 A., 328. The demurrer, in which there was joinder, tests the face of the bill, or any exhibit, in point of law. 10 R. C. L., 464. If a bill, as presented, does not manifest occasion for the interference of a court of equity, it may be dismissed on demurrer. Story, Equity Pleading, 660; *Reed* v. *Johnson*, 24 Me., 322; *Masters* v. *Van Wart*, 125 Me., 402, 134 A., 539.

The other defendant, New England Fuel Oil Corporation, answered. Its answer, while setting up, so insistence is, a complete defense to the bill, essentially acquiesces in the demurrer filed by the first named defendant.

The appeal opens the whole case for rehearing. *Emery* v. *Bradley*, 88 Me., 357, 360, 34 A., 167; *Wood* v. *White*, 123 Me., 139,

122 A., 177. Upon the appeal, this Court must determine the correctness of the decree below. *Masters* v. *Van Wart*, supra.

In 1916, and prior thereto, the New England Fuel Oil Company, defendant, was drilling for petroleum in the Republic of Mexico. The company had certain lands and leaseholds, with appertaining rights, and was carrying on generally the business of producing and distributing petroleum and its products. It wanted to sell its holdings, and the Magnolia Petroleum Company, a Texas joint-stock association, wished to buy, on agreed terms, subject to the confirmation of titles, and conditioned on the coming in of wells.

The ruling purpose of an agreement dated February 25, 1916, between the company and the association, was to pass, from the one to the other, ownership of the Mexican properties and their appurtenant easements and servitudes, for a consideration, partially cash, partially a promise to deliver, from operations, proportionate quantities of oil.

The situation was complicated by apprehension that legal title to the lands and subsoil deposits might not, because of disturbed conditions in Mexico, be directly conveyed; first obtaining permission from the government would probably be necessary.

The agreement recited, contingent on the title, and the demonstration out of the ground of results worth the price, that, in the stead of deeds or other instruments, there could, to effect purpose, be assignment to the Magnolia Petroleum Company, or to a trustee for it, of the whole, or of at least seventy-five per centum of the outstanding shares of the capital stock of the New England Fuel Oil Company, the Maine entity.

Provision was made, too, for the forming of a third corporation, to acquire the shares, and succeed to the agreement rights of the Maine company.

Termination of the existence of the Maine company was not, however, contemplated. On the contrary, this company should continue to be and maintain its corporate identity, and, on being afforded financial backing by the Texas association, remain a worker in the oil fields.

Titles were approved; oil prospecting was satisfactory.

Shortly after, the new corporation, the New England Fuel Oil Company of Massachusetts, had been formed. It had acquired, not

the entire issue, but enough shares of the capital stock of the Maine company; these had been turned over, through the intervention of a trustee, to the Texas concern.

A second written agreement, of date June 20, 1916, which, as in the instance of the first, was not under seal, was entered into; all three organizations, Maine, Texas and Massachusetts, to designate them by the states of their respective creations, were parties.

"Whereas," a word grammatically and logically tantamount to the words "considering that" or "being the case that" introduced three prefatory statements. Then, relative to present inquiry, were paragraphs as follows:

"ARTICLE I. Magnolia agrees with Massachusetts Company and with Fuel Company to put the Fuel Company in funds, whenever and as soon as the same may be required, to perform the obligations to be by it performed hereunder, and guarantees to Massachusetts Company the punctual performance by Fuel Company of all its obligations hereunder, and waives all notice and other rights of a guarantor and agrees with Massachusetts Company to perform all the obligations of Fuel Company hereunder if Fuel Company does not, to the end that Massachusetts Company may enforce its rights hereunder either against Fuel Company or Magnolia, either jointly or severally."

"ARTICLE II. Fuel Company agrees with Massachusetts Company to carry out its contract with Magnolia hereinbefore mentioned and to do all things incumbent upon it to be done in order to enable Magnolia to pay the royalties, to be paid hereunder, whether in cash or in oil, and further to enable Magnolia to perform all its obligations hereunder."

"ARTICLE III. As provided in Article II of the Preliminary Agreement, Magnolia agrees with the Massachusetts Company to pay to the Massachusetts Company the royalties and consideration hereinafter stated, subject to abatement, however, where so stated, in the proportion which the stock in Fuel Company not transferred and delivered or caused to be transferred and delivered by the Massachusetts Company to Magnolia or to a Trustee as hereinafter set forth, by April 1,

1918, bears to the entire present authorized stock of the Fuel Company."

(Article II, of recital in above paragraph, should read Article III.)

"ARTICLE VI. As a minimum royalty provision the Massachusetts Company shall also have the right in the year beginning April 1, 1918, and in each subsequent year to require the delivery to it f.o.b. ships, Tampico, in the manner and subject to the charges hereinbefore provided, of oil to the amount of its royalty percentage, applied however to the entire capacity instead of to the production of the leases for such year . . . ."

"Magnolia will deliver to Massachusetts Company oil required by Massachusetts Company as aforesaid unless Magnolia is unavoidably prevented therefrom . . . ."

"ARTICLE XI. *Section C.* (2) Magnolia and Fuel Company agree that Fuel Company shall keep full and clear accounts of its own separate conditions and property."

"ARTICLE XII. (1st paragraph omitted.)

The Fuel Company and Magnolia shall, on or before the last day of each calendar month, furnish to the Massachusetts Company a statement of all the oil, from the leases covered by this contract, obtained, stored, transported or sold; the expense of handling such oil; the receipts therefrom; and a brief account of the development work, if any, for the preceding month."

(3rd paragraph omitted.)

"ARTICLE XVII. All the obligations of the Fuel Company and Magnolia hereinabove set out are joint and several obligations and Massachusetts Company may enforce the same against either the Fuel Company or Magnolia without joining the other, and it shall not lose its rights against either by any delay or extension of time given to either or any modification hereof made with either or for want of any demand or notice to either, or otherwise, except only by the receipt of the full consideration stipulated for."

Other provisions are of no instant importance.

The New England Fuel Oil Corporation, defendant, was organized July 2, 1929, with authorized capital of $25,000, divided into 50,000 shares, each of fifty cents, par value. The stock is, it appears, all issued and outstanding. Of such, plaintiffs own 2640 shares, the greater part since 1933.

The Massachusetts company, after conveyance of all its assets to the Nevada company, was subsequently duly dissolved.

Plaintiffs allege, to recur to their position, that, respecting royalty oil, the directors of their corporation have refused fully to protect corporation rights, and that any approach to reverse such refusal would be unavailing.

The bill, as has been stated, names the New England Fuel Oil Corporation, (Nevada,) one defendant, and the New England Fuel Oil Company, (Maine,) the other. The Magnolia Petroleum Company is not a party to this suit.

Plaintiffs contend, as against the Maine company, in especial reference to Articles VI and XVII, in interrelation, that every obligation binding the Texas association became as well that of the Maine company, (of the two jointly and severally,) so that each might be compelled for the whole.

The language of the agreement must be varied materially in order to have it susceptible of that interpretation.

The first maxim of construction, and that upon which rest all the rules, is this, namely, that, so far as the law will permit, the apparent intent of the contracting parties shall be regarded. Operation and intent are to be ascertained from the purpose of the parties; their meaning and understanding as shown by the language they used, applied to the subject-matter. *Hathorn* v. *Hinds*, 69 Me., 326; *Ames* v. *Hilton*, 70 Me., 36; *Veazie* v. *Forsaith*, 76 Me., 172; *Union Water Power Company* v. *Lewiston*, 101 Me., 564, 65 A., 67; *Bell* v. *Jordan*, 102 Me., 67, 65 A., 759; *Bar Harbor, etc. Company* v. *Foundation Company*, 129 Me., 81, 149 A., 801.

Article XVII, a sweeping one, is last but two of the separate, numbered paragraphs in the document. Of the two last, the first authorizes the Massachusetts company to assign its rights; the other defines a barrel of oil as forty-two United States gallons.

The use of a sweeping clause is, generally, to guard against any accidental omissions.

Article XVII must be held to apply in those instances only where, on the part of the Magnolia Petroleum Company and that of the New England Fuel Oil Company, there is unity of liability.

The undertaking of the New England Fuel Oil Company, under Article XVII, in difference from Article I, which is complete in itself, is not the collateral one of a guarantor, nor of suretyship, of binding one person with another, called the principal, for the performance of a duty with regard to which such other is already bound and primarily liable for performance. The promise here is where originally promisors were jointly bound, and were only liable in common; such promises are made enforceable against either or both of the promisors.

But, assuming that the undertaking does relate to the promise made by the Texas association, that it was meant that the Maine company should promise, with the Texas association, collectively and individually, to deliver to the Massachusetts company the royalty oil the Texas association had promised to deliver to Maine, which Massachusetts had competently been substituted to receive, this agreement would, on the part of the Maine company, be without consideration, and could not be enforced.

The showing of the record on appeal is this: first, a valid obligation that the Magnolia Petroleum Company would deliver oil, or pay money equivalent, to the New England Fuel Oil Company; second, the assent of these parties and the New England Fuel Oil Company of Massachusetts to the new contract, whereby Magnolia engaged to deliver to the Massachusetts company what it had before assured to the Maine company. This introduced the change, not of a new debtor, but a new creditor. *Barre Granite Company* v. *Fraser*, 82 Vt., 55, 71 A., 828; *Stowell* v. *Gram*, 184 Mass., 562, 69 N. E., 342; *Hamlin* v. *Drummond*, 91 Me., 175, 39 A., 551; *Pennington* v. *Gartley*, 109 Me., 270, 83 A., 701.

Appeal dismissed.
Decree below affirmed, with additional costs.

FRANZ U. BURKETT, ATTORNEY GENERAL,

ON RELATION, PETITIONER FOR MANDAMUS,

vs.

FRANK O. YOUNGS ET AL., OF THE CITY COUNCIL OF BANGOR.

Penobscot. Opinion, May 18, 1938.

MANDAMUS. MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW.

In mandamus, the alternative writ corresponds to a common-law declaration in an ordinary action, and is usually deemed the first pleading in the cause. By the writ, the respondent is called upon to perform the act sought to be enforced, or, by way of answer, commonly termed a return, aver why it should not be done.

The legislature defines, in minimum requirement, what amount of money must be raised and expended by a city for common schools.

The initiative and referendum do not supersede city government, but are consistent with it. The city remains a governmental unit; even in instances of the rejection, on referendum, of submitted propositions, the city government, as such, would still function.

The right of initiative and referendum, in reference to a city, is necessarily restricted to "municipal affairs."

Municipal affairs, it has been said, comprise the internal business of a municipality.

The City of Bangor is a territorial and political division of the State of Maine. Purely of legislative creation, the municipality, as an instrument of government, a hand of the state, is always subject to public control through the legislature.

The city has, by delegation, a measure of ordinance power.

A city may not legislate without limit; it is subordinate to the state.

The legislature may, at any time, revise, amend, or even repeal any and all of the city charters within the state, having reference, of course, to vested rights and limitations provided by fundamental law.

The public school system is of state-wide concern.

Public officers act for the public, and not merely as agents acting for the town.

The referendum, as applied to municipal affairs, affects only those ordinances and resolves that are municipal legislation.

The policy of some individual state, its laws, organic, statutory and decision, may be otherwise, but the trend of the decided cases is that matters which relate, in general, to the inhabitants of the given community and the people of the entire state, are of the prerogatives of state government. The state at large is equally concerned with the city regarding education, the support of the poor, the construction and maintenance of highways, the assessment and collection of taxes, and other matters. In fact, there are comparatively few governmental doings that are completely municipal.

Where the manifest intention of the Constitution is that, in relation to cities, the referendum shall be limited to municipal affairs, that intention must prevail.

Mandamus will not be granted where it will avail nothing.

On certification. Mandamus proceedings instituted by the Attorney General, upon the relation of a taxpayer and voter of the City of Bangor, to coerce the respondents, who compose the city council of Bangor, to refer, for the local electorate's acceptance or rejection, the general appropriation resolve which the council passed for the fiscal year 1938. The peremptory writ should be denied and the petition dismissed. The case is so decided. Case fully appears in the opinion.

Pattangall, Goodspeed & Williamson, for petitioner.

James B. Mountaine,

Charles P. Conners,

Cook, Hutchinson, Pierce & Connell, for respondents.

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

DUNN, C. J. This mandamus proceeding was instituted by the Attorney General, upon the relation of a taxpayer and voter of Bangor, to coerce the respondents, who compose the city council of Bangor, to refer, for the local electorate's acceptance or rejection,

the general appropriation resolve which the council passed for the fiscal year 1938.

The majority of the council members allegedly refused a petition for a referendum.

Procedure has been this:

On application for the writ, rule issued to the adverse parties, to appear and show cause, if they could, why the prayer of the relator should not be granted.

Service was duly proven.

The respondents conceded that the petition would, in respect to form, as the antithesis of, and in opposition to substance, justify the issuance of an alternative writ.

In mandamus, the alternative writ corresponds to a common-law declaration in an ordinary action, and is usually deemed the first pleading in the cause. By the writ, the respondent is called upon to perform the act sought to be enforced, or, by way of answer, commonly termed a return, aver why it should not be done.

The concession with regard to premise for the alternative writ having been made, thereupon the parties stipulated that whether the issue for the peremptory writ should be maintained might be determined on the application and answers, implemented by evidence of relevancy and legal admissibility.

The peremptory writ requires doing the thing absolutely.

At the time for hearing on the merits, agreement as to the facts was stated.

Upon that, the case was, the parties consenting, certified to the Chief Justice. R. S., Chap. 91, Sec. 9; Chap. 116, Sec. 17. See, in analogy, *Welch* v. *Sheriff*, 95 Me., 451, 50 A., 88.

Bangor's new city charter vests certain powers of government in a city council. P. & S. L. 1931, Chap. 54; P. &. S. L. 1935, Chap. 49. The members, nine in all, constitute the municipal officers of the city; they have the powers and authority of municipal officers, as well as those of mayors of cities.

The city council appoints the superintending school committee, and fills vacancies in membership; it chooses, annually, a chief administrative officer, called a city manager.

Agreeably to a charter provision, the school committee furnished

the city council with an estimate, inclusive of the particulars, the details and all the incidents of the cost of supporting the existing grade schools, as well as the high school and the evening school, for the year 1938.

The city manager submitted his budget for expenses and improvements; he indicated the extent to which, to provide revenue in addition to that expected from other sources, there should be, to defray both estimate and budget, exercise of the power of taxation.

The resolve, as passed by the city council, is as follows:

"Resolve, Appropriation for the Municipal Year of 1938. By the City Council of the City of Bangor:

"Resolved, That the sum of Eight Hundred Eighty-five Thousand Seven Hundred & fifty-four dollars (885,754.00) be raised by assessments upon the polls and estates of the inhabitants of the City of Bangor and upon the estates of non-resident proprietors within said city for the present municipal year and the same is hereby appropriated in addition to sums otherwise provided, the amount for each purpose being specified in the schedule hereto annexed—to wit:"

The schedule is, for present purposes, in these words and figures:

"*Summary*

	Budget 1938
General Government	$ 68,062.
Protection of Persons & Prop.	197,137.
Health Department	13,038.
Public Works	161,865.
All Charities	125,304.
Education	366,790.
Library	20,000.
Recreation	1,800.
Unclassified	26,175.
Public Service Enterprises	170,560.
Cemeteries	2,900.
Interest	39,523.

Municipal Indebtedness	20,000.
Bangor Bridge District	6,000.
Municipal Airport	——.
Notes	7,500.
Total	$1,226,654.
Revenue Received	——.
Estimated Revenue	340,900.
	$ 885,754.

* * * * * *

* * * * * *

Amount to be provided for by assessment upon the polls and estates of the inhabitants of Bangor and upon the estates of non-resident proprietors for the expenses of the City for the fiscal year.....1938–885,754."

Some of the appropriations were, under state law, obligatory on the city; for illustration, common schools. The Legislature defines, in minimum requirement, what amount of money must be raised and expended, in such connection. R. S., Chap. 19, Sec. 16; *Piper* v. *Moulton*, 72 Me., 155, 166; *Farmington* v. *Miner*, 133 Me., 162, 175 A., 219.

The proportion of the State tax, as determined by the Legislature, which each city, town and plantation shall pay, respectively, is required to be added to the local taxes, assessed and collected locally, and paid to the State. R. S., Chap. 13, Sec. 33, as amended by P. L. 1933, Chap. 285; P. & S. L. 1937, Chap. 102; *Rowe* v. *Friend*, 90 Me., 241, 38 A., 95. The county tax, too, is, by statute, for local assessment, commitment and collection. R. S., Chap. 13, Sec. 68.

The Thirty-first Amendment to the Constitution of Maine is, in section 21, of this tenor:

"Sec. 21. The city council of any city may establish the initiative and referendum for the electors of such city in re-

gard to its municipal affairs, provided that the ordinance establishing and providing the method of exercising such initiative and referendum shall not take effect until ratified by vote of a majority of the electors of said city, voting thereon at a municipal election. Provided, however, that the legislature may at any time provide a uniform method for the exercise of the initiative and referendum in municipal affairs."

The Legislature has not provided a uniform method for the exercise of the initiative and referendum in municipal affairs.

The initiative and referendum do not supersede city government, but are consistent with it. The city remains a governmental unit; even in instances of the rejection, on referendum, of submitted propositions, the city government, as such, would still function. However, the initiative and referendum may well be a means of obtaining, on the part of a city government, in the field of legislation, a sense of direct responsibility to the people. Munro: The Initiative, Referendum and Recall, p. 88.

The constitutional amendment employs, without definition, the expression "municipal affairs."

Hereon, this opinion will later say more.

The Bangor City Council established the initiative and referendum. The ordinance was ratified at a popular election on December 7, 1931. It appears to have been retained in 1935.

This right of initiative and referendum was necessarily restricted to "municipal affairs."

What are municipal affairs?

There are no well laid rules or principles by which to ascertain the answer to that question. McQuillin, Municipal Corporations, (2nd ed.) Sec. 194, citing *Sapulpa* v. *Land*, 101 Okl., 22, 223 P., 640, 35 A. L. R., 872; *Browne* v. *New York*, 241 N. Y., 96, 149 N. E., 211.

Municipal affairs, it has been said, comprise the internal business of a municipality. *Fragley* v. *Phelan*, 126 Cal., 383, 58 P., 923.

"The referendum as applied to municipal affairs affects only those ordinances or resolutions that are municipal legislation." *State* v. *White*, 36 Nev., 334, 136 P., 110, 50 L. R. A.

(N. S.), 195 note, at page 204; *Long* v. *Portland*, 53 Ore., 92, 98 P., 149.

The City of Bangor is a territorial and political division of the State of Maine. *Lovejoy* v. *Foxcroft*, 91 Me., 367, 40 A., 141; *Hone* v. *Water Company*, 104 Me., 217, 71 A., 769. Purely of legislative creation, the municipality, as an instrument of government, a hand of the state, is always subject to public control through the Legislature. *Thorndike* v. *Camden*, 82 Me., 39, 19 A., 95; *Bayville Village Corporation* v. *Boothbay Harbor*, 110 Me., 46, 85 A., 300; *Frankfort* v. *Waldo Lumber Company*, 128 Me., 1, 145 A., 241.

The city has, by delegation, a measure of ordinance power.

When, in 1834, the Legislature conferred the city charter, there was empowerment to ordain such acts, laws and regulations, not inconsistent with the Constitution and laws of the state, as needful for good order therein. P. & S. L. 1834, Chap. 436.

In 1935, the Bangor City Council was specifically authorized to enact thirty or more regulatory ordinances. P. &. S. L. 1935, Chap. 14.

A city may not legislate without limit; it is subordinate to the state.

> "As well might we speak of two centers in a circle as two sovereign powers in a state." *Timlin, J., concurring, in State, ex rel.* v. *Thompson*, 149 Wis., 488, 137 N. W., 20.

The Legislature may, at any time, revise, amend, or even repeal any or all of the city charters within the State, having reference, of course, to vested rights and limitations provided by fundamental law. *Straw* v. *Harris*, 54 Ore., 424, 103 P., 777.

That it may not always be easy to distinguish local administration from state administration, and separate state from municipal functions, presents no new difficulty. *McQuillin*, supra, Section 194, and cases cited.

> "If the Constitution or statute speaks upon a subject, the public policy of the state is necessarily fixed to that extent." *Gathright* v. *Byllesby & Co.*, 154 Ky., 106, 157 S. W., 45.

The public school system is of state-wide concern. Constitution of Maine, Art. VIII; *Talbot* v. *East Machias*, 76 Me., 415; *Sawyer* v. *Gilmore*, 109 Me., 169, 83 A., 673; *Lunn* v. *Auburn*, 110 Me., 241, 247, 85 A., 893. The obligation to appoint policemen is devolved by statute, but they act as conservators of the public peace, the peace of the state, not the peace of the city alone. *Cobb* v. *Portland*, 55 Me., 381. Tax assessors proceed under statute authority. *Thorndike* v. *Camden*, supra; *Rockland* v. *Farnsworth*, 93 Me., 178, 44 A., 681; *Penobscot, etc. Company* v. *Bradley*, 99 Me., 263, 59 A., 83; *Brownville* v. *Shank Company*, 123 Me., 379, 123 A., 170; *Milo* v. *Water Company*, 131 Me., 372, 163 A., 163. So also do tax collectors. *Tozier* v. *Woodworth*, 135 Me., 46, 188 A., 771. It would be their duty to act, when occasion arises, even in spite of a vote of the town. *Thorndike* v. *Camden*, supra. Road commissioners are chosen in the performance of a public duty imposed by law. *Bryant* v. *Westbrook*, 86 Me., 450, 29 A., 1109; *Goddard* v. *Harpswell*, 84 Me., 499, 24 A., 958. Public officers act for the public, and not merely as agents acting for the town. *Goddard* v. *Harpswell*, supra.

> "On the other hand," to quote from Mr. McQuillin's book, "all of those public affairs which alone concern the inhabitants of a locality as an organized community apart from the people of the state at large, as supplying purely municipal needs and conveniences and the enforcement of by-laws and ordinances of a strict local character limited to the interests of the city residents, are essentially local matters." *McQuillin*, supra, Sec. 196.

The distinction is between state affairs and local affairs. *People* v. *Chicago*, 51 Ill., 17; *People* v. *Detroit*, 28 Mich., 228; 29 Mich., 108.

The referendum, as applied to municipal affairs, affects only those ordinances and resolves that are municipal legislation. *Long* v. *Portland*, supra; re-hearing denied, 53 Ore., 99, 98 P., 1111. See, also, *Acme Dairy Company* v. *Astoria*, 49 Ore., 520, 90 P., 153.

The policy of some individual State, its laws, organic, statutory and decision, may be otherwise, but the trend of the decided cases is that matters which relate, in general, to the inhabitants of the

given community and the people of the entire State, are of the prerogatives of State government. The State at large is equally concerned with the city regarding education, the support of the poor, the construction and maintenance of highways, the assessment and collection of taxes, and other matters. *Libby* v. *Portland*, 105 Me., 370, 74 A., 805; *Chase* v. *Litchfield*, 134 Me., 122, 182 A., 921. In fact, there are comparatively few governmental doings that are completely municipal.

The statement seems to decide this case.

Where the manifest intention of the Constitution is that, in relation to cities, the referendum shall be limited to municipal affairs, that intention must prevail.

Mandamus will not be granted where it will avail nothing.

The peremptory writ should be denied and the petition dismissed.

The case is so decided.

ANNIE LAURA ROSE, ADMX.

ESTATE OF JACOB W. SILLIKER *vs.* GEORGE OSBORNE, JR.

Androscoggin. Opinion, May 20, 1938.

EQUITY. R. S. 1930, CHAP. 91, SEC. 53.

R. S. 1930, *Chap.* 91, *Sec.* 53, *requires the single Justice when a mandate has been received from the Law Court, to enter a decree "in accordance with the certificate and opinion of the law court" and the sitting Justice has no authority to depart from the mandate in any respect or to postpone the filing of the decree.*

A party aggrieved by the form of a decree as entered has a right to except thereto, and the procedure for bringing the question before the Law Court is specifically set forth in Rule XXVIII. There is no provision by which the matter can be reported.

On report. Bill in equity by Annie Laura Rose, administratrix of the estate of Jacob W. Silliker, deceased, against George Os-

borne, Jr., to recover the proceeds of three savings accounts which originally stood in the name of Jacob W. Silliker, deceased. Case came forward on report of proceedings had after mandate from Law Court to enter a decree in accordance with its opinion. Report discharged. Case fully appears in the opinion.

Berman & Berman (Lewiston, Maine), for plaintiff.

Ralph W. Crockett, for defendant.

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

THAXTER, J. More than four years ago the plaintiff, who is the administratrix of the estate of Jacob W. Silliker, filed a bill in equity to recover the proceeds of three savings accounts which originally stood in the name of Jacob W. Silliker, one in the Androscoggin County Savings Bank, situated in Lewiston, Maine, amounting to $5481.18, another in the Savings Bank of New London in Connecticut, amounting to $5370.72, and the third in the Mariners Savings Bank also located in New London, amounting to $7301.72. The question at issue was whether a valid gift *inter vivos* had been made of these by Silliker to the defendant. The Justice who heard the case entered a decree holding that the account in the Lewiston bank was the property of the plaintiff and that the defendant was the owner of the two accounts in the Connecticut banks. The plaintiff appealed and in an opinion filed July 26, 1935 the appeal was sustained only as to the account in the Mariners Savings Bank which was held to be the property of the plaintiff. The direction of the mandate from the Law Court was for a "decree in accordance with this opinion." *Rose, Admx.* v. *Osborne*, 133 Me., 497, 180 A., 315, 321.

A draft of a decree was filed by the plaintiff December 9, 1935, and the defendant within five days after receipt of notice thereof filed corrections thereto in accordance with equity rule XXVIII. A hearing was had on the issue thereby raised about January 1, 1936 but no decision was rendered. Apparently the plaintiff discovered that the defendant, at some time prior to the issuance of the injunction on the original bill, had withdrawn money from the Mariners Savings Bank and from the Androscoggin County Savings Bank,

had used the same, and had no funds with which to make good the amount of such withdrawals except the deposit in the Savings Bank of New London. She sought by the terms of the decree to force the application of this deposit to make good the deficiency. With matters in this status, she also on September 13, 1937 filed a so-called supplemental bill, the purpose of which was to reach the same result which she was seeking by her draft of the decree on the original bill. The defendant thereupon on October 2, 1937 filed with the sitting Justice a motion for a decision on the form of the decree, the hearing on which matter had been had in January 1936. The plaintiff objected to the allowance of this motion until there should be a hearing and decision on the supplemental bill. The plaintiff's contention was sustained by the Justice and a hearing was then had as one cause on the form of the decree on the original bill and on the supplemental bill. Without a decision on either question the cause was reported with the consent of the parties to the Law Court.

R. S. 1930, Chap. 91, Sec. 53, requires the single Justice when a mandate has been received from the Law Court, to enter a decree "in accordance with the certificate and opinion of the law court." The sitting Justice has no authority to depart from the mandate in any respect or to postpone the filing of the decree. *Whitney* v. *Johnston*, 99 Me., 220, 58 A., 1027. A party aggrieved by the form of the decree as entered has a right to except thereto, and the procedure for bringing the question before the Law Court is specifically set forth in Rule XXVIII. There is no provision by which the matter can be reported.

The procedure prescribed by the statute and the rule was in this case not followed. The decree should have been entered forthwith in accordance with the opinion of the Law Court.

If the so-called supplemental bill is in the nature of an addition to or continuance of the original bill, it will not lie, for the case stood as finally decided by the Law Court on the filing of the mandate. If the so-called supplemental bill is in the nature of a bill to enforce a decree, it is premature, if brought before the entry of the decree on the original bill.

As there is nothing before this Court on which to act the entry must be

Report discharged.

STATE OF MAINE *vs.* J. BAMFORD SPRAGUE.

Aroostook. Opinion, June 4, 1938.

EVIDENCE. CRIMINAL LAW. HOMICIDE.

It is the province of the jury to determine controverted issues of fact.

It has long been the rule in this state that all crimes may be proved by circumstantial evidence.

A witness who saw the arrest of the accused in a restaurant and observed the officer take the accused out to the sidewalk where a crowd had collected was asked on cross-examination, "What was said then by any members of the crowd which indicated the temperament of the crowd as this was happening?" This question was properly excluded, since question called for expression of opinion reached by persons in the vicinity, regardless of their opportunity to observe actual events and under a situation which demonstrated that such observation was practically impossible. Much depends upon the circumstances in a given case, and a trial judge is called upon to exercise his discretion in determining the admissibility of testimony under such circumstances.

Murder, as defined by statute and common law alike, is the unlawful killing of a human being with malice aforethought either express or implied, and it is incumbent upon the State to prove malice.

Testimony showed that the respondent, following his resistance to arrest, and while he was being taken to the police station, on several occasions said, "Let go of me or I will tear your Christless guts out." This evidence was admissible as bearing upon the question of express malice, tending to show the attitude of mind of the respondent, its weight being for the jury.

Evidence of the effect of a blow received or an assault committed need not depend for its introduction upon testimony of witnesses who saw the blow struck. A cut or slash received in a melee may be unnoticed by onlookers, but when a man emerges from an affray with visible wounds, testimony thereof is pertinent. The law is not so inconsistent as to declare that the only proof of a thing which from its very nature can not be shown otherwise, shall not be heard or considered.

In a murder prosecution the strength and physical condition of the deceased and the respondent at the time of the affray causing death may be shown.

When witness stated on cross-examination that he did not recall whether fire

alarm rang about the time that accused was arrested, the presiding Justice properly excluded testimony that witness was seen directing traffic in connection with a fire on evening of arrest of accused, since inquiry was with reference to a collateral matter and proffered testimony did not impeach credibility of witness.

It is not error to admit inconsequential evidence relating to a matter germane to the issue.

The rule that collateral testimony can not be contradicted is confined to testimony introduced in cross-examination by the party who proposes to contradict it. It does not apply to testimony introduced by the other party.

On appeal and exceptions. Respondent was indicted for murder and found guilty of manslaughter. Appeal was entered to denial of motion for a new trial upon the ground that the evidence was insufficient to warrant the verdict. Exceptions were also taken to the admission and exclusion of certain testimony. Appeal dismissed. Exceptions overruled. Judgment for the State. Case fully appears in the opinion.

Franz U. Burkett, Attorney General,
George B. Barnes, County Attorney, for State.
J. Frederic Burns,
Albert F. Cook, for respondent.

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

MANSER, J. Respondent was indicted for murder and found guilty of manslaughter. Appeal was entered to denial of motion for a new trial upon the ground that the evidence was insufficient to warrant the verdict. Exceptions were also taken to the admission and exclusion of certain testimony.

The appeal will be first considered. The case, as developed by the State, was to the following effect:

Thomas Giggey, thirty-eight years of age, robust and healthy in appearance, powerful of build, was on duty as a policeman in the Town of Fort Fairfield on the evening of August 8, 1936. The respondent, in a restaurant and beer shop on Main Street, was intoxicated and troublesome. The officer, inspecting the premises in the performance of his duties, was requested to eject the respondent. Re-

spondent refused to leave and slumped to the floor. The officer pulled him up and impelled him forward to the sidewalk. There the respondent turned and the two faced each other, standing close together. A crowd immediately collected and pressed toward the center of action. The respondent was resisting arrest. No witnesses saw all that actually took place, but suddenly the officer, addressing the respondent by his nickname, exclaimed, "Let go, Vance, or I'll hit you." This he repeated twice, at the same time reaching for his club, which he obtained with some difficulty, and then struck the respondent on the head with it, causing him to go down over the edge of the sidewalk. The police chief then appeared and the two officers took the respondent to the police station. On the way, on two or more occasions, the respondent used the expression, "Let go of me or I will tear your Christly guts out."

At the station, the officer exhibited to his superior a wound to his private parts, it being the inflamed lacerated head of the penis, from which blood was dripping. The officer continued on duty for several days, but the injured organ became infected. He was taken to the hospital and between that time and early in October the organ sloughed off. As a direct result of the injury, and from infected embolism, sepsis of the left lung developed, causing the death of the officer in November, 1936.

The respondent's version as to the occurrence on the sidewalk agrees with that of the State that the two men were facing each other, close together, and that the officer told the respondent to let go but "I just had my hands on him more to hold myself on my feet than anything else. If I had let go of him, I probably would have fell over."

Of the seven witnesses produced by the State or the respondent as to what took place at the time of the striking of the blows by the officer, six testified that the respondent's hands were not both in sight at the same time. The seventh said that both hands of the respondent were on the officer's shoulders at the time of the blow. The credibility of this witness was sharply attacked and the State argued that from his position it was impossible for him to see what he asserted to be the fact.

Another matter in controversy was as to physical handicaps of

the respondent which it was claimed in defense rendered him incapable of the act charged. The evidence offered upon the point by the State was to the effect that the gripping power of the man's hands was undiminished.

The issue is not that the injury occurred in self-defense, but instead a denial that the respondent inflicted it. No evidence was offered to contradict the fact that the officer received a wound and died as a result of it.

It is the province of the jury to determine controverted issues of fact. In this case, the Court finds nothing to warrant interference with the result of its function in that respect.

It is urged that the crucial fact of the particular assault alleged by the State as the cause of death is not shown by any direct testimony. It depends entirely upon circumstantial evidence.

It has long been the rule in this state that all crimes may be proved by circumstantial evidence. *State* v. *Hynes*, 66 Me., 114. As was pointed out in *State* v. *Richards*, 85 Me., 252, 27 A., 122, 123:

> "Several distinct circumstances, no one of which is conclusive in its nature and tendency, may be found so naturally associated with the fact in controversy and so logically connected with each other, as to acquire from the combination a weight and efficacy that will be accepted as absolutely convincing."

Yet, as further said in the same case with reference to such evidence:

> "Its accuracy and soundness must be negatively tested by inquiring whether it excludes every other hypothesis than that of guilt."

Tested thus, then as remarked by the Court in *State* v. *O'Donnell*, 131 Me., 294, 161 A., 802, 803:

> "When, considered as a whole, circumstantial evidence leads to a conclusion of guilt, with which no material fact is at variance, it is not, as a matter of law, inferior to direct evidence, and neither the court nor the jurors can conscientiously disregard it."

In the instant case, the Court is of opinion that the evidence is sufficient to sustain the verdict of the jury.

EXCEPTIONS.

The first exception is to the exclusion of the question, "What was said then by any members of the crowd which indicated the temperament of the crowd as this was happening?" The question was asked in cross-examination of a witness called by the State. He had testified that he was in the restaurant and had seen the arrest of the respondent who was then taken by the officer out to the sidewalk, where a crowd collected. The witness himself could not see all that happened outside because of the crowd. The members of this group had seen no part of what transpired in the restaurant. A considerable number of people were massed into the limited area of a sidewalk, and were hemmed in by buildings on one side and parked automobiles at the curb. The inquiry was not as to exclamations, outcries or declarations of either of the participants, as in *State* v. *Wagner*, 61 Me., 178, or even the spontaneous outburst of a spectator. The question appeared to call for an expression of opinion or a conclusion reached by persons in the vicinity, regardless of their opportunity to observe the actual events, and under a situation which demonstrated that such observation was practically impossible. It was not offered in proof of the happening of an actual occurrence but, at best, to the mental reaction of individuals in a crowd present when an officer was attempting to arrest an intoxicated person. Counsel for the respondent contend that certain acts of the officer, enumerated in the brief, aroused the anger and resentment of the crowd who observed them. The record discloses that no suggestion of this character was made to the Court as a basis for the admission of the testimony and, further, the record of subsequent testimony in defense, does not support these claims of counsel. Accordingly, it appears that the Court is asked to rule that assumed or non-existent facts should be the foundation for statements made by bystanders, regardless of their opportunity for observation.

It is needless to engage in fine differentiations with respect to the hearsay rule, *res gestae*, spontaneous exclamations or the verbal

act doctrine. Much depends upon the circumstances in a given case, and the trial judge is called upon to exercise his discretion in determining the admissibility of testimony under such circumstances. *Roach* v. *Great Northern R. Co.*, 133 Minn., 257, 158 N. W., 232.

With respect to the particular evidential rules here invoked, and this exercise of judicial discretion as to cross-examination, the comment of Wigmore in his work on "Evidence" (Vol. 3, Par. 1750) is of interest. It does not appear that any prejudicial error was committed.

The second exception is to the admission of statements made by the respondent himself following his resistance to arrest, and while he was being taken to the police station. The testimony was that the respondent on several occasions said, "Let go of me or I will tear your Christless guts out." It was objected to as not a part of the *res gestae*. It was admitted for the "purpose of showing such light as may be, if any, upon his mental attitude or condition of mind."

The respondent was on trial for murder. As defined by statute and common law alike, this crime is the unlawful killing of a human being with malice aforethought either express or implied. In support of the charge, it was incumbent upon the State to prove malice. It was an essential element. *State* v. *Neal*, 37 Me., 468; *State* v. *Leavitt*, 87 Me., 72, 32 A., 787. The evidence was admissible as bearing upon the question of express malice, tending to show the attitude of mind of the respondent, its weight being for the jury. *State* v. *Albanes*, 109 Me., 199, 83 A., 548.

> "Declarations made by defendant after the fatal affray showing his hostility to deceased, are admissible in evidence on the issue of malice." 30 C. J., Homicide, Par. 375, with citations from State and Federal Courts.

The third exception is to the admission of evidence offered to show a wound, freshly lacerated, sustained by the deceased. This was immediately after the respondent had been placed in jail.

The fourth and fifth exceptions are to testimony relative to the physical condition of the deceased subsequent to the alleged injury. These exceptions may be grouped for consideration. As to the first, it is specifically objected that the evidence was not a part of the *res gestae* and the case of *State* v. *Maddox*, 92 Me., 348, 42 A., 788, is

cited as authority. In that case, however, exceptions were upheld to *declarations* made by a participant subsequent to the event. In the instant case, the presiding Justice expressly excluded any statement made by the deceased with reference to the injury or its cause. The other objection was general in all three exceptions, that the particular battery alleged as the cause of death had not been proved by any direct evidence, and the condition might have been caused otherwise. The probative force of the testimony may be arguable, without affecting its admissibility. Evidence of the effect of a blow received or an assault committed need not depend for its introduction upon testimony of witnesses who saw the blow struck. A cut or slash received in a melee may be unnoticed by onlookers, but when a man emerges from an affray with visible wounds, testimony thereof is pertinent. The law is not so inconsistent as to declare that the only proof of a thing which from its very nature can not be shown otherwise, shall not be heard or considered. *Phillips* v. *Kelly*, 29 Ala., 628.

Exceptions six and seven are to the exclusion of evidence offered from a physician to show that the respondent in 1932 suffered a paralytic shock and that his condition was the same at the time of a recent examination. The respondent was afforded and took advantage of full opportunity to present testimony in support of his claim of physical incapacity at the time of the occurrence. Although this evidence of his condition five years previously was properly excluded, the respondent has no ground for complaint in any event, as later testimony from the physician, to which the State did not object, was to the effect that the respondent showed evidence of a cerebral hemorrhage of a few years' duration, and the respondent himself testified at length as to his physical condition covering a period of twenty years. The correct rule, however, is that the strength and physical condition of the deceased and the respondent at the time may be shown. *State* v. *Lederman*, (N. J.) 170 A., 652.

Exception eight; one Perry Knight, chief of police, and also a fireman, was a witness for the State. He was asked in cross-examination with reference to the performance of his duties, after the arrest of the respondent as follows:

Q. Didn't the fire alarm blow that evening?
A. Not that I recall.
Q. Do you recall the fire alarm ringing when you were out there at the car, as Mr. Sprague was being escorted into the car?
A. I do not.
Q. You say the fire alarm didn't ring, then?
A. I don't say that it didn't ring.
The Court: The witness has stated that he didn't recall.
Q. You say that you can't recall that a fire alarm rang about that time?
A. Right.
Q. Is it your duty to answer fire alarm calls immediately when they are rung?
A. Not necessarily.

Later a defense witness was asked as to whether he saw Perry Knight directing traffic in connection with a fire on the evening of the day in question. Upon objection by the State, the Court took the precaution to have the previous testimony of Knight read "to see if Mr. Knight denied there was a fire that night or whether he said that he didn't remember," and then ruled that the inquiry was with reference to a collateral matter, and further, that the evidence did not impeach the credibility of the witness because he had simply stated that he did not recall whether the alarm rang or not.

> "It is undoubtedly true, that our rules and practice permit counsel, who expect to be able to prove an independent fact by a witness called by the opposite party to some other point, to call out that fact upon cross-examination, and in case of failure, through the false or erroneous reply of the witness, whenever the fact is material to the issue, to proceed to prove it aliunde, and to impeach and nullify the witness's statement respecting it. . . . To make such statements admissible, the witness must have testified to something that requires to be impeached, in order to make proof of the fact, and mere want of recollection can seldom, if ever, be of that character." *State* v. *Reed*, 60 Me., 550.

The ruling was correct.

The same situation exists as to exception nine. The witness, Knight, was asked in cross-examination as to whether he went into the restaurant after the respondent had been arrested, and some time later in the evening arrested one Grenier. He testified he did not recall making such arrest that night although he had apprehended the man on one occasion, and further "I will not say that it was not on that night." Testimony was offered in defense that the officer on the evening in question did make such arrest. The Court ruled that if the testimony contradicted a positive statement it could be admitted but, after the record was again read, the question was excluded. The fact of the arrest of another man later on in the evening is not shown to have any relation to the issue, was therefore collateral, and in any event comes within the rule applicable to the previous exception.

The last exception is to the admission of testimony as to a statement by respondent concerning his age, which was contradictory to his evidence given on direct examination. The physical condition of the respondent at the time of the alleged assault was pertinently developed at length. His age is a relevant element in that inquiry. It might be of slight importance and of little assistance in determination of the fact as to physical condition but it is not error to admit inconsequential evidence relating to a matter germane to the issue. Counsel for the respondent complains that it was collateral, and the rule applied against him in the two previous exceptions should have worked in his favor in this instance. Assuming it to be collateral, it is to be noted, however, that the rule that collateral testimony can not be contradicted is confined to testimony introduced in cross-examination by the party who proposes to contradict it. It does not apply to testimony introduced by the other party. *State* v. *Sargent*, 32 Me., 429; *State* v. *Kimball*, 50 Me., 409 at 415; *Williams* v. *Gilman*, 71 Me., 21.

Appeal dismissed.
Exceptions overruled.
Judgment for the State.

JOSEPH P. GORHAM, ADMINISTRATOR
WITH THE WILL ANNEXED OF THE ESTATE OF HANNAH EDBLAD

vs.

NELL M. CHADWICK,
THE INHABITANTS OF THE TOWN OF HOULTON AND
ELSIE F. HARVEY.

Aroostook. Opinion, June 20, 1938.

WILLS.

The cardinal rule for the interpretation of wills is that they shall be construed so as to give effect to the intention of the testator. It is the intention, however, gathered from the language used in the testament which governs; and it is the intention of the maker of the will at the time of its execution.

Although a will speaks only from the maker's death, the language used in the testament must be construed as of the date of its execution and in the light of the then surrounding circumstances.

The use, by testatrix, of the possessive "my" is convincing indication that she intended to make her gift specific.

The distinctive characteristic of a specific legacy is its liability to ademption. If the specific thing or particular fund bequeathed is not in existence or has been disposed of by the testator subsequent to the making of the will, the legacy is extinguished or adeemed. The rule is otherwise if the identity of the subject matter of the gift is preserved though somewhat changed in name or form.

Where trust company stock bequeathed by testatrix was exchanged for different stock in course of reorganization of trust company, pursuant to agreements entered into by testatrix and her administrator, payment of testatrix' stock assessment as part of exchange did not change character of transaction, and bequest of stock was not adeemed or abated pro rata *by the payment.*

On report on agreed statement of facts. Bill in equity brought by Joseph P. Gorham, administrator with the will annexed of the Estate of Hannah Edblad, to obtain a construction of the will of

Hannah Edblad, late of Houlton, deceased. The case is remanded for entry of a decree in accordance with this opinion. And proper costs and counsel fees may be allowed all parties. So ordered. Case fully appears in the opinion.

A. A. Putnam, for plaintiff.
Nathaniel Tompkins,
Bernard Archibald,
J. Frederic Burns, for defendants.

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

STURGIS, J. This bill in equity brought to obtain a construction of the will of Hannah Edblad, late of Houlton, deceased, is certified forward on report accompanied by an agreed statement of facts and the pleadings in the case. All interested parties, having been joined as defendants, answer, join in the prayer for the construction of the will and, waiving all denials, by stipulation admit the truth of the allegations of the bill.

Hannah Edblad died on the twenty-third day of November, 1935, leaving a will dated June 20, 1929, which was thereafter duly proved and allowed. Joseph P. Gorham, the complainant, as administrator d. b. n. c. t. a. of her estate brings this bill for instructions in the performance of his duties. In the third paragraph of her will, the testatrix made the following bequest:

> "I give and bequeath to Nell M. Chadwick of Houlton, Maine, my diamond ring and my stock in Houlton Trust Company."

In the fourth paragraph, she gave her niece Elsie F. Harvey of Kansas City, Missouri, two thousand dollars ($2000.00) and certain enumerated items of personal property.

By the sixth paragraph, she bequeathed and devised the residue of her estate to the Inhabitants of the Town of Houlton to be used for the maintenance of her homestead property as a community house, with additional provision for the use of the residue for the erection and maintenance of any community house which might be acquired in place of her homestead.

The other provisions of the will are not involved in this inquiry and are not passed upon in this opinion.

It appears and is to be assumed from statements of counsel that Hannah Edblad on June 20, 1929, when she executed her will, owned the same and only the ten shares of common stock of the Houlton Trust Company of Houlton, Maine, each of the par value of $100.00, which she had when that bank on March 4, 1933, was closed, and continued to own until she died. In the course of the reorganization of the Houlton Trust Company, however, an assessment of $1000.00 was made against her as a stockholder under sections 93, 94 of Chapter 57, Revised Statutes, and persons liable for stock assessment having been authorized to subscribe for a proposed second preferred stock in an amount equal to his or her liability and in lieu thereof, on June 4, 1934, in writing and as a stockholder she deposited her original shares of the common stock of the bank to be held subject to the terms of the reorganization and decrees of court making the same effective, subscribed for and agreed to purchase shares of non-cumulative, nonassessable second or class B, so called, preferred stock of an aggregate par value of $1000.00, and assigned her savings deposit of $9213.22 which she had in the Houlton Trust Company as collateral security for the performance of her contract. When she died, this agreement had not been acted upon but remained in full force and effect.

After Hannah Edblad's death, the Supreme Judicial Court having jurisdiction of the proceeding modified its earlier decree authorizing stockholders to satisfy their liability for stock assessments by subscribing for a new second preferred stock, by approving an issue of common stock and permitting such stockholders to subscribe therefor in lieu of the second preferred stock and on the same terms. Complying with this decree, the complainant, as administrator d. b. n. c. t. a., made a new surrender for retirement of the original ten shares of stock of the Houlton Trust Company owned by his testatrix, cancelled her subscription of June 4, 1934, as a stockholder for second preferred stock, and agreed to take common stock of the same aggregate par value in lieu thereof and subject to the same provisions as to cancellation of his testatrix' stock liability. This agreement was accepted and forty shares of common stock of the par value of $25.00 each were issued to the Estate of

Hannah Edblad, her savings deposit in the possession of her personal representative charged with $1000.00, her double liability as a stockholder cancelled, and her original ten shares of the common stock of the bank were retired.

It also appears that as a part of the reorganization of the Houlton Trust Company it was proposed that refinancing be effected through the sale of first preferred stock to the depositors, and Hannah Edblad on January 13, 1934, as a depositor subscribed for one hundred and forty shares, or such part thereof as might be allotted to her, of six per cent cumulative, nonassessable, $10.00 par preferred stock of the Houlton Trust Company at a price of $50.00 per share, including in that subscription contract an order authorizing the amount payable thereunder to be charged to her savings or demand account. This subscription continued in force until after Hannah Edblad's death, and by virtue of it, as is stipulated in the agreed statement, sixty-nine shares of the par value of $10.00 each of the preferred stock of the reorganized bank were issued to her administrator d. b. n. c. t. a., and the agreed price of $50.00 per share and altogether the sum of $3450.00 was charged to the balance of her savings deposit.

The precise question presented is whether under the third paragraph of Hannah Edblad's will the legatee, Nell M. Chadwick, is entitled to take either the forty shares of common stock or the sixty-nine shares of preferred stock, or both, which on final reorganization of the Houlton Trust Company were issued to the testatrix' estate.

The cardinal rule for the interpretation of wills is that they shall be construed so as to give effect to the intention of the testator. It is the intention, however, gathered from the language used in the testament which governs. *Blaisdell* v. *Hight*, 69 Me., 306; *Torrey* v. *Peabody*, 97 Me., 104, 53 A., 988; *Palmer* v. *Estate of Palmer*, 106 Me., 25, 75 A., 130; *Spear* v. *Stanley*, 129 Me., 55, 149 A., 603. And it is the intention of the maker of the will at the time of its execution. Although a will speaks only from the maker's death, the language used in the testament must be construed as of the date of its execution and in the light of the then surrounding circumstances. Another and accurate statement of this rule is that a will is not operative until the death of the maker and then speaks his or

her intention at the time of its execution. *Cook* v. *Stevens*, 125 Me., 378, 134 A., 195; *Spear* v. *Stanley*, supra; *In re Mandelle's Estate*, 252 Mich., 375, 233 N. W., 230.

The testatrix, Hannah Edblad, owning ten shares of the stock of the Houlton Trust Company, described her bequest in the third paragraph of her will to her beneficiary, Nell M. Chadwick, as "my stock in Houlton Trust Company." As to whether she then contemplated a sale or exchange of these shares or the acquisition of more stock of the bank is not disclosed in the will and can not be considered. It may be safely assumed, however, that she did not anticipate that the Houlton Trust Company would close and she would be called upon to participate in a reorganization in the manner and to the extent reported. Limiting our inquiry then to the will itself and the time and surrounding circumstances of its making, we are convinced that this testatrix intended her bequest to include only the stock in the Houlton Trust Company which she then owned. The language which she used discloses an intention that her legatee should receive the very stock bequeathed and not merely its equivalent in kind or value. She identifies that particular stock as then belonging to her and distinguishes it from all other parts of her property of like kind. Her use of the possessive "my" is convincing indication that she intended to make her gift specific. *In re Gibson*, L. R., 2 Eq. Cas. 669; *Bothamley* v. *Sherson*, L. R., 20 Eq. Cas. 304; *Ashburner* v. *Macguire*, 2 Brown Ch. Rep. 89; *Blackstone* v. *Blackstone*, 3 Watts. (Pa.), 335; *Martin, Petitioner*, 25 R. I., 1, 54 A., 589; *Emery* v. *Wason*, 107 Mass., 507; *Johnson* v. *Goss*, 128 Mass., 433; *Harvard Unitarian Society* v. *Tufts*, 151 Mass., 76, 23 N. E., 1006; *Fidelity National Bank & Trust Co.* v. *Hovey*, 319 Mo., 192, 5 S. W., 2d., 437; *In re Estate of Largue*, 267 Mo., 104, 113, 183 S. W., 608; *Loring* v. *Woodward*, 41 N. H., 391; *Mecum* v. *Stoughton*, 81 N. J. Eq., 319, 86 A., 52; *Will of Hinners*, 216 Wis., 294, 257 N. W., 148; 10 Ann. Cas. 493; 69 Corpus Juris, 931; 28 R. C. L., 290. The testatrix' gift of her stock in Houlton Trust Company falls within the definitions of specific bequests already approved by this Court. *Stilphen, Appellant*, 100 Me., 146, 60 A., 888; *Palmer, Appellant* v. *Palmer*, 106 Me., 25, 75 A., 130; *Spinney* v. *Eaton*, 111 Me., 1, 87 A., 378; *Maxim* v. *Maxim*, 129 Me., 349, 152 A., 268.

The distinctive characteristic of a specific legacy is its liability to ademption. If the specific thing or particular fund bequeathed is not in existence or has been disposed of by the testator subsequent to the making of the will, the legacy is extinguished or adeemed. *Stilphen, Appellant*, 100 Me., 146, 60 A., 888. The rule is otherwise if the identity of the subject matter of the gift is preserved though somewhat changed in name or form.

Thus in *Spinney* v. *Eaton*, 111 Me., 1, 87 A., 378, a specific bequest of stock in a corporation is held not to be extinguished by the testator's exchange of the stock for bonds of the same corporation. "The stock was exchanged, not sold, and the security it represented is substantially the same as at the date of the will. It has not lost its identity."

In re Clifford, L. R., 1, Ch. Div. (1912) 29, holds that a specific bequest of twenty-three shares of stock in a corporation was not adeemed by exchange of the original shares for new subdivided shares, the change being in name and form only with the continued substantial existence of the subject of the bequest.

In *Fidelity Title & Trust Co.* v. *Young*, 101 Conn., 359, 125 A., 871, it is held that a specific bequest of one hundred and fifty shares of stock in a corporation of the par value of $100.00 was not adeemed by the subdivision of each of the original shares into five shares of the par value of $20.00 each. *In re Clifford*, 1, Ch. Div. (1912) 29, is cited as directly in point and followed.

In *Pope* v. *Hinckley*, 209 Mass., 323, 95 N. E., 798, a testator, by his will, gave numerous legacies of shares of the first preferred stock of a New Jersey corporation in which he was a heavy stockholder. Later and prior to his death, the corporation passed into the hands of a receiver and a new Connecticut corporation was formed to take over its assets and succeed to the business. The testator deposited his stock in accordance with the plan of reorganization and received negotiable voting trust certificates therefor to be exchanged for stock in the new corporation at a stated ratio. Soon after the death of the testator, his executors made the exchange in accordance with his deposit agreement. On these facts, that court held that the legacies of the first preferred stock of the original corporation were not adeemed by the testator's acts in connection with the reorganization but took effect subject to his

engagements in connection therewith. When the exchange was effected by the executors, the preferred stock of the new corporation stood to all intents and purposes, so far as legacies of the first preferred stock of the original corporation were concerned, in the place of that stock.

In *Chase National Bank* v. *Deichmiller*, 107 N. J. Eq., 379, 152 A., 697, 698, the testator in a will executed in March, 1926, made a bequest of "eight hundred shares of the capital stock of the F. W. Woolworth Company which I now own and possess." After the execution of the will, the corporation by a stock dividend and a stock "split up" multiplied its outstanding shares so that at the testator's death the interest in the corporation formerly represented by eight hundred of its shares was represented by three thousand new shares, and it was held that the bequest was specific and the original interest in the corporation bequeathed was still owned and possessed by the testator at the time of his death in changed form but with identity preserved.

In *Peirce, Petitioner*, 25 R. I., 34, 54 A., 588, a testatrix, having made a bequest of stock in a bank, thereafter without changing her will participated in a reorganization and exchanged the stock bequeathed for stock in the new bank making a small payment in cash to equalize values, and it was there held that there was no ademption of the legacy of the original stock.

In *Will of Hinners*, 216 Wis., 294, 257 N. W., 148, a bequest of two hundred twenty-five shares of "my stock" in a named corporation is held to be specific and not adeemed by an exchange of it by the testator for shares of new common and preferred stock issued in a reorganization of the capital structure of the corporation, the exchange being merely a formal change and substitution of new stock for old. Numerous supporting authorities in point are cited and reviewed.

In the light of these authorities, we are of opinion that the forty shares of common stock of the reorganized Houlton Trust Company issued to the Estate of Hannah Edblad after her death passes under her bequest of "my stock in Houlton Trust Company" to Nell M. Chadwick, legatee named in the third paragraph of her will. An analysis of the reorganization of that bank planned and finally effected, as reported, and the testatrix' participation there-

in as a stockholder leaves no doubt that in fact there was only an exchange of the ten shares of $100.00 common stock originally bequeathed for forty $25.00 shares of new common stock accompanied by a payment of the testatrix' stock assessment. She arranged in her lifetime for such an exchange of her common stock for second preferred stock and the cancellation of her stock liability, deposited her shares for retirement, and died with that arrangement pending. If she can be considered as still owning the stock which she bequeathed subject only to the engagements which she had made, there is no basis for regarding what had been done as an ademption of the legacy, and what her administrator d. b. n. c. t. a., did after her death in compliance with the decree of the court having jurisdiction of the proceeding and, under his engagement made in substitution of hers, accepting common stock instead of second preferred stock in exchange for her original shares can not change that result. On this view of the legal and factual situation, the testatrix did not extinguish her legacy before she died and ademption can not result from the subsequent acts of her personal representative. *Pope* v. *Hinckley*, 209 Mass., 323, 95 N. E., 798, *supra.*

No more can ademption be found if the testatrix' arrangement as a stockholder for participation in the reorganization of the Houlton Trust Company is deemed an exchange of the stock which she bequeathed for new stock in the bank modified after her death by her administrator so that common stock was issued to her estate in lieu of the second preferred stock for which she had subscribed. Considered together and in their entirety, her agreement and that of her personal representative may be viewed, we think, as one transaction which in the end resulted in simply an exchange of old stock for new, a change in form but not in substance of the subject of her legacy to Nell M. Chadwick.

The payment of the testatrix' stock assessment as a part of the exchange did not, we think, change the character of the transaction. That liability accrued when the court ordered a resort thereto and fixed the amount thereof, and this was in Hannah Edblad's lifetime. It did not abate at her death, but survived, and her estate in the hands of her administrator d. b. n. c. t. a., was chargeable therefor and it was his duty to pay it. *Johnson* v. *Libby*, 111 Me., 204, 88 A., 647. We find no ground upon which it can be held that

the specific bequest of the testatrix' bank stock was adeemed or can be abated even *pro rata* by this payment.

Hannah Edblad's subscription of January 13, 1934, for first preferred stock of the Houlton Trust Company as a depositor, upon which sixty-nine shares of such stock of the par value of $10.00 each were finally issued to her estate, presents an entirely different question. The new stock was neither subscribed for nor received in exchange for the stock which she bequeathed Nell M. Chadwick. It originated in and from her status as a depositor of the bank, it had neither actual nor potential existence when her will was executed, and there is nothing to indicate that its subsequent acquisition was then contemplated. No intention to include this after-acquired stock in the bequest is found.

Cases cited by counsel for the beneficiary of the special bequest do not support their contention that the preferred stock in controversy is to be treated as a part of her legacy. *Bireley's Administrators* v. *U. L. Church in America*, 239 Ky., 82, 39 S. W., 2d., 203, is authority only for the rule already stated in this opinion that the exchange of shares of stock bequeathed for an increased number of shares issued in lieu thereof in a corporate reorgnization does not bring ademption but permits the legacy to take effect. And *Emery* v. *Wason*, 107 Mass., 507 already cited in another connection, is not more in point. There, the testator when he made his will owned two hundred shares of Boston & Albany Railroad stock and had subscribed for ninety new shares and had paid one half of the amount due therefor. And it was held that the stock subscribed for, in so far as the construction of his will was concerned, belonged to him as fully as that which had been actually issued and passed to his legatee under a bequest of "the income of my Boston & Albany Railroad stock." If the testatrix in the instant case had subscribed for new preferred stock in the Houlton Trust Company before she made her will, it might well be that her subscription and rights accruing under it could be viewed as within a bequest of "my stock" in the bank. That question can not be here decided.

We must, therefore, instruct the administrator d. b. n. c. t. a., of Hannah Edblad's will that it is his duty to deliver to the legatee, Nell M. Chadwick, the forty shares of new common stock issued to his testatrix' estate in kind and free from charges or obligations.

The sixty-nine shares of preferred stock which is held by her personal representative by virtue of her subscription as a depositor must pass to her residuary legatee subject to her debts and proper administration charges and the payment of general legacies. *Matter of Brann*, 219 N. Y., 264, 114 N. E., 404.

The case is remanded for entry of a decree in accordance with this opinion. And proper costs and counsel fees may be allowed all parties.

So ordered.

STATE OF MAINE *vs.* WILLIAM J. MACKESY ET AL.

Androscoggin. Opinion, June 30, 1938.

EXCEPTIONS. CRIMINAL LAW.

Exceptions, as to merits of which members of the Law Court are evenly divided in opinion, must be overruled.

On exceptions. Respondents were convicted of criminal conspiracy in the Superior Court for the County of Androscoggin. Exceptions overruled. Judgment for State. Case fully appears in the opinion.

Frank T. Powers, County Attorney for State.

A. Raymond Rogers,

Sumner Marcus,

Ernest L. Goodspeed, for defendant.

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

DUNN, C. J. The indictment in this case was for criminal conspiracy. The charge was set forth, under the statute, R. S., Chap. 138, Sec. 26, in substance, that eighteen persons, severally named, of whom three do not appear to have been apprehended, and still other persons, the latter averred to the grand jurors unknown, did

conspire and agree together, with the fraudulent and malicious intent wrongfully and wickedly to injure the business of eighteen shoe manufacturing corporations, some at Lewiston, some at Auburn, cities directly opposite on banks of the same river.

Prior to the selection of the jury, the county attorney was permitted to amend the indictment by striking out so much thereof as pertained to all but one of the corporations, namely, the Charles Cushman Company. Concerning the others, there was refusal to proceed with the action.

All pleas recorded were not guilty.

The issue was the existence of a malicious conspiracy to interfere with the business of the Charles Cushman Company, and cast a loss upon it.

Nolle prosequi was, during the progress of the case, entered as to one respondent; two were freed by direction of the trial judge. The jury found three innocent; they were discharged from custody. Nine, the present exceptants, were adjudged guilty, and sentenced to jail.

The case is forward on exceptions. The exceptions are numbered in the bill from one to thirteen, both inclusive.

Any discussion of the objections taken to the directions or decisions of the justice, delivered during the trial of the case, and the exceptions taken thereto, would tend to no essentially useful purpose.

As to the second, sixth, eighth, ninth, tenth, eleventh, and thirteenth exceptions, this court (the full personnel sitting at the argument,) is unanimous that the same are meritless, and should be and they are hereby overruled. The majority of the members of the court are of the opinion that the first, fourth and fifth exceptions are not sustainable. These are therefore overruled. Exceptions three, seven and twelve are overruled by an evenly divided court.

Exceptions overruled.
Judgment for the State.

CHARLES CUSHMAN CO. ET AL. *vs.* WILLIAM J. MACKESY ET AL.

VENUS SHOE MANUFACTURING CO. *vs.* WILLIAM J. MACKESY ET AL.

Androscoggin. Opinion, June 30, 1938.

CONTEMPT PROCEEDINGS. INJUNCTIONS. COURTS.

Want of jurisdiction is fatal in every stage of a cause and may be brought to the attention of the court at any time, although the want of jurisdiction is not specifically set forth in the bill of exceptions.

The court has no equitable jurisdiction except in so far as it may have been conferred by legislative enactment.

Contempts are of two kinds. There are those which occur in the presence of the court, which tend to bring the court into disrepute and interfere with the orderly conduct of judicial proceedings; and there are those, of which the court does not have first-hand information, for example those arising out of the failure to obey some order which the court has lawfully made. The procedure for punishment in the two cases is different. In the first the court may forthwith on its own initiative punish the offender; in the second, the matter must be brought to the court's attention by some formal pleading and sentence may be imposed only after a hearing.

The petition or complaint on which the process is issued to bring a contemnor before the court should be under oath or supported by affidavit.

The requirement of the statute that the complaint, in contempt proceedings in disregarding or disobeying court's process, must be verified is jurisdictional and lack of verification is fatal as jurisdiction can not be conferred even by consent of the parties.

On exceptions by respondents after conviction and sentence in contempt proceedings for violating an injunction. Contempt proceedings dismissed for lack of verification. Case fully appears in the opinion.

Skelton & Mahon,

Webber & Webber,

Berman & Berman (Lewiston, Maine), for plaintiffs.
A. Raymond Rogers,
Ernest L. Goodspeed, for defendants.

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

THAXTER, J. This case arises out of petitions charging the respondents with contempt of court.

On April 9, 1937 two separate bills in equity were filed in the Supreme Judicial Court in the County of Androscoggin against certain labor organizers, some of whom were officials of the United Shoe Workers of America, an affiliate of the Committee for Industrial Organization. The plaintiffs in these bills were various shoe manufacturers located in the cities of Lewiston and Auburn who sought injunctions both temporary and permanent against the continuation of a strike alleged to have been called by the defendants and against all activities in support of such strike. On April 20th, after an extended hearing on the consolidated bills, a temporary injunction was issued declaring the strike illegal; and the defendants, their agents, servants, attorneys and representatives, were enjoined until further order of court from maintaining, encouraging, aiding and abetting said strike and from inducing, advising, counselling, or aiding the employees of the plaintiffs to continue it. Coercion, intimidation and all forms of picketing were forbidden. On April 22nd, a petition for contempt was filed by the plaintiffs against six of the defendants mentioned in the original bills, and on April 23rd a second petition was filed against Sidney Grant, an attorney who had appeared for the defendants at the injunction hearing. These two petitions prayed that each of the respondents be adjudged in contempt on the ground that each of them in violation of the injunction had addressed meetings urging the continuation of the strike, and that three of them, Hapgood, Mackesy, and Henry, had directed picketing and had incited a riot. On May 4th a hearing opened before a jury empanelled in accordance with the provisions of P. L. 1933, Chap. 261. The respondents were found guilty and sentenced to six months in jail.

R. S. 1930, Chap. 91, Sec. 67, in accordance with which the contempt petitions purport to have been filed, provides that "No ap-

peal lies from any order or decree for such punishment, nor shall exceptions thereto be allowed, save upon questions of jurisdiction." Exceptions were taken and allowed by the court, if allowable. Certain of these question the jurisdiction of the court. The exceptions were argued at the September 1937 Term of the Law Court. The record and the transcript of the evidence required by the presiding Justice to be a part of the bill were only partially included, and the exceptions were dismissed in order that the omission might be supplied. *Charles Cushman Co. et al.* v. *Mackesy et al; Venus Shoe Mfg. Co.* v. *Same*, 135 Me., 294, 195 A., 365. The corrected record is now before us.

The respondents claim that the court was without jurisdiction to render any judgment against them because the contempt petitions on which the proceeding was founded were not under oath. This was a defect which was not called to the attention of the presiding Justice and possibly was not noticed by respondents' counsel until after the hearing had ended. In fact it is not set forth specifically in the bill of exceptions. This is not, however, of importance for a want of jurisdiction is fatal in every stage of a cause and may be brought to the attention of the court at any time. *Darling Automobile Company* v. *Hall et al.*, 135 Me., 382, 197 A., 558; *Powers* v. *Mitchell*, 75 Me., 364. The petition against Sidney Grant was not even signed by a party but only by the attorneys for one of the parties. The procedure authorizing punishment for contempt for disobedience of an injunction is governed by statute. R. S. 1930, Chap. 91, Sec. 67. This reads as follows:

> "Whenever a party complains in writing, and under oath, that the process, decree, or order of court, which is not for the payment of money only, has been disregarded or disobeyed by any person, summary process shall issue by order of any justice, requiring such person to appear on a day certain and show cause why he should not be adjudged guilty of contempt, and such process shall fix a time for answer to the complaint, and may fix a time for hearing on oral testimony, depositions, or affidavits, or may fix successive times for proof, counter proof, and proof in rebuttal, or the time for hearing and manner of proof may be subsequently ordered upon the return day or

thereafter. The court may, for good cause, enlarge the time for such hearing. If the person so summoned does not appear as directed, or does not attend the hearing at the time appointed therefor, as enlarged, or if, upon hearing, he is found guilty of such disregard or disobedience, he shall be adjudged in contempt, and the court may issue a capias to bring him before it to receive sentence, and may punish him by such reasonable fine or imprisonment as the case requires. The court may allow such offender to give bail to appear at a time certain, when such punishment may be imposed, if he continues in contempt. But when a second time found guilty of contempt in disregarding or disobeying the same order or decree, no bail shall be allowed. When such person purges himself of his contempt, the justice may remit such fine or imprisonment or any portion thereof. No appeal lies from any order or decree for such punishment, nor shall exceptions thereto be allowed, save upon questions of jurisdiction, nor in any case shall such exceptions suspend the enforcement of any such order or decree, unless the court so directs."

This provision was first enacted in 1881, P. L. 1881, Chap. 68, Sec. 23, and has come down without change through the various revisions of the statutes in 1883, Chap. 77, Sec. 33, 1903, Chap. 79, Sec. 36, 1916, Chap. 82, Sec. 36, and 1930, Chap. 91, Sec. 67. It has been amended by the provisions of P. L. 1933, Chap. 261, but not with respect to the steps to be taken to initiate the proceedings.

At the time that Maine became a separate state in 1820, the Supreme Judicial Court was not granted general equity powers. Jurisdiction was given in certain specified cases. From time to time this was enlarged; but it was not until 1874 that full equity powers were granted. Our Court has consistently held that it has no equitable jurisdiction except in so far as it may have been conferred by legislative enactment. *Tuscan* v. *Smith*, 130 Me., 36, 153 A., 289.

In 1881, after the exercise by the court of this broad authority for a period of seven years, it was apparently felt advisable by the legislature to specify in detail the rules to govern the use of it. These were set forth with great clearness in the statute enacted at

that time. This was entitled "An Act to Regulate the Practice in Equity Proceedings." It was, however, something more than a direction or guide on procedural problems. This act was incorporated in the revision of the statutes in 1883 under the heading "Equity Powers" in that portion of Chap. 77 entitled "Supreme Judicial Court. Organization. Jurisdiction and Powers." R. S. 1883, Chap. 77. With minor modifications and some additions the provisions of this law are now incorporated in R. S. 1930, Chap. 91, relating in part to the equity powers of the Supreme Judicial and Superior Courts.

The framers of the original act, realizing that the authority to punish for contempt was a necessary attribute of a court invested with equity jurisdiction, inserted Section 23 to define and to limit the manner in which such power should be exercised.

The power of courts to punish for contempt has existed from earliest times. It was useless to establish courts unless they had authority to punish acts which might interrupt the orderly course of judicial procedure; and it was likewise futile to confer jurisdiction to issue orders or injunctions without the power to enforce obedience to such decrees.

Contempts are of two kinds. There are those which occur in the presence of the court, which tend to bring the court into disrepute and interfere with the orderly conduct of judicial proceedings; and there are those, of which the court does not have first-hand information, for example those arising out of the failure to obey some order which the court has lawfully made. The procedure for punishment in the two cases is different. In the first the court may forthwith on its own initiative punish the offender; in the second the matter must be brought to the court's attention by some formal pleading and sentence may be imposed only after a hearing. *Androscoggin & Kennebec Railroad Company* v. *Androscoggin Railroad Company*, 49 Me., 392. Contempts of this latter kind are sometimes divided into two classes, depending on whether the sentence imposed is punitive—to vindicate the authority of the court, or remedial—to compel obedience to a decree. *Gompers* v. *Buck's Stove & Range Company*, 221 U. S., 418, 31 S. Ct., 492. In this jurisdiction the distinction is not of importance, for the procedure in both cases, in so far as equity decrees are concerned, is governed

by the statutory provisions above mentioned. *Cheney* v. *Richards*, 130 Me., 288, 155 A., 642.

From earliest times courts have consistently required that the petition or complaint on which the process is issued to bring a contemnor before the court should be under oath or supported by affidavit. Blackstone's Commentaries, 1807 Ed., Vol. 4, 286. Judge Daly, in *The People ex rel, Larocque* v. *Murphy*, 1 Daly, 462, 467, points out that the principle, on which such practice is based, is as old as the reign of Edward III. See also *Murdock's Case*, 2 Bland (Md.), 461, 486; *Ex parte Biggers*, 85 Fla., 322, 341, 95 So., 763; *Ex parte Duncan*, 78 Tex. Crim. App., 447, 182 S. W., 313, 2 A. L. R. 222. One of the older encyclopaedias, 4 Enc. Pl. & Pr., 779, summarizing the law as it existed more than forty years ago, says:

> "The almost universal method by which contempt proceedings are begun is by an affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential."

In a note to *Ex parte Duncan*, supra, 2 A. L. R., 225, we find the following statement:

> "It is well settled that cases of contempt not committed in the immediate view or presence of the court must be brought to the attention of the court by a statement of the facts by persons who witnessed them or have knowledge of them (see R. C. L. tit. Contempt, p. 531), and the rule seems to be uniformly recognized that this statement must be made under oath, either in the form of an affidavit or by some other sworn statement."

There can be no doubt that the purpose of our statute is declaratory of what had been the practice from earliest times.

The question presented by the arguments in this case is whether the requirement of the statute that the complaint must be verified is jurisdictional. We must hold that it is and if so the defect is fatal, for jurisdiction can not be conferred even by consent of the parties. A waiver is unavailing. *State* v. *Bonney*, 34 Me., 223; *Milliken* v.

Morey, 85 Me., 340, 27 A., 188; *Darling Automobile Company* v. *Hall et al.*, supra.

No Maine case has been cited dealing precisely with the point here raised. By analogy, however, considerable light is thrown on the problem. Thus it has been held that an indictment not certified as "a true bill" is void. *Webster's Case*, 5 Me., 432. The same result follows if an indictment is not found upon oath. *State* v. *McAllister*, 26 Me., 374. A warrant for arrest is void without a seal. *State* v. *Drake*, 36 Me., 366. See also *State* v. *Smith*, 99 Me., 164, 165, 58 A., 779. Likewise a poor debtor proceeding is void, if the citation to the creditor bears no seal. *Miller* v. *Wiseman*, 125 Me., 4, 130 A., 504.

In *Pinkham* v. *Jennings*, 123 Me., 343, 122 A., 873, a writ had neither a seal nor the signature of the clerk. The plaintiff claimed that the defendant by pleading the general issue had waived the defects. It was held that there was no jurisdiction and that want of jurisdiction could not be waived. If proceedings defective in such particulars are void, does not the same result follow in the case now before us?

The exact point in issue has been passed on by many courts and the overwhelming weight of authority is that the failure to verify a complaint is fatal. There is nothing before the court.

In *Hurley* v. *Commonwealth*, 188 Mass., 443, 74 N. E., 677, the respondent was before the court on a complaint for contempt made by a prosecuting officer of the court. It was held that such a complaint should be verified, but that a formal presentation by a sworn prosecuting officer was sufficient verification to justify judicial action. The court suggests, however, that this would only be the case "in the absence of a statute or of an established rule of law requiring that in all cases the complaint itself shall be sworn to." Such a statute we have in Maine.

The case of *Robertson* v. *State*, 20 Ala. App., 514, 104, So., 561, is in some respects very similar to that before us. The petitioner was cited for contempt of an equity decree ordering him to pay alimony. The affidavit annexed to the petition alleged the facts to be true according to the best of deponent's "knowledge, information and belief." The court, deciding that this form of affidavit was insufficient, enters into a lengthy discussion of the authorities and holds

that a contempt complaint, unverified or not accompanied by an affidavit in proper form, gives to the court no jurisdiction to hear the case. On a petition for habeas corpus, the petitioner was discharged.

The case of *Ex parte Gunnels*, 25 Ala. App., 577, 151 So., 605, is to the same effect. The court says, page 581, 151 So., page 608, "We hold that complainant's verification of her petition in the contempt proceedings instituted in the court below was insufficient, and that the same did not invest the court below with jurisdiction to render a decree, or to pronounce a judgment adjudging the respondent in contempt."

In re McCarty, 154 Cal., 534, 98 P., 540, is a similar case. The court says, page 539, 98 P., page 542: "Where the contempt is a constructive one, in order to invest the court with jurisdiction to proceed to punish for it, it is essentially a prerequisite to the exercise of such jurisdiction that an affidavit setting forth the fact of noncompliance with the order should have been presented to the court."

In *Ex parte Duncan*, supra, the court holds that unless a petition for contempt is sworn to, the court has no jurisdiction.

In re Emery T. Wood, 82 Mich., 75, 45 N. W., 1113, was a case of a habeas corpus petition to secure the release of one who had been committed for contempt. There was no affidavit accompanying the complaint setting forth the contempt. The court said, page 83, 45 N. W., page 1116: "In the case under consideration, the fact was not made to appear by affidavit upon which the alleged contempt proceedings are predicated; and the court therefore obtained no jurisdiction either to order Mr. Wood to show cause, or to cause him to be arrested for the misconduct alleged. A person can not be deprived of his personal liberty except in the mode pointed out by law."

Batchelder v. *Moore*, 42 Cal., 412, came before the court on certiorari to review a commitment for contempt. The California statute provided that when a contempt was not committed in the presence of the court, an affidavit setting forth the contempt should be presented. The court held that without a proper affidavit there was no jurisdiction. The court said, page 414: "The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be

upheld, except under the circumstances and in the manner prescribed by law."

State ex rel Conn, 37 Ore., 596, 62 P., 289, is to the same effect as the preceding case. The court said, page 599, 62 P., page 290: "Indeed, a proper regard for the liberty of the citizen forbids any proceeding by which he may be deprived of his liberty without the information furnished by such an affidavit, and so the courts hold."

The opinion in *The People ex rel, Larocque* v. *Murphy*, supra, states that, if there is no affidavit accompanying the complaint for contempt, the court is without jurisdiction. The court said, pages 467–468: "When the misconduct is not committed in the presence of the Court, the statute requires due proof by affidavit of the facts charged. This is requisite to give the Court jurisdiction to act in the matter of a contempt alleged to have been committed out of its presence; and without this, a court has no authority to order a party to be arrested and brought before it, and to adjudge upon the matter of the alleged contempt. . . . The attachment was therefore issued without due proof by affidavit, and was, together with the commitment founded upon it, entirely without authority. It may be said that sufficient appeared in the defendant's answers to the interrogatories, without resorting to the affidavits upon which the attachment was issued, to show that he had been guilty of a contempt. I doubt if his answers to the interrogatories make out a case of intentional disobedience to the order of the Court; or if they do, I doubt if that would help the matter. It is sufficient to say that he was arrested, brought before the Court, and compelled to answer interrogatories without any authority in law, and as the subsequent commitment necessarily relates back to, and includes, the facts and allegations which constituted the ground for his arrest in the first instance, the one can not be severed from the other. The proceeding, in its inception, was void for the want of jurisdiction. (*Denning* v. *Corwin*, 11 Wend., 647), and as the commitment was founded upon the proceeding, it was equally void."

It would add nothing to discuss the large number of other cases which affirm this same doctrine. A few of them we merely cite. *State* v. *Harvey*, 16 N. D., 151, 112 N. W., 52; *Denny* v. *State*, 203 Ind., 682, 182 N. E., 313; *State* v. *Gallup*, 1 Kan. App., 618, 42 P., 406; *In re Eastern Idaho Loan & Trust Co.*, 49 Ida., 280, 288 P., 157;

Herdman v. *State*, 54 Neb., 626, 74 N. W., 1097; *Belangee* v. *Nebraska*, 97 Neb., 184, 149 N. W., 415; *Freeman* v. *City of Huron*, 8 S. D., 435, 66 N. W., 928; *In re Solberg*, 51 S. D., 246, 213 N. W., 9; *In re Roth*, 3 Cal. App. (2d), 226, 39 P., 2d., 490; *Kirby et al* v. *Chicago, Rock Island & Pacific Railway Company*, 51 Colo., 82, 116 P., 150; *State, ex rel Gemmell, Relator* v. *Clancy, Judge Respondent*, 24 Mont., 359, 61 P., 987; *Ex Parte Hedden*, 29 Nev., 352, 90 P., 737; *State* v. *Blackwell*, 10 S. C., 35; *Wilson* v. *The Territory of Wyoming*, 1 Wyo., 155; *State* v. *Driscoll*, 151 Ore., 363, 50 P., 581. See also *Kelly* v. *United States*, 250 Fed., 947; *Campbell* v. *Judge of Recorder's Court*, 244 Mich., 165, 221 N. W., 138.

Counsel for complainants argue that the court had jurisdiction because of the inherent power of courts at common law to punish for contempt. There is no doubt of this power but it must nevertheless be exercised in conformity with those rules which from time immemorial have been followed and are now embodied in our statute governing the procedure in such cases. Nor does it make any difference that in all the subsequent proceedings in this case the provisions of the statute may have been complied with. The oath called for here was not as counsel claim merely a procedural requirement which could be waived. It was essential to confer jurisdiction.

Counsel cite the case of *Clark* v. *United States*, 61 F. (2d), 695. This is not an authority that a statutory requirement governing the initiation of contempt proceedings can be waived. The opinion contains a general discussion of the sufficiency of the complaint and holds that, if it gives notice to the respondent of the charge, it is sufficient even though it may not have the technical accuracy of an indictment.

The case cites the well-known comment of Chief Justice Taft in *Ex parte Grossman*, 267 U. S., 87, 117, 45 S. Ct., 332, 336, to the effect that: "Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction." That all such safeguards are not granted to one charged with contempt does not mean, however, that none of them are. Rather should it be true that for that very reason there should be a scrupulous adherence to those require-

ments which are designed to protect one accused as a contemnor. As a matter of fact, this was the very bearing of the Chief Justice's statement, which was given as a reason why the President should have the pardoning power in cases of contempt.

Counsel cite but three cases which seem to touch the point at issue. *People ex rel Barnes*, 147 N. Y., 290, 295, 41 N. E., 700; *Aaron* v. *United States*, 155 Fed., 833; *Sona* v. *Aluminum Casting Co.*, 214 Fed., 936. The opinion in the first contains a rather casual dictum that the want of a verification on a complaint for contempt can be waived. The second is a decision of the Circuit Court of Appeals of the Eighth Circuit to the same effect. It is based on the dictum in the Barnes case, *supra*, and on three citations not one of which sustains the point. The third case is a *per curiam* decision of the Circuit Court of Appeals for the Sixth Circuit.

In any event these cases are opposed to the overwhelming weight of authority which holds that the want of an oath on a complaint for contempt is a matter which goes to the jurisdiction, and not one of them so far as the opinions show involved a statute which as in Maine expressly provides for a complaint under oath.

That the complaints in the case before us were not sworn to was not brought to the attention of the justice who heard the case; and the defect was not commented on until the argument before the Law Court. That fact does not, however, alter the result. The error is not technical. It is fundamental; for no man, however reprehensible his conduct, may be deprived of his liberty except in accordance with the law. The Court was without jurisdiction to impose sentence on the respondents and the entry must be

Contempt proceedings dismissed for lack of verification.

RUTH A. SYMONDS *vs.* FREE STREET CORPORATION.

Cumberland. Opinion, July 14, 1938.

NEGLIGENCE. LANDLORD AND TENANT. EXCEPTIONS.

Where defendant proceeds on exception to the refusal of the presiding Justice to direct a verdict for the defendant, and also on a motion for a new trial, and the motion raises the same question as the exception, the exception is regarded as waived.

Defendant would be liable for the intervening act of a third person if his employee foresaw, or ought to have foreseen, that the third person might start elevator, injuring plaintiff, and if, by the exercise of reasonable care, such wrongful act could have been prevented.

Question of employee's negligence is one of fact for the jury.

On exception to the refusal of the presiding Justice to direct a verdict for the defendant, and on a motion by the defendant for a new trial. Exception overruled. Motion overruled. Case fully appears in the opinion.

Berman & Berman (Portland, Maine), for plaintiff.

Robinson & Richardson, for defendant.

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

THAXTER, J. After a verdict for the plaintiff this case is before us on an exception to the refusal of the presiding Justice to direct a verdict for the defendant and on a motion by the defendant for a new trial. As the motion raises the same question for our consideration as does the exception, the exception is regarded as waived.

The plaintiff, who was a tenant in an office building owned and operated by the defendant in Portland, was injured by the sudden starting of the elevator while she was in the act of alighting at the

first floor. The elevator was in the control of an employee of the defendant by the name of Shea, of the age of nineteen, whose competency for the particular work is not questioned. When the accident happened and for a time prior thereto, there was in the elevator a boy of the age of approximately twelve years, who had been waiting to take a music lesson in one of the offices in the building. He had been riding in the elevator and Shea had been showing him how to run it. In fact Shea had allowed him to operate it. The elevator was four feet ten inches one way, and four feet two inches the other. The operating lever was about three feet and a half from the outside edge of the door. The power remained on only as this lever was held to one side or the other of the vertical position. Receiving a signal, Shea ran the elevator with the young boy in it to the third floor where the plaintiff got on. On arriving at the first floor he took his hand off the control lever and opened the door for the plaintiff to alight. As she was in the act of stepping out, the other boy grasped the lever and threw on the power. As the elevator started, the plaintiff was thrown heavily to the floor of the building and received the injuries for which she now seeks compensation.

The essential facts are not in dispute. The defendant claims that as a matter of law the operator of the elevator was not negligent, because the accident was due to the intervening act of a third person for which the defendant was in no way responsible.

The circumstances under which a defendant will be held liable in spite of or because of the intervening act of a third person were recently considered by this Court. *Hatch* v. *Globe Laundry Co.*, 132 Me., 379, 171 A., 387. The rule laid down in that case as applied to the case now before us would seem to be that this defendant would be liable if the operator of its elevator foresaw, or ought to have foreseen, that the young boy might do what he did in this instance, and if, by the exercise of reasonable care, such wrongful act could have been prevented. The determination of this question was one of fact for the jury. It is not necessary to discuss again the long line of authorities bearing on this subject. Such differences as seem to arise are not so much with the rule as with its application.

Counsel for the plaintiff call attention to the case of *Jones* v. *The Co-Operative Association of America*, 109 Me., 448, 84 A., 985, which seems decidedly in point. The facts of the case are al-

most identical with those before us except that the boy operating the elevator was fourteen years and five months old, seven months below the age required by the statute for a boy so employed. The negligence charged was the employing of an inexperienced boy of immature years. Counsel for the defendant claim that this fact distinguishes that case from this. We can not see why. The court said, pages 451–452: "A boy of more mature years and judgment might have anticipated that it would be necessary to guard the lever of the elevator with vigilance in order to prevent the mischief which might be caused by an intermeddling playmate who had shown an eager desire to obtain control of the lever and operate the elevator himself." If the defendant in control of the building was in that case responsible for the failure to employ an operator for its elevator of sufficient maturity to anticipate the intermeddling by the other boy, does it not inevitably follow that it would have been responsible on the doctrine of *respondeat superior* for the negligence of a mature boy in failing to anticipate what he should have foreseen?

A case which shows the same general trend on the part of this Court is *Clapp* v. *Cumberland County Power & Light Co.*, 121 Me., 356, 117 A., 307, which holds that it was a question of fact for a jury whether the defendant in operating a street car was responsible for the failure to protect a passenger in alighting against the consequences of another passenger's wrongful act in giving the signal to the motorman to start the car.

The evidence in the present case indicates that the operator of the elevator took no precautions as he relinquished control of the lever to guard it, nor did he give any warning to the young boy who was with him as to the danger of interference with it. Whether he should have anticipated such intermeddling and was negligent in not taking precautions against it were questions of fact for the jury.

Exception overruled.
Motion overruled.

RALPH O. DALE *vs.* CITY OF BATH.

Sagadahoc. Opinion, July 30, 1938.

MUNICIPAL CORPORATIONS. CONTRACTS.

Under R. S. 1930, *Chap.* 5, *Sec.* 1, *a town has authority to appoint an attorney or an agent for a limited time, or for a special purpose, without thereby establishing an office which must always be kept filled.*

An attorney does not by reason of his employment become a subordinate officer or agent entitled to continue in office beyond the time when the services which he was employed to carry on have been concluded.

A contract can be implied only by proof that the particular services were rendered at the request of those having authority to employ the plaintiff or that there was a ratification by them of what he may have done.

On exception. Plaintiff seeks recovery of salary as city solicitor of the City of Bath for the year 1937–1938. Case heard before Justice presiding at the January Term of the Superior Court in Sagadahoc County. Decision for defendant. Plaintiff filed exception. Exception overruled. Case fully appears in the opinion.

John P. Carey, for plaintiff.

Edward W. Bridgham,

Harold J. Rubin, for defendant.

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

THAXTER, J. The plaintiff in one count of his declaration seeks to recover $300 as salary as city solicitor of the City of Bath for the year 1937–1938. In another count based on a *quantum meruit* he claims the same amount for legal services which he alleges that he performed for the city during that year. The case was heard by the Justice presiding at the January Term of the Superior Court in Sagadahoc County who found for the defendant. The case is before this Court on an exception to that ruling.

The plaintiff on April 1, 1936, was duly elected for the current year city solicitor of the City of Bath by a joint convention of the board of aldermen and the common council. The succeeding year no one was elected to take his place.

The charter of the City of Bath, Priv. & Spec. Laws 1847, Chap. 5, Sec. 4, as amended, contains the following provisions:

> "But all elections of officers by the City Council shall be by joint ballot of the two boards in convention. The City Council shall annually, on the third Monday in March, or as soon thereafter as conveniently may be, elect and appoint all subordinate officers and agents for the city for the ensuing year. All officers shall be chosen and vacancies supplied for the current year, except as herein otherwise directed. All the said subordinate officers and agents shall hold their offices during the ensuing year and until others shall be elected and qualified in their stead, unless sooner removed by the City Council."

The plaintiff contends that he was a subordinate officer or agent of the city and as such held office until his successor was elected and qualified in his stead and was, therefore, entitled to his salary for the succeeding year.

By the terms of Section 4 of the charter of the City of Bath the powers which had been vested in the inhabitants of the town became vested in the mayor and aldermen and the common council. One of these general powers which then existed in towns, R. S. 1841, Chap. 5, Sec. 23, and still does exist, R. S. 1930, Chap. 5, Sec. 1, was that of "appointing attorneys and agents."

The charter provision relating to the holding over of subordinate officers and agents must be read in the light of the end sought to be gained; and it must be that a town has authority to appoint an attorney or an agent for a limited time or for a special purpose without thereby establishing an office which must always be kept filled. An attorney does not by reason of his employment become a subordinate officer or an agent entitled to continue in office beyond the time when the services which he was employed to carry on have been concluded.

It is not necessary to define just what officials may come under the designation of "subordinate officers" or "agents" who hold over.

It is sufficient to say that the plaintiff because of his appointment as city solicitor was not one. The office is not created by the city charter, and there is no mention of it in the ordinances passed under the authority given by the charter.

The plaintiff can not recover on a *quantum meruit*. Such legal work as he may have done for the city after March 1937 was performed without any express authorization from those having the right to employ him. A contract can be implied only by proof that the particular services were rendered at the request of those having authority to employ the plaintiff or that there was a ratification by them of what he may have done. *Van Buren Light & Power Co.* v. *Inhabitants of Van Buren*, 116 Me., 119, 100 A., 371. The presiding Justice in finding for the defendant decided against the plaintiff on these points. There was evidence to support such ruling.

Exception overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

LENA PARROTT *vs.* CHRISTINE HOMER.

Kennebec County. Decided March 10, 1937. In this action, the jury awarded damages to the plaintiff for the injuries she received while riding as a guest passenger in the defendant's automobile. The defendant files a general motion for a new trial.

There is evidence in the case tending to show that as the defendant drove her car up Western Avenue in Augusta, although she saw and called her passenger's attention to the fact that an automobile was coming out of Chapel Street, an intersecting way, and was apparently headed directly across Western Avenue, she accelerated the speed of her engine in an attempt to get through the intersection first, the cars came together, and the plaintiff was injured. Apparently disinterested and credible persons who saw the collision testify that the automobiles entered the intersection at practically the same time.

It can not be held that on this record the jury were manifestly wrong in finding that the defendant failed to exercise that mutual forbearance in driving into and through this intersection, which the law imposes upon all travellers upon the highways. Although through the fault of the other driver a collision was indicated, it remained the duty of the defendant to seek to avoid that unfortunate result, even to the extent of stopping and waiting.

The jury being warranted in finding that the negligence of the defendant was a contributing cause of the plaintiff's injuries, it is no defense to the action that the driver of the other car was also negligent. Contributory negligence on the part of the plaintiff as a

matter of law is not disclosed by the evidence. The damages awarded are not excessive. Motion overruled. *Locke, Campbell & Reid*, for plaintiff. *Butler & Butler*, for defendant.

ELMER W. NICKERSON *vs.* JOSEPH BARBER.

Androscoggin County. Decided April 30, 1937. Action on the case, for damages incurred in collision of automobiles, comes to this Court by bill of exceptions to acceptance of the report of the Referee appointed by Rule of Court.

At the time of reference, the parties to the suit specifically reserved the right to except only to findings as to questions of law.

Facts as to the collision and attendant circumstances, as found by the Referee are as follows: The time was about nine o'clock A. M., November 12, 1935, when, because of rain and fog conditions, visibility was poor.

Plaintiff, with his employee and witness, Foster, was driving his automobile, at fifteen to eighteen miles per hour because of "bad driving conditions," northerly along the easterly side of Bates Street in the City of Lewiston, a street thirty feet wide.

Defendant's car was parked on the easterly side of said Bates Street, the second in a file of three cars so parked, and twenty or more feet in the rear of the most northerly car, before the collision, and plaintiff and his companion Foster saw defendant's car so parked when they were from thirty-five to fifty feet southerly therefrom; saw no sign that defendant's car was about to be started; the next time they saw defendant's car was coincident with the contact between the front mudguards.

"Defendant had no actual knowledge of the approach of the car from the rear and that such car gave no warning of its approach.

"Without any signal of hand or horn the middle car started out and the two came together. . . . The defendant did not see the approaching car from the rear . . . did not claim that his area of

vision as he looked back was more than thirty feet. He must be held to know that under such circumstances a car approaching on its own right hand side of the road at 18 miles an hour could reach his car almost within a second. The defendant was clearly negligent in undertaking to drive out into the lane of traffic moving in the same direction without using greater precautions."

The Referee further found that plaintiff was not guilty of contributory negligence.

Each finding of the Referee is a finding of fact, and it is not to be said, upon this record, that such findings are not supported by evidence. Exceptions overruled. *Samuel O. Foss*, for plaintiff. *Seth May*, for defendant.

ELEANOR BOYD HYDE, APPELLANT

vs.

DECREE, JUDGE OF PROBATE.

Sagadahoc County. Decided June 28, 1937. The Court being equally divided, the exceptions must be overruled. It is so ordered. *Mayo A. Shattuck*, for appellant. *Ernest L. Goodspeed*, for appellee.

J. WALLWORTH'S SONS, INC.

vs.

DANIEL E. CUMMINGS CO.

Somerset County. Decided July 24, 1937. The report of this case is discharged, on mutual request of counsel, that the present record may be supplemented, in the court below, by the introduction into the evidence of such statute provisions as, in the sister

state of Pennsylvania, relate to contracts to sell and sales of personal property. It is so ordered. *Bernard Gibbs*, for plaintiff. *James H. Thorne*, for defendant.

STATE OF MAINE *vs.* EDWARD J. BECHARD.

Kennebec County. Decided November 19, 1937. For the reason that the record here presented does not disclose the procedure which brought this criminal prosecution from the Municipal Court of its origin to the Superior Court, whence the case was reported to the Law Court for determination, such report is discharged. Report discharged. *Francis Bate*, County Attorney, for State. *Merrill & Merrill*, for respondent.

STATE OF MAINE *vs.* FERNE BECKWITH,

WHOSE FULL, TRUE AND CORRECT NAME IS TO YOUR GRAND JURORS UNKNOWN.

Penobscot County. Decided January 4, 1938. Indictment for soliciting another to commit the crime of arson. On motion to quash, the presiding Justice reported the question of the sufficiency of the indictment to the Law Court, but without record that the parties consent to the report and stipulate that decision here made may in one alternative at least supersede further proceedings. The report must be discharged. So ordered. *John Quinn*, County Attorney, for State. *Locke, Campbell & Reid*, for respondent.

FREDERICK T. LARRABEE *vs.* ELMER LOVELY.

Hancock County. Decided January 14, 1938. Exception herein was taken to grant of non-suit, on motion of defendant, at conclusion of testimony of plaintiff.

The action, in a plea of the case, arose on a crop mortgage of potatoes to be grown and delivered by Linwood Buchanan, in Presque Isle, Aroostook County, to Elmer Lovely, of that town, in the season of 1936.

The mortgage recited, with other elements, Buchanan's agreement to deliver to Lovely between the fifteenth of September and the fifteenth of October, 1936, 361 barrels, U. S. grade Number 1, Green Mountain potatoes; was executed by the parties thereto, on June 8, and assigned, for a valid consideration, to the plaintiff, on July 16, of that year.

After the execution of the assignment, plaintiff paid Lovely $361 and gave his note for a like amount, securing the payment of the note by a chattel mortgage of the potatoes.

Buchanan delivered to Lovely at digging time, of the variety and quality prescribed by the terms of the mortgage, about 203 barrels of potatoes and no more.

The testimony contains no evidence of guaranty in writing on defendant's part.

The pleadings set up the statute of frauds.

When plaintiff rested his case there was no question for jury consideration. Exceptions overruled. *Blaisdell & Blaisdell, Frederick T. Larrabee*, for plaintiff. *Jasper H. Hone, Hodgdon C. Buzzell*, for defendant.

STATE OF MAINE *vs.* JOHN LAWRENCE.

Somerset County. Decided January 21, 1938. On exception to a ruling by a Justice of the Superior Court denying the respondent's motion for a mistrial. The prosecution originated by complaint and warrant before a trial Justice. The record failing to

show the rendition of any judgment by the trial Justice and the taking and perfection of any appeal to the Superior Court, its jurisdiction is not made to appear. *State* v. *Bechard*, 135 Me., 510, 195 A., 202; 4 C. J. S., Sec. 692, page 1171. For that reason, the entry must be, Exception dismissed. *Clayton E. Eames*, County Attorney, for State. *William H. Niehoff*, *Daniel Steward*, for respondent.

MARY PRINGLE, PETER K. PRINGLE, PETITIONERS

vs.

WILLIAM E. GIBSON.

Washington County. Decided March 4, 1938. The petitioners, plaintiffs in two former actions against the said William E. Gibson (See 135 Me., 297, 195 A., 695), alleging error in the decisions therein, seek correction thereof.

Having given due and full consideration to their contentions, the petition is to be denied for the reason that it is amply manifest that no error has been committed. Petition denied. *Stern, Stern & Stern*, for petitioners. *James E. Mitchell*, for defendant.

AMY T. GOODWIN *vs.* HILTON MCALLISTER.

Cumberland County. Decided March 8, 1938. This case, heard by a Referee, who found for the plaintiff, and awarded damages, came to this Court on defendant's exceptions to the overruling of his objections to the acceptance of the Referee's findings.

The report of the evidence taken out before the Referee is incorporated in the record.

Written brief was filed by plaintiff only, and there was no oral argument.

Plaintiff sued for damages arising from a collision of automo-

biles occurring on an October afternoon in 1936, when her car, running in a northerly direction, on a straight public highway, at a point which afforded unobstructed view for some 700 feet southerly and more than 300 feet northerly, and driven at lawful speed, was hit by defendant's car, which entered the public highway from a private road leading into the public way on plaintiff's left-hand side.

The evidence clearly shows that defendant did not see plaintiff's car until within "a second or two before they hit me," as defendant testified. He had no right to assume, from that cursory glance, that the approaching car was about to diverge from its course and turn in off the highway. He was negligent, in that he violated the law of the road, "The driver of a vehicle entering a public way from a private road shall yield the right of way to all vehicles approaching on such public way." R. S., Chap. 29, Sec. 7.

The facts on the main issue are not in dispute. The findings of the Referee on the law involved are correct. Exceptions overruled. *Francis W. Sullivan*, for plaintiff. *Albert J. Stearns*, for defendant.

STATE OF MAINE *vs.* AMEDEE CYR.

York County. Decided April 27, 1938. The respondent was tried on an indictment charging him with the crime against nature by committing sodomy with a certain female person, and he was convicted. The evidence established beyond a reasonable doubt that he was guilty of committing the filthy and unnatural sexual act known to medical jurisprudence as fellatio. The case comes forward on his exception to the denial of his motion for a directed verdict of not guilty.

Since this state was first established, the offense laid in the indictment has been prohibited by statute. The present law as stated in R. S., Chap. 135, Sec. 3 reads:

> "Whoever commits the crime against nature, with mankind or with a beast, shall be punished by imprisonment for not less than one year, nor more than ten years."

The statute gives no definition of the crime but with due regard to the sentiments of decent humanity treats it as one not fit to be named, leaving the record undefiled by the details of different acts which may constitute the perversion. The generality of the prohibition brings all unnatural copulation with mankind or a beast, including sodomy, within its scope.

The thesis of counsel for the respondent on the brief is that the offense here proved was not sodomy at common law and can not be deemed the crime against nature under the statute. This contention is not supported by reason or a convincing weight of authority. In the early case of *Rex* v. *Jacobs*, Russ. & R. C. C. 331, the judges held, but without stating reasons therefor, that fellatio was not sodomy, and controlled by the doctrine of *stare decisis*, this *ipse dixit* has been followed in this country by text-writers and by the courts in some states, and statutes deemed declaratory of the common law have been construed accordingly. *People* v. *Boyle*, 116 Cal., 658, 48 P., 800; *Koontz* v. *People*, 82 Col., 589, 263 P., 19; *Commonwealth* v. *Poindexter*, 133 Ky., 720, 118 S. W., 943; *Kinnan* v. *State*, 86 Neb., 234, 125 N. W., 594; *Mitchell* v. *State*, 49 Tex. Crim., 535, 95 S. W., 500; 3 Russ. Crim. (6th Ed.) 250; 2 Bishop's New Crim. Law, Sec. 1194.

By the weight of recent authority apparently supported by better reasoning, sodomy as used in connection with statutes prohibiting the crime against nature is interpreted in its broad sense and held to include all acts of unnatural carnal copulation with mankind or beast. We shall not cumber our reports with a recital of the rulings or reasons given therefor. We are in accord with the results reached in the following authorities. *State* v. *Maida*, 6 Boyce (Del.), 40, 96 A., 207; *Herring* v. *State*, 119 Ga., 709, 46 S. E., 876; *Glover* v. *State*, 179 Ind., 459, 101 N. E., 629; *Kansas* v. *Hurlbert*, 118 Kan., 362, 234 P., 945; *State* v. *Guerin*, 51 Mont., 251, 152 P., 747; *State* v. *Start*, 65 Ore., 178, 132 P., 512; *In re Benites*, 37 Nev., 145, 140 P., 436; *State* v. *Fenner*, 166 N. C., 248, 80 S. E., 970; *State* v. *Whitmarsh*, 26 S. D., 426, 128 N. W., 580; 8 R. C. L., Sec. 365; 55 Corpus Juris 788. Exception overruled. Judgment for the State. *Joseph E. Harvey*, County Attorney for State. *Max L. Pinansky, Mark L. Barrett, Harry S. Judelshon*, for respondent.

SHAWMUT WAXED PAPER COMPANY

vs.

EMILE A. TONDREAU.

Cumberland County. Decided May 17, 1938. On exceptions by plaintiff to the acceptance below of the report of a Referee, favorable to the defendant.

On May 14, 1936, a salesman soliciting business for plaintiff called on defendant in Brunswick, this state, and conferred with him about supplying wrapping paper for bread, and the procuring and use of an engraved plate for stamping or printing such paper, to be furnished to the White Notch Baking Company, then being formed, as evidence shows the salesman was told. The certificate of corporate organization, designating defendant as president, was officially approved May 14, 1936, and public record completed on May 18, 1936.

The salesman prepared an order for the purchase of a consignment of paper and the desired plate, on a form provided by plaintiff, the substance whereof pertinent here being that, subject to conditions printed on the back of the sheet, plaintiff "Sold to White Notch Baking Co." to be delivered to the company at Laconia, N. H., the merchandise therein described; defendant signed it "E. A. Tondreau President" and delivered it to the salesman.

On the back of the form used, two "conditions" have weight in the case:

> "1. All contracts are subject to acceptance at the Home Office."
>
> "5. We reserve the right to refuse to make shipment of any merchandise where buyer's financial responsibility shall at any time become unsatisfactory to us."

By shipments from June 5 to June 22, 1936, the goods ordered were shipped to, and on being received, were retained by, the Baking Company, at Laconia.

As to demand that there be payment by defendant, the evidence shows only that by letter dated September 10, to Mr. Tondreau,

statement is made that a former letter was written to him on the first of the month.

Demand, if any, is in these words: "You have always taken care of your bills so promptly we don't understand why this has not been paid."

Twelve days later, another letter was written, claiming payment of Mr. Tondreau as guarantor.

Six letters of demand followed before suit. In some of them the defendant is treated as purchaser; in others as guarantor.

There is no evidence that defendant ever, in writing or by word, purchased for himself, or guaranteed payment of any bill of the Baking Company.

Conclusion, therefore, is: Exception overruled. *Ellis L. Aldrich, Sherwood Aldrich,* for plaintiff. *Joseph A. Aldred,* for defendant.

VELMA E. SHAW *vs.* AMBROSE A. BRIDGE.

Penobscot County. Decided June 17, 1938. This case is before us on exceptions to the acceptance of a report of a Referee. The plaintiff seeks to recover for personal injuries growing out of an automobile accident. The defendant abandons all objections to the Referee's findings except a claim that the damages awarded are excessive. Damages were assessed at $2000 and a credit was given of $300 which had been paid to the plaintiff by Ervin A. Call in whose car she was a passenger and to whom she had given a covenant not to sue.

The plaintiff's injuries consisted of severe lacerations to her face. When these wounds were sutured glass was removed from her face and for a period of several months thereafter glass continued to come to the surface. She was in a hospital for eleven days. The Referee was justified in finding that both her eyesight and hearing were affected and that for a long time after the accident she suffered pain from the blows which she received in the accident.

This Court has so many times laid down the rule that exceptions

will not lie to findings of fact by a Referee if there is any evidence to support them that it seems almost unnecessary to say so again. *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171; *Throumoulos* v. *First National Bank of Biddeford*, 132 Me., 232, 169 A., 307. Apparently, however, the rule is not even now fully understood.

Not only is there evidence to support the findings of the Referee but the damages awarded seem very reasonable.

The entry will be: Exceptions overruled. Judgment on the report. *H. R. Coolidge*, for plaintiff. *Fellows & Fellows*, for defendant.

ETHEL M. PARTRIDGE *vs.* HARRY M. LYON.

Kennebec County. Decided July 16, 1938. At the trial of this action of negligence, before any evidence was offered, the trial judge, on request, ruled that the suit was barred by the statute of limitations, which the defendant had pleaded. Without further proceedings in the cause, exception reserved to the ruling was allowed and certified to this Court.

The exception is not properly before the Law Court. It should have remained in the Trial Court until the case was there prepared for final disposition. Exception dismissed. *Locke, Campbell & Reid*, for plaintiff. *McLean, Fogg & Southard*, for defendant.

EDITH T. HILTON *vs.* BOOTH H. HARDING.

Somerset County. Decided July 16, 1938. In this action of negligence, the plaintiff has the verdict and the case comes forward on the defendant's general motion for a new trial.

As the plaintiff was leaving the fair grounds at Skowhegan on August 22, 1936, riding as a guest passenger on the back seat of the automobile which the defendant was driving, she was suddenly thrown forward and down upon the floor with great force breaking

her right leg and suffering other serious bodily injuries. The accident occurred as the defendant drove his car into Madison Avenue from an intersecting street and stopped to avoid oncoming traffic.

The printed case discloses a sharp conflict between the evidence on the one side and the other as to the defendant's negligence and the plaintiff's due care. No conclusive presumptions in the defendant's favor appear in the record. A finding for the plaintiff on all issues was not manifestly wrong. Motion overruled. *James H. Thorne*, for plaintiff. *Merrill & Merrill*, for defendant.

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, DECEMBER 3, 1936, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, Maine, December 3, 1936.

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, and being advised and believing that the questions of law are important, and that it is upon a solemn occasion I, Louis J. Brann, Governor of Maine, respectfully submit the following statement of facts and questions, and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT.

The Legislature of 1935 passed an Act entitled, "AN ACT to Create a Milk Control Board," which Act appears in the Acts and Resolves of 1935 as Chapter 13 of the Public Laws of Maine. This Act was an emergency Act and was approved by the Governor on the twenty-seventh day of February 1935. Within seven days from the effective date of this Act, the Governor, with the advice and consent of the Council, appointed as members of "a milk control board," two producers, a dealer and a producer dealer.

Walter H. Perkins was the "Dealer" appointed, and John A. Ness was appointed as one of the "Producer" members of the Board.

Subsequently, a petition was filed with the Governor and Council protesting the appointment of said Perkins and Ness on the ground that they were ineligible to serve in the capacity of "Dealer" and "Producer" respectively.

Several hearings were had before the Governor and Council at which no decision could be made.

I am attaching hereto, and making a part hereof, an agreed statement of facts relative to the qualification of Walter H. Perkins as the "Dealer" member of the Board, and also an agreed statement of facts relative to the qualification of John A. Ness as a "Producer" member of the Board.

Question No. 1.

Is Walter H. Perkins legally eligible to serve as the "Dealer" member of said Milk Board under the provisions of the Statute referred to in the foregoing statement?

Question No. 2.

Is John A. Ness legally eligibile to serve as a "Producer" member of said Milk Board under the provisions of the Statute referred to in the foregoing statement?

Very respectfully,

LOUIS J. BRANN
Governor.

STATEMENT OF FACTS RELATIVE TO QUALIFICATION OF WALTER H. PERKINS, MEMBER OF THE MILK CONTROL BOARD.

WALTER H. PERKINS

Mr. Perkins was appointed as dealer member of the Board.

He is now forty-nine years old and has been engaged in the purchase and sale of milk within the state for consumption within

the state since he was fourteen years old under the following employments:

He worked first for the Turner Center System, a corporation in Auburn, for nine and one-half years; following that, eight and one-half years for H. P. Hood & Sons Company, a corporation, and since November, 1921, a period of fifteen years, has been connected with Maine Dairies, Inc., a corporation, which operates a plant in Portland and which purchases and sells milk within the state for consumption within the state.

He is a stockholder in the Maine Dairies, Inc.; is a Director; and is General Manager, having complete charge of the operation of the Company in purchasing and selling milk within the state for consumption within the state.

He attends to all purchasing and distribution and signs all checks for the Company.

STATEMENT OF FACTS RELATIVE TO QUALIFICATION OF JOHN A. NESS, MEMBER OF THE MILK CONTROL BOARD.

JOHN A. NESS

Mr. Ness was appointed as one of the two producer members of the Board on March 13, 1936.

He has operated a farm in Auburn and has produced and sold milk since 1904.

At the time of his appointment he was selling the milk produced by himself to H. P. Hood & Sons Company, a corporation, and that Company was at that time and has since been a dealer purchasing and selling milk within the state for consumption within the state, in accordance with the provisions of the Milk Control Act and under license issued by the Board, in the Lewiston and Auburn markets and eight other market areas in the state.

In addition to the milk sold in the Lewiston and Auburn areas the H. P. Hood & Sons Company shipped milk to Boston and other markets.

None of the milk purchased by H. P. Hood & Sons Company in Auburn is kept separate, but it is mingled with other milk in the plant.

Part of the milk is pasteurized and sold in Lewiston and Auburn and the remainder shipped to Boston and other markets.

The H. P. Hood & Sons Company pays to certain producers the producers price established by the Milk Control Board for the Lewiston and Auburn area for the quantity of milk sold by it in that area and pays to the other producers the prevailing Boston producers price.

The price of milk produced by Mr. Ness and sold to the Hood Company is not established by the Maine Control Board; neither is Mr. Ness assessed by the Maine Control Board to assist in paying the expenses of the Board; nor is he under the control of the Maine Control Board, but Mr. Ness is paid for his milk by the H. P. Hood & Sons Company at the prevailing Boston rate.

During the last eight months Mr. Ness has been selling eighty quarts of milk per day to Bernard M. Keough, who is a dealer selling milk in the Lewiston and Auburn area for consumption in that area, and who is licensed as such dealer by the Milk Control Board.

At the time of Mr. Ness's appointment he was not selling to Mr. Bernard M. Keough.

To the Honorable Louis J. Brann, Governor:

The questions submitted on the twenty-eighth instant, with reference to the elegibility of certain persons to serve as members of the milk control board, are not ones upon which the justices are individually required to give their opinion. Indeed, any expression of opinion might prejudice the question before the arising of any occasion for its legal determination.

A writ of *quo warranto*, or a petition or information in the nature of *quo warranto*, which the attorney general may sue out or initiate in term time or vacation, would be an appropriate proceeding to test, judicially, as against one who is in actual possession of a public office, the issue of the validity of his title to the office.

In such a proceeding, both the State and the officer could be represented and heard, and a final judgment could be rendered.

CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY S. F. THAXTER
JAMES H. HUDSON
HARRY MANSER

December 31, 1936.

STATE OF MAINE

Rule Relative to Administration of Justice.

At the Supreme Judicial Court holden at Portland in and for said State on the first day of February in the year of our Lord one thousand nine hundred and thirty-eight, it is

ORDERED, By the Justices of the Supreme Judicial Court, that, beginning with the fifteenth day of March in the year of our Lord one thousand nine hundred and thirty-eight, no judge, recorder, or clerk of a municipal or police court, nor any trial justice, shall be retained or employed or shall practice as an attorney on the criminal side of any court in the State.

Charles J. Dunn Chief Justice

Guy H. Sturgis
Charles P. Barnes
Sidney St. F. Thaxter Justices
James H. Hudson
Harry Manser

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BASTARDY.

BANKS AND BANKING.

BILLS AND NOTES.

A promise to pay money to another gives a right of action to such third party against the promisor, if there is a breach of such undertaking.

Verrill, Conservator v. *Weinstein*, 126.

Liability of an indorser is contingent, secondary to that of the maker and dependent upon substantially different conditions and contingencies. It is a several obligation and, in the absence of statute, a joint action can not be maintained against the indorser and the maker; and the severalty of the rights and liabilities of the defendants as maker and indorser are not affected by trial of the cases together.

Barton, Executrix v. *McKay*, 197.

Accommodation indorsers are considered as indorsers under provisions of R. S., Chap. 164, Sec. 63.

An action against an indorser is not an action on the note, as the indorser's contract is distinct from that of the maker of the note.

Although an indorsement may be on a witnessed note, the indorser's contract does not come within the exception of the statute applicable to witnessed notes, and the general limitation of six years properly pleaded is a bar to recovery.

Portland Savings Bank v. *Shwartz et al.*, 321.

Where no express reservation of interest is made in a demand note, it will not carry interest until demand.

The commencement of suit on a demand note constitutes a demand.

Bryne v. *Bryne et al.*, 330.

CARRIERS.

The state legislature has the power to regulate the business of the contract carrier, so far as he makes use of the state's public highways, without violating the due process and equal protection provisions of the State and Federal Constitutions, providing the regulatory statute is not arbitrarily discriminatory.

State v. *King*, 5.

CERTIORARI.

Petitioner in certiorari must allege, and establish to the satisfaction of the court to which the application is made, that substantial justice demands that the writ should issue.

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CONSTITUTIONAL LAW.

a state may classify the objects of legislation so long as its attempted classification is not clearly arbitrary and unreasonable.

In order for one to show a state statute to be in violation of the Federal Constitution he must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.

State v. *King*, 5.

CONTEMPT PROCEEDINGS.

Contempts are of two kinds. There are those which occur in the presence of the court, which tend to bring the court into disrepute and interfere with the orderly conduct of judicial proceedings; and there are those, of which the court does not have first-hand information, for example those arising out of the failure to obey some order which the court has lawfully made. The procedure for punishment in the two cases is different. In the first the court may forthwith on its own initiative punish the offender; in the second, the matter must be brought to the court's attention by some formal pleading and sentence may be imposed only after a hearing.

The petition or complaint on which the process is issued to bring a contemnor before the court should be under oath or supported by affidavit.

The requirement of the statute that the complaint, in contempt proceedings in disregarding or disobeying court's process, must be verified is jurisdictional and lack of verification is fatal as jurisdiction can not be conferred even by consent of the parties.

Charles Cushman Co. et al. v. *Mackesy et al.*, 490.

CONTRACTS.

Mere forbearance to sue does not constitute a good consideration for a promise unless, at the time it was made, promisee had a cause of action against the promisor on which the former might have maintained an action, either in law or equity.

Tozier, Collector v. *Woodworth*, 46.

Chapter 123, Section 12 of the Revised Statutes, relative to a contract of agency to sell real estate, makes contract void after one year, unless time for determination is definitely stated, and is inclusive of contracts both written and oral.

To be entitled to commission, agent must procure customer able to purchase in accordance with the agency contract.

Bad faith and dishonesty are not to be presumed.

Sawyer v. *The Federal Land Bank of Springfield*, 137.

CORPORATIONS.

COURTS.

A liability to pay damages for a tort can be discharged or modified by the law of the state which created it.

While it is the rule that remedies are regulated and governed by the *lex fori* and that included in the procedural policy of the state are statutes of limitations, yet it is when the statute relates to the remedy and does not obliterate the right of action that such right continues to exist.

No law has any effect of its own beyond the limits of the sovereignty from which its authority is derived, but foreign law is enforced because it is our law that foreign law shall govern transactions in question and that for purposes of the case the foreign law becomes the local law.

Whether recognition and effect shall be given to foreign law by the courts of this state depend upon the principles of comity.

Comity is neither a matter of absolute obligation nor of mere courtesy and good will. It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Where foreign laws are in conflict with our own regulations, or our local policy, or do violence to our views of religion or public morals, or may do injustice to our citizens, they are not to be regarded in this state.

Pringle v. *Gibson*, 297.

Want of jurisdiction is fatal in every stage of a cause and may be brought to the attention of the court at any time, although the want of jurisdiction is not specifically set forth in the bill of exceptions.

The court has no equitable jurisdiction except in so far as it may have been conferred by legislative enactment.

Charles Cushman Co. et al. v. *Mackesy et al.*, 490.

An unintentional misstatement of the testimony by the trial judge in his charge to the jury in a criminal case, concerning a vital point in the case, may well be a decisive factor in the verdict, and being prejudicial to the respondent, is error.

Nothing less than a positive correction of the error will suffice; and it has always been taken for granted that it is the imperative duty of the court to make such correction.

The trial judge, having once assumed the burden of referring to the testimony, can not thereafter wash his hands of the responsibility for an inaccurate

CRIMINAL LAW.

CRIMINAL PLEADINGS

In criminal prosecutions, the description of the offense in the complaint or indictment must be certain, positive and complete, and in charging an attempt to commit a crime, which is akin to soliciting the same to be done, it is necessary to allege and set out with reasonable certainty the particular offense attempted.

Neither the term "house" nor "a certain building, to wit, a house," without more than an allegation of undefined occupancy, describes a dwelling-house or a building occupied in part for dwelling or lodging-house purposes, the burning of which is statutory arson under Sec. 1, Chap. 130, R. S., as amended.

Counts in an indictment alleging that defendant solicited another person to burn a "house" or "a certain building, to wit, a house," occupied by defendant, the house would be presumed, by the weight of authority to belong to the defendant. Under these circumstances the counts in the indictment are defective as they do not allege that the respondent solicited the burning of the house or building of another.

State v. *Beckwith*, 423.

A respondent pleading mental incapacity because of intoxication from voluntary use of drugs assumes the affirmative because of changing the issue and it is immaterial whether his plea is written or verbal.

Mental incapacity may be resorted to, as matter of defense, in connection with a plea of not guilty, but it is not and can not be a part of it.

The plea of mental incapacity to form and harbor an intent to kill and slay is, and of necessity must be, a plea of confession and avoidance, and does not meet any question propounded by the indictment, but raises one outside of it.

The question of mental incapacity to form and harbor an intent to kill and slay can never be raised, unless by the prisoner; and only in an affirmative allegation, such as carries with it the burden of proof.

When insanity of the accused is pleaded in defense, ability to distinguish between right and wrong is the test; when mental incapacity to entertain and act upon an intent to kill and slay is pleaded the mental state of the accused at the time he committed the act under investigation is the issue.

State v. *Quigley*, 435.

DAMAGES.

Plaintiff is entitled to recover the money value of loss resulting from use of adulterated fertilizer sold by defendant and the damages recoverable are the

EMPLOYMENT.

EQUITY.

The literal import of the equity act notwithstanding, an appeal can not, within the spirit of that act, be presented by a party not aggrieved. A thing within the letter is not within the statute if contrary to the intention of it. The real meaning of the statute is to be ascertained and declared, even though it seems to conflict with the words of the statute.

A party may appeal from a favorable decree if he is not given all to which he is entitled or there is error or prejudice. But, as a usual thing, a decree in one's own favor is not appealable.

The analogies of the law do not permit one who has a verdict in his favor to except to an adverse ruling.

That an appeal must have objective other than the affirmation of the decree appealed from, is self-evident.

Perkins v. *Kavanaugh et al.*, 344.

In equity, the record, for the purpose of appeal, consists of the bill and all the pleadings.

Appeals from interlocutory decrees, in equity, must await the final decree.

Demurrers, by dilatory pleas, must be settled preliminary to a final adjudication.

Katz et al. v. *New England Fuel Oil Company et al.*, 379.

A statutory creditor's bill brought to reach and apply, in payment of debt, must allege that the complainant is a creditor, the principal defendant a debtor having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it can not be reached by common-law process against the debtor, and the property is held by some third person who may be considered an equitable trustee of the debtor. These allegations are jurisdictional.

If the necessary allegations are lacking, the error is fatal in every stage of the cause and can not be cured by consent of the parties. When inspection of the pleadings makes it manifest that it has no jurisdiction, it becomes the duty of the court to stay proceedings and dismiss the action.

Allegations in equity, solely on information, raise no issue and are fatally defective.

A complainant in bill in equity brought primarily for relief and incidentally for discovery can not have discovery if he is not entitled to relief.

A complainant in a bill in equity takes nothing in his allegations on information which are not traversed, and Chancery Rule XXVII does not apply to allegations not well pleaded.

The answer of a defendant, although under oath, is not evidence for either party unless called for by the bill.

Direct evidence, although sufficient to support a bill, is useless without proper allegations in the pleadings.

Darling Automobile Company v. *Hall et al.*, 382.

Decisions have pointed out that the trend of legislation plainly shows it is not intended to confer equity jurisdiction for redemption of chattel mortgages except in particular cases where the statutory methods are insufficient to give complete remedy.

To warrant a court of equity in assuming jurisdiction where fiduciary relations exist, it must appear that an accounting is necessary to determine the amount due, and that defendant has been intrusted with plaintiff's property; and the fact that there is an adequate remedy at law has been held not to deprive equity of jurisdiction.

Gallagher v. *Aroostook Federation of Farmers*, 386.

A decree dismissing a bill brought under one section of the statutes does not determine the right to bring one under the other, but it does not, however, follow that a bill brought under one section may not be amended to come under the terms of the other.

The distinction between rights and remedies is of real importance in determining whether a proposed amendment presents a new cause of action, the introduction of which the court is reluctant to permit after a hearing.

An amendment will ordinarily be allowed, if its aim is merely to seek an added remedy for an established right.

Equity has always been liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result.

Fogg v. *Twin Town Chevrolet, Inc.*, 444.

R. S. 1930, Chap. 91, Sec. 53, requires the single Justice when a mandate has been received from the Law Court, to enter a decree "in accordance with the certificate and opinion of the law court" and the sitting Justice has no authority to depart from the mandate in any respect or to postpone the filing of the decree.

A party aggrieved by the form of a decree as entered has a right to except thereto, and the procedure for bringing the question before the Law Court is specifically set forth in Rule XXVIII. There is no provision by which the matter can be reported.

Rose, Adm'x. v. *Osborne, Jr.*, 467.

EVIDENCE.

A party who claims compensation for a wrong suffered must establish the amount of his damages with reasonable certainty, but absolute certainty is not required. Damages are not uncertain for the reason that the amount of the loss sustained is incapable of exact mathematical proof.

All facts and circumstances tending to show the probable amount of damage are properly received and the triers of fact are allowed to make the most intelligent and probable estimate which the nature of the case will permit, and it is not a sufficient reason for disallowing damages that a party can state the amount only approximately.

The Hincks Coal Company v. *Milan et al.*, 203.

Presumption that child born during wedlock is the child of husband and legitimate may be rebutted.

Testimony of neither husband nor wife can be admitted to show non-access by husband, if the result would be to bastardize issue born after marriage, and statutes removing the bar against parties testifying or even those specifically authorizing the mother to testify in bastardy proceedings do not change the rule.

Hubert v. *Cloutier, alias*, 230.

In bearing on the issue of the sanity of a person, his conversations, declarations, claims and acts are admissible as evidence of the real state of his mind but they are not taken as evidence of the truth of the matter stated, but only as bearing on his mental condition.

Exclusion of the testimony of the ward in the Probate Court, when read in its entirety, tended to support rather than refute the finding that the man was of sound mind and, therefore, was not prejudicial.

Hogan, Appellant, From Decrees of Judge of Probate In Re: Patrick T. Hogan, 249.

Circumstantial evidence, in a criminal case, must exclude every other hypothesis than that of guilt and it is not sufficient that the circumstances are all consistent with defendant's guilt, and raise a strong probability of it; they must also exclude beyond a reasonable doubt the hypothesis of his innocence and be incapable of explanation upon any other reasonable hypothesis than that of his guilt.

State v. *Parento*, 353.

A record is understood to be conclusive evidence, but whether it is or is not a record is a matter of evidence, and may be proved like other facts.

Nissenbaum, Plaintiff in Error v. *State*, 393.

There is nothing for a jury to consider when its decision can only be based on conjecture.

Freeport Sulphur Company et al. v. *Portland Gas Light Company*, 408.

When intent forms the gist of the offense it must be specifically proved.

Intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion or mental status, is manifested by external circumstances capable of proof.

The general presumption is that every man is normal and is possessed of ordinary faculties; such defenses as intoxication, insanity and aphasia are affirmative defenses, and the burden is on the defendant to establish them.

A simple plea of not guilty puts in issue the allegations in the indictment and as to them the prosecution has the affirmative.

Where intent to do a criminal act must be proven, the jury, if not satisfied of the presence of the specific intent, may find the respondent guilty of a lesser crime rather than not guilty.

State v. *Quigley*, 435.

It has long been the rule in this state that all crimes may be proved by circumstantial evidence.

A witness who saw the arrest of the accused in a restaurant and observed the officer take the accused out to the sidewalk where a crowd had collected was asked on cross-examination, "What was said then by any members of the crowd which indicated the temperament of the crowd as this was happening?" This question was properly excluded, since question called for expression of opinion reached by persons in the vicinity, regardless of their opportunity to observe actual events and under a situation which demonstrated that such observation was practically impossible. Much depends upon the circumstances in a given case, and a trial judge is called upon to exercise his discretion in determining the admissibility of testimony under such circumstances.

Testimony showed that the respondent, following his resistance to arrest, and while he was being taken to the police station, on several occasions said, "Let go of me or I will tear your Christless guts out." This evidence was admissible as bearing upon the question of express malice, tending to show the attitude of mind of the respondent, its weight being for the jury.

Evidence of the effect of a blow received or an assault committed need not depend for its introduction upon testimony of witnesses who saw the blow struck. A cut or slash received in a melee may be unnoticed by onlookers, but when a man emerges from an affray with visible wounds, testimony thereof is perti-

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FALSE IMPRISONMENT.

See Abuse of Process, *Stern* v. *Sullivan*, 1.

FORECLOSURE.

See *Fogg* v. *Twin Town Chevrolet, Inc.*, 260.

GAMBLING.

GUARDIAN AND WARD.

HIGHWAYS.

R. S., Chap. 27, Sec. 65 provides "highways, town ways, and streets, legally established, should be opened and kept in repair so as to be safe and convenient for travelers. . . ."

R. S., Chap. 27, Sec. 94 provides "Whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair . . . in any highway . . . may recover for the same in a special action on the case" if, the way being one which the town is obliged to repair, the municipal officers or road commissioner "had twenty-four hours actual notice of the defect or want of repair."

Under these statutes the only standard of duty fixed, and the only test of liability created, is that highways shall be constructed and maintained as to be reasonably safe and convenient for travellers, not that they shall be entirely and absolutely safe and convenient.

Wells v. *City of Augusta*, 314.

HUSBAND AND WIFE.

Suits between husband and wife, with certain exceptions of equity suits involving doctrine of separate estate, to prevent fraud, to relieve from coercion, to enforce trust, and to establish other conflicting rights concerning property, are not authorized in Maine.

Statutory provision, R. S., Chap. 74, Sec. 5, does not empower wife to sue husband at law.

Anthony v. *Anthony*, 54.

A wife in exercising her right to the care and custody of her child in her husband's absence and free from his control, does so without authority delegated by him.

Husband and wife not jointly and mutually assuming and exercising the responsibility of care in a particular situation, are not subjects of the doctrine of imputed negligence, as the independent responsibility of each spouse has been recognized and the contributory negligence of the one held not to be imputable to the other.

Statutes conferring equal powers, rights and duties upon the father and mother in the care and custody of their children, negative the idea that the mere existence of the marital relation *ipso facto* constitutes each parent the representative of the other as regards the rearing of their minor children.

Illingworth v. *Madden, Jr.*, 159.

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See *State* v. *Beckwith*, 423.

See *State* v. *Quigley*, 435.

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See *Symonds* v. *Free Street Corporation*, 501.

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MORTGAGES.

A previous demand by plaintiff's predecessor in title does not enure to the benefit of the plaintiff.

Fogg v. *Twin Town Chevrolet, Inc.*, 260.

The mortgagee is not required to notify the mortgagor of entry for purpose of foreclosure, other than by recording.

Provisions of Sec. 7, Chap. 104 of the Revised Statutes provide "the receipt of income from the mortgaged premises, by the mortgagee or his assigns while in possession thereof shall not constitute a waiver of the foreclosure proceedings of the mortgage on such premises."

Donovan et al. v. *Sweetser*, 349.

A mortgagee of chattels is entitled to possession before default in the absence of any express or implied stipulation to the contrary. Such stipulation, however, need not be in writing. It can be proved by parol.

Gallagher v. *Aroostook Federation of Farmers*, 386.

The remedies to enforce a right of redemption are prescribed by R. S. 1930, Chap. 104, Secs. 15 and 16; and a bill in equity to redeem from a mortgage will not be entertained unless these statutory provisions have been complied with.

Where the debtor has shown a readiness and a reasonable effort on his part to perform the legal duty required of him, and the failure to accomplish it is due to no fault of his own, but to the act of the other party putting it beyond his power, a forfeiture will not be permitted by the court.

A person purchasing an overdue note and mortgage, which is in fact already in process of foreclosure, receives no greater right than his assignor and is subject to any claim with respect thereto which could have been validly asserted against the assignor.

Fogg v. *Twin Town Chevrolet, Inc.*, 444.

MOTOR VEHICLES.

Motor Vehicle Law, R. S., Chap. 29, Secs. 82, 83 and 84, does not express or imply that coasting sleds of any type are required to have lights, and in the absence of a clear statutory mandate, it is not generally held that sleds are vehicles within the meaning of that term as used in regulatory statutes.

Illingworth v. *Madden, Jr.*, 159.

MUNICIPAL CORPORATIONS.

When a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes its power of legislation is limited to the cases and objects specified, and if a by-law or ordinance is outside the scope of the grant and exceeds the power to legislate conferred upon the municipality, it is invalid.

Business, in a legislative sense, is that which occupies the time, attention and labor of men for the purposes of livelihood or for profit, and constitutes a considerable part of their occupation, business or vocation.

A by-law or ordinance of a town or city, which is unreasonable and oppressive, is not valid.

The power of a municipal corporation to license an occupation or privilege or to impose a license tax thereon is not an inherent power, but can be exercised only when conferred by the State either in express terms or by necessary implication.

State v. *Brown*, 36.

Regardless of the cause of the defect, if in fact the way is not reasonably safe and convenient, the town is liable, and it is immaterial whether the defect arises from the negligence of the town or city officials or from causes which could not be avoided or controlled by them in the exercise of ordinary care and diligence, including the acts or omissions of others.

What obstructions, irregularities or conditions render a highway defective are questions for the triers of fact and their conclusion, unless manifestly wrong, will not be set aside.

As a matter of law, mere slipperiness of the surface of a way caused by either ice or snow is not a defect or want of repair within the meaning of the statute.

If a way is not reasonably safe and convenient, the town, upon proper notice, is liable for injuries caused thereby.

Independent of statute there is no liability whatever on the part of municipalities for injuries caused by defective highways.

Notice of a defect in a public highway must be of the identical defect which caused the injury.

Wells v. *City of Augusta*, 314.

The legislature defines, in minimum requirement, what amount of money must be raised and expended by a city for common schools.

The initiative and referendum do not supersede city government, but are consistent with it. The city remains a governmental unit; even in instances of the

NEGLIGENCE.

The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle or had an equal right to do so.

It is not error to refuse to allow the jury to consider an impossible and impracticable theory which has no support in the evidence.

Illingworth v. *Madden, Jr.*, 159.

Proof of a violation of a statute regulating traffic, raises a presumption of negligence which may be rebutted.

Testimony that another car, proceeding in same direction as plaintiff's car, collided with defendant's parked truck, and a third car narrowly avoided accident by running into a snowbank, is admissible as tending to corroborate plaintiff's witnesses that the parked truck was not clearly discernible to travellers on the highway.

A passenger in an automobile has the duty of keeping a lookout and warning the driver of apparent danger, although this duty does not require or empower an assumption of control; and if, in the exercise of reasonable care, passenger could have done nothing to avert the accident, she is not barred from recovery.

Nadeau v. *Perkins*, 215.

If the failure of a motor vehicle operator to see that which by reasonable care he should have seen is the proximate cause of an injury to another, he is liable in damages for his negligence.

"Apparent" danger of which the passenger must give warning, is that danger not necessarily apparent to the individual but that which is or ought to be reasonably manifest to the ordinarily prudent person.

When dangers which are either reasonably manifest or known to an invited guest confront the driver of a vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, and sits by without warning or protest, such negligence will bar recovery.

Banks v. *Adams*, 270.

Violation of safety rules is evidence tending to show negligence.

It is the duty of a person to see that which is open and apparent and take knowledge of obvious dangers and govern himself suitably.

Hoskins v. *The Bangor & Aroostook Railroad Company*, 285.

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ORDINANCE.

Chap. 5, Sec. 136 of R. S. 1930, as amended by Chap. 247, P. L. of 1931, and by Chap. 158, P. L. of 1935, authorizes towns, cities and village corporations to make by-laws or ordinances not inconsistent with law, and enforce them by suitable penalties.

An ordinance imposing a license fee, to be valid and operative, must state the time of the duration and validity of the license to be issued.

State v. *Thompson*, 114.

PAUPERS AND PAUPER SETTLEMENT.

The obligation of towns, regarding the relief of the poor, originates in statutory enactment, and not from contract, express or implied.

Under Chap. 186 of the P. L. of 1935, legitimate children have the settlement of their father, if he has any in the state.

The legislature can alter as well as enact statutes, as respects paupers and the liability of towns to provide for them.

The rights of parties are not to be governed by statutes which are repealed.

City of Rockland v. *Inhabitants of Town of Lincolnville*, 420.

Under Chap. 91 of the P. L. of 1935, it is necessary for the town where pauper resides to give the town of his settlement notice when town of residence is providing school conveyance for children of pauper in order to establish right of compensation for school conveyance.

Pauper notices are given for the following reasons:

1. To permit the Overseers of the town of settlement to take such measures as they deem expedient.
2. To lay foundation for future action.
3. To give information that the relief and expense will fall on the town notified.
4. To prevent accumulation of expense and permit removal of the pauper.
5. To fix the time when the cause of action accrues and the statute of limitations commences to run.

The pauper notice statute is mandatory.

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PLEADING AND PRACTICE.

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TAXATION.

A tax collector is a public officer, owing to the public, and not to the town alone, the duties imposed by statute.

A tax collector, as such, can not maintain an action except when empowered by statute to do so.

Tozier, Collector v. *Woodworth*, 46.

Regarding corporations, income taxes are not assessed and levied directly on property, but against the gain or income derived therefrom, and such taxes are exacted upon the basis of annual earnings.

European and North American Railway v. *Maine Central Railroad Company*, 338.

TORT FEASORS.

It is well settled, as a general rule, that in the absence of a statute an assessment of damages against those sued jointly for a wrong should be for one sum and against all found guilty.

Joint tort feasors are each liable for the entire damage resulting from the wrong done, and neither is entitled to contribution from the other, and it is held that a several assessment of damages in an action against joint wrong doers is at most an irregularity which may be cured by the judgment taken and entered.

The Hincks Coal Company v. *Milan et al.*, 203.

TRESPASS.

In order that a trespasser may recover for an injury, he must do more than show negligence, he must show that a wanton or intentional injury was inflicted on him.

Foley v. *H. F. Farnham Company*, 29.

TROVER.

Measure of damages in actions of conversion is the value of the property at the time of conversion, with interest.

Right of immediate possession and possession in law of an automobile held by a bailee or agent remains in a conditional purchaser, as bailor.

Jeffery v. *Sheehan*, 246.

See *Brooks* v. *Bess*, 290.

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WORKMEN'S COMPENSATION ACT.

Incapacity due from a skin infection caused by entry of a germ through an abrasion on a hand, which abrasion was itself suffered in the course of employment, is compensatory.

Exact time of receiving abrasion is unimportant, if evidence shows causal connection between abrasion and infection received in course of employment.

Lugie Bearor's Case, 225.

In order to recover compensation for injury under Workmen's Compensation Act employee must show injury arose out of and was also received in the course of his employment.

Injury "arises out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

Injury is received "in the course of" employment when it comes while the workman is doing the duty which he is employed to perform.

An employee acting outside the scope of his employment, and engaged in activity not in any sense incidental to his employment can not recover for injuries sustained.

Willette's Case, 254.

Notice and petition, given within the time limited by law, are prerequisite to an employee's right to recover compensation for accidental injury, except that, "any time during which the employee is unable by reason of physical or mental incapacity to make said claim or file said petition shall not be included in the periods aforesaid."

Thibodeau's Case, 312.

Under Chap. 55, Sec. 32 of the Revised Statutes an employee, in full possession of his mental faculties, is not excused from statutory compliance as to notice on the ground of mental incapacity simply because he was lead to believe "he would be better."

Occupational diseases are not within the terms of the compensation act.

Wallace v. *Booth Fisheries Corp.*, 336.

WRITS OF ERROR.

A writ of error presents nothing to a court of errors but a transcript of the record and what is not incorporated into the record constitutes no part of it.

A transcript of the record is the only competent evidence.

What is technically called the record is, essentially, the certified transcript of the written extension by the clerk of the court of the precise history of the original proceeding from its beginning to its termination.

The record, after the caption, should consist of the indictment properly indorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court.

Nissenbaum, Plaintiff in Error v. *State*, 393.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF THE UNITED STATES.

STATUTES OF KANSAS.

STATUTES OF MASSACHUSETTS.

PRIVATE AND SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.