MAINE REPORTS

132

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 16, 1933, TO MAY 19, 1934

EDWARD S. ANTHOINE

REPORTER

PORTLAND, MAINE
THE SOUTHWORTH PRESS
Printers and Publishers
1934

THE SOUTHWORTH PRESS

PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. WILLIAM R. PATTANGALL, CHIEF JUSTICE

HON. CHARLES J. DUNN

HON. GUY H. STURGIS

HON. CHARLES P. BARNES

HON. FRANK G. FARRINGTON[1]

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON[2]

Active Retired Justices of the Supreme Judicial Court

HON. JOHN A. MORRILL[3]

HON. WARREN C. PHILBROOK[4]

[1] Died September 3, 1933

[2] Appointed November 20, 1933

[3] Term expired June 4, 1933

[4] Died May 31, 1933

JUSTICES OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

HON. GEORGE H. WORSTER

HON. ARTHUR CHAPMAN

HON. HARRY MANSER

HON. GEORGE L. EMERY

HON. JAMES H. HUDSON[1]

HON. HERBERT T. POWERS

HON. HERBERT E. HOLMES[2]

[1] Resigned November 20, 1933

[2] Appointed November 20, 1933

ATTORNEY GENERAL

HON. CLYDE R. CHAPMAN

REPORTER OF DECISIONS

EDWARD S. ANTHOINE

TABLE OF CASES REPORTED

D

E

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

MILES R. HAWKINS, PRO AMI

vs.

MAINE AND NEW HAMPSHIRE THEATERS CO.

AND

MILES S. HAWKINS

vs.

MAINE AND NEW HAMPSHIRE THEATERS CO.

Androscoggin. Opinion, February 16, 1933.

PLEADING AND PRACTICE. LAW COURT.

NEGLIGENCE. THEATRES. REFEREES.

In the reference of a case under Rule XLII of the Supreme Judicial and Superior Courts, the decision of the Referee on all questions of fact is final, if there is any evidence to support the finding of fact. When, however, the facts are undisputed and but one possible deduction can be drawn from them, the question is then one of law, and if proper reservation is made in the rule of reference, may be considered by the Law Court.

The obligation which the proprietor of a theatre or amusement enterprise owes to his guests is to guard them not only against dangers of which he has actual knowledge but also against those which he should reasonably anticipate. The failure to carry out such duty is negligence, and a recovery may be had, even though the wilful or negligent act of a third person intervenes and contributes to the injury, provided such act should have been foreseen.

In the case at bar, the giving away of the balloons by the defendant cannot be regarded as negligence per se. The management of the theatre might well have been charged with notice that the filling of the balcony with children and the giving out of balloons would result in boisterous and unruly conduct, and it was its duty to take reasonable precautions to guard against injury to its guest under such conditions. It was under no obligation, however, to provide an attendant for every child or to anticipate an isolated, wilful and sudden act of one boy, the natural tendency of which was to inflict serious harm upon another. The act which resulted in injury to the plaintiff was not one which the management was bound to have foreseen or to have guarded against.

On exceptions by defendant. Two actions on the case to recover for personal injuries resulting from the alleged negligence of the defendant, the operator of the Strand Theatre, in Lewiston, Maine. The cases were heard by Referees under Rule of Court XLII, right of exceptions being reserved. The Referees found for the plaintiff in each case. Written objection to the acceptance of the reports were filed by the defendant and exceptions taken in each case. Exceptions sustained. The cases fully appear in the opinion.

Alton C. Wheeler,
Robert T. Smith, for plaintiffs.
Fred H. Lancaster,
John G. Marshall, for defendants.

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

THAXTER, J. These two cases, one brought by a father to recover for medical expenses in treating injuries to his minor son alleged to have been caused by the defendant's negligence, the other brought by the minor through his father as next friend, were submitted to Referees with right of exceptions reserved, who found for the plaintiff in each case and awarded damages. Written objections to the allowance of the reports were duly filed by the defendant, and to the action of the Justice of the Superior Court in accepting them, exceptions were taken.

The declarations allege that the minor, a guest in a motion picture theatre conducted by the defendant, was injured through the failure of the defendant to restrain the "playful, sportive and mischievous acts" of other children in the theatre. The specific failure

alleged was the omission to provide a sufficient staff of ushers and attendants and to station them at convenient points. As a result it is alleged that an assault was committed on the plaintiff, Miles R. Hawkins, by another boy.

The facts as found by the Referees are not in dispute. The defendant advertised a special matinee performance on Washington's birthday, February 22, 1932, at its Strand Theatre in Lewiston. It was announced that a balloon would be given to each child purchasing a ten cent ticket. These tickets admitted the holder to the balcony which was well filled with children, mostly boys. The plaintiff, a boy of twelve, accompanied by a friend, purchased a ten cent ticket, was admitted to the balcony, and took his seat in the fourth row. He and the other children had been given balloons, which frequently burst from over inflation. Several of the children had rubber bands, which in a few instances they used to snap paper pellets at the balloons; but these acts were done when the ushers and the attendants were not looking. One boy, Francis Malloy, thirteen years old, who sat in the front row, came to the theatre with a sling shot and some BB shot. This weapon he had used in the morning to shoot at tin cans, and had in his pocket, but not with the slightest intent of using it in the theatre. In fact he states that he had forgotten that he had it with him until he put his hand in his pocket to put away his own balloon. With this and the BB shot, when the ushers were not looking, he fired at two balloons. One of these shots struck the plaintiff, Miles R. Hawkins, in the eye, causing the injuries for which these suits were brought. The incident occurred shortly after the plaintiff arrived at the theatre. Two ushers and a house boy were in attendance in the balcony at the time. They ushered and assisted in keeping order, but none of them saw the accident or knew that it had occurred till some time afterwards. The attendants did not at any time see the use of the sling shot by the boy or the snapping of the paper pellets.

The Referees ruled that, in view of the conditions created in the theatre by the management in giving away the balloons and permitting the children to blow them up so that they furnished alluring targets for other boys, the supervision given was not sufficient to constitute due care. In effect the Referees found that the defendant permitted a condition in its theatre which to the patrons

constituted a danger which the management should have foreseen and guarded against.

In the reference of a case under Rule XLII of the Supreme Judicial and Superior Courts, the decision of the Referee on all questions of fact is final. *Jordan* v. *Hilbert*, 131 Me., 56, 58, 158 A., 853. If there is any evidence to support a finding of fact, it is not our province to overrule the decision of a Referee. *Hovey* v. *Bell*, 112 Me., 192, 195, 91 A., 844; *Jordan* v. *Hilbert*, supra. When, however, the facts are undisputed and but one possible deduction can be drawn from them, the question is then one of law, *Lasky* v. *Canadian Pacific Railway Co.*, 83 Me., 461, 22 A., 367, and if proper reservation is made in the rule of reference, may be considered by this Court.

The obligation, which the proprietor of a theatre or amusement enterprise owes to his guests, has been clearly set forth. He must guard them not only against dangers of which he has actual knowledge but also against those which he should reasonably anticipate. *Morrison* v. *Union Park Association*, 129 Me., 88, 149 A., 804. The failure to carry out such duty is negligence. A recovery may be had, even though the wilful or negligent act of a third person intervenes and contributes to the injury, provided such act should have been foreseen. *Easler* v. *Downie Amusement Co., Inc.*, 125 Me., 334, 133 A., 905; *Lane* v. *Atlantic Works*, 111 Mass., 136; *Cousineau* v. *Muskegon Traction & Lighting Co.*, 145 Mich., 314, 108 N. W., 720; *Mastad* v. *Swedish Brethren*, 83 Minn., 40, 85 N. W., 913; *Hines* v. *Garrett*, 131 Va., 125, 108 S. E., 690.

The theory of the plaintiff's case appears to be that the defendant, by giving out the balloons and by appealing particularly for the patronage of children on the afternoon in question, created a condition in its theatre which called for more oversight than was given.

If decorating a dance hall with inflammable crepe paper is not negligence, *Cloutier* v. *Oakland Park Amusement Co.*, 129 Me., 454, 152 A., 628, the giving away of the balloons by the defendant can not be so regarded. The management of this theatre might well have been charged with notice that the filling of the balcony with children and the giving out of balloons would result in boisterous and unruly conduct. It was, accordingly, its duty to take rea-

sonable precautions to restrain what all will concede are the ordinary inclinations of children under such circumstances. It was under no obligation to provide an attendant for every child, or to anticipate the isolated, wilful and sudden act of one boy, the natural tendency of which was to inflict serious harm upon another. There is no evidence that such an incident ever had happened before or that the defendant had any warning whatsoever that it was likely to take place. It was not a danger which it was bound to have foreseen or to have guarded against.

Accepting the facts as found by the Referees, the deduction drawn can not in our opinion be sustained.

Exceptions sustained.

STATE OF MAINE *vs.* ISAIAH CHADBOURNE.

York. Opinion, February 18, 1933.

CRIMINAL LAW. P. L. 1931, CHAP. 199, SEC. 7.

The purpose of Chap. 199, *P. L.* 1931, *is to prevent the sale of clams taken from contaminated areas.*

Section 7 *of that Chapter provides a means by which purchasers of clams or officers engaged in enforcement of the provisions of the statute may readily ascertain the source from which clams are taken.*

The method of labelling packages containing clams as set out in Section 7 *is designed to cover shipments in closed packages rather than delivery in open receptacles.*

While the method of labelling employed by respondent did not literally comply with the requirements of Section 7, it satisfied the spirit and intent of the law and fulfilled its purpose.

On exceptions by respondent, who was tried and found guilty on a complaint alleging transportation of clams without being tagged as required by statute. At the close of all the evidence, respondent moved for a directed verdict of not guilty, which mo-

tion was denied. Respondent seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Ralph W. Hawkes, County Attorney for the State.

Mathews & Varney, for respondent.

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

PATTANGALL, C. J. On exceptions to refusal of the presiding Justice to direct a verdict of "not guilty." Respondent was charged with a violation of Sec. 7, Chap. 199, P. L. 1931, which reads, "All packages used in the shipment and transportation of clams from town to town and from a place within the state to a place without the state shall bear a label which in plain and distinct letters and figures shall state the name and license number of the consignor and the name of the consignee, the word 'clams,' the date of shipment, and the name of the town in which the clams were dug."

It was stipulated that respondent transported clams from town to town in bags which were not fastened at the top, that no labels were affixed to the bags but that a tag was placed inside of each upon which was written all of the information required by the statute—which respondent contended satisfied the requirements of the law. It also appeared that respondent was duly licensed to buy and sell clams and transport them from place to place in Maine.

The particular act upon which the complaint against him was based consisted of his having delivered by truck to a customer in a neighboring town six bushels of clams in open bags, unlabelled except as stated in the stipulation. The sole issue is whether or not, under the circumstances of the case and on the agreed facts, he violated the provisions of the section above quoted.

Reference to Chap. 199, P. L. 1931, discloses its purpose to be the prevention of the sale of clams taken from contaminated areas. The requirements as to licensing dealers and labelling packages were designed to aid in consummating that purpose. The label was especially important. From it could be ascertained the place where the clams were dug, which was the vital fact to be determined if the law was to be of benefit to the public.

Taken literally, Section 7 would not apply to the case at bar. It apparently refers to closed packages. The word "clams" was to

appear on the label. Quite obviously this would be superfluous if the package were open.

It is also clear that the language of Section 7 is not strictly applicable to personal deliveries by vendor to vendees. We do not speak of a direct delivery by a seller of goods to a buyer as a "shipment," nor do we designate the parties to such a transaction as "consignor" and "consignee." These terms imply something quite different than appears in the case before us.

"Shipment" is defined by Webster as "Act or process of shipping; act or process of dispatching goods by vessel or other means of transportation; delivery of goods to a carrier for transportation." It is defined in 6 Words and Phrases (3rd Series) 1088 as a "complete delivery of goods by shipper to carrier. Transportation and shipment is not made until shipper has parted with all control over goods and nothing remains to be done by him to complete delivery."

Webster defines "consignee" as one to whom something is consigned or shipped; and "consignor" as one who consigns something — correlative to "consignee." "A consignee is one to whom something is consigned or shipped." 2 Words and Phrases (3rd Series) 344. "A consignor is a person who delivers freight to a carrier, or a shipper of merchandise or a vendor who ships goods." 2 Words and Phrases (1st Series) 1449-50.

There is no "shipment" here. There may be "transportation" but not "shipment and transportation." The words appear conjunctively in the statute and taken together carry a much broader implication than does the word "transportation" alone. There is no consignment, no consignor, no consignee. There is no closed package. There is a delivery of an open receptacle by a seller to a purchaser.

We think, however, that this would not excuse failure to label; and there was no such failure. The real object of the law must be kept in mind; namely, to convey to purchasers and wardens information from which could be determined whether or not the clams came from contaminated areas.

Under the circumstances shown here, the method of labelling adopted by respondent was sufficient. The label was filled out in accordance with law. It contained all of the information required.

The only complaint is that it was inside instead of outside the open bags in which the clams were carried.

The purpose and intent of the statute were carried out. Respondent's motion should have been granted.

Exceptions sustained.

STATE OF MAINE *vs.* VAUGHN MCNAUGHTON.

Aroostook. Opinion, February 20, 1933.

CRIMINAL LAW. INTOXICATING LIQUORS. PLEADING AND PRACTICE.

To grant a view of premises is common in our practice; of chattels not commonly requested.

To grant or deny such a request is within judicial discretion.

In the case at bar, the question asked the respondent, "if he sold anything to Mr. Marr on October 7," was properly excluded, as the question to whom the sale was made was a question of law; likewise the question, "if Mr. Marr had asked him to sell anything on October 7 would he have sold him any alcohol," was properly excluded. The evidence in the case was sufficient to require submission to the jury of the question of the respondent's guilt of selling liquor without lawful authority.

On exceptions. Respondent, tried on an indictment charging illegal sale of intoxicating liquor, was found guilty. To the exclusion of certain testimony offered in his behalf and to certain rulings of the presiding Justice, respondent seasonably excepted. Exceptions overruled. Judgment for the State. The case fully appears in the opinion.

J. Frederic Burns, County Attorney for the State.

Jasper H. Hone,

A. S. Crawford, for respondent.

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

BARNES, J. This is a criminal appeal, on exceptions. Respondent was tried on an indictment charging that at Presque Isle, in

this state, on the seventh day of October, 1931, without lawful authority, license or permission, he sold three gallons of alcohol to Chester N. Marr.

Respondent admitted sale by him of the alcohol, at the time and place alleged, but denied that he sold it to Marr, claiming he made the sale to one Tufts. He testified that between two and three o'clock, on the afternoon of that day he had negotiated with Tufts, at a grocery store in Presque Isle, for the sale of a three-gallon can of alcohol.

The State presented as witnesses, Chester N. Marr, of Bath, one of a Prohibition squad working that fall in Aroostook County, Edwin R. Goodenow, of Kittery, a Federal Prohibition officer, and Thomas W. Kempton and Dana B. Tufts, local deputy sheriffs. Messrs. Tufts and Goodenow testified that on the afternoon of October 7, 1931, they, with Marr and Kempton, in two cars, left Presque Isle at 1.45 in the afternoon and drove to Houlton, where they remained until about 7.30, when they left Houlton on their return to Presque Isle.

Goodenow testified that upon orders from his superior the four officers attempted to purchase alcohol of respondent that night.

The officers testified that Tufts drove them, in his car, to respondent's house on Chapman Street, in Presque Isle, shortly before 9.30 at night and that Tufts alone left the car and entered the house.

Tufts testified that he did not see respondent on October 7 until at the evening call; that he had known respondent for seven years; that he found him at home on the evening of October 7, 1931, and, as to the agreement of sale, "I asked him if he had any alcohol. . . . He said he had a plenty. I told him I had some friends at the camp at Echo Lake who would like to have a three-gallon can. He said he would be glad to deliver it anywhere, any time. I asked him if he would deliver it that night and he said yes. I gave him directions how to reach the camp. He told me to go to the camp and, if he wasn't there in half an hour, to come out to where the road turned off from the main Houlton road, and wait for him there." It is undisputed that the officers went to the camp, some miles south of the village, and that shortly after ten o'clock Tufts, with Goodenow and Marr, returned from the camp so far as to the

junction of the crossroad with the Houlton road and there met the respondent.

Respondent assured them he had the liquor in his car but refused to deliver it until he should arrive at the camp.

They then proceeded to the camp; respondent carried the three-gallon can into the main room of the camp, opened it and served five or more drinks.

As to who made the purchase, we find in the record that, when he found respondent at the junction of the roads, Tufts offered to take delivery there, but respondent insisted that he would carry the can to the camp and deliver it there; that in the camp yard Tufts offered to take the can and pay for the liquor.

But respondent carried the can in, placed it where Marr ordered, and Marr testified that he paid respondent, placed the thirty dollars in his hand; that twice, before the liquor was carried into the camp, he had offered to pay for it; that in the camp he offered to pay for it; that respondent refused to accept the money until after the first round of drinks; that shortly after that he, Marr, placed the thirty dollars in respondent's hand and he then accepted it.

Kempton testified that he saw Marr pay respondent.

Goodenow testified that twice, on the road, Marr offered to pay for the liquor, and once in the camp, and that on the second attempt by Marr to pay in the camp, the money passed from Marr to respondent.

Respondent's testimony, on direct examination, was that Mr. Marr produced the money, and this is his version of the procedure in payment:

"Q. And what did he (Marr) say or do?

A. First he asked me how much the alcohol was, and I told him thirty dollars. He said, 'That is kind of steep, isn't it?' I didn't make him any answer.

Q. What did he finally do with the thirty dollars?

A. Laid it on the table.

Q. What did you do with it?

A. We had a round of drinks and then I took it and put it in my pocket."

Much testimony followed, as to conversation at the camp during respondent's visit, which was prolonged until midnight.

At the end of the testimony respondent's counsel moved for a directed verdict of not guilty.

This the Court refused, and exception was taken.

From the whole evidence it must be the Court was satisfied that respondent was guilty as charged in the indictment. No course was open to him but to submit the question to the jury.

During the trial his counsel asked respondent, "Did you sell anything to Mr. Marr on that October 7th last?"

The Court then said: "That is excluded in that form. The question to whom the sale was made, Mr. Crawford, is a question of law. He can tell all the facts and circumstances, but it is not for him to say whether the sale was made to him or not."

The Court was manifestly right. This exception fails.

Again respondent was asked, "If Mr. Marr had asked you to sell him anything on October 7th, would you have sold him any alcohol?"

Upon objection this question was excluded, and properly.

The question is not entirely clear, but its answer, if in the negative, would probably have had no probative force with jurors of ordinary intelligence. The issue was not what he would have done, but what he did, and the question was properly excluded.

During the hours spent in the camp, while all agree that not more than two drinks were taken by any, and that some of the company drank nothing, the respondent is said to have told in detail of the risks he ran in running rum into Maine from Canada. In particular he is said to have reported that he was at times fired upon by officers.

It is in the record that he offered to employ Kempton to travel with him at ten dollars per day, thirty dollars a trip, to serve as his gunman and return shot for shot. The State's witnesses testified that respondent asked them to go into the yard and look at bullet holes in his car.

Before closing his case, respondent's counsel said he "would like to move that the jury be permitted to view the car."

Whereupon the Court remarked, "I see no object in wasting time for that, Mr. Attorney. It is immaterial."

Respondent had denied making talk about bullet holes in the car; had testified that he had polished it since October 7, and observed none, and that the car was on the street near the courthouse.

To grant a view of premises is common in our practice; of chattels not commonly requested.

To grant or deny such a request is within judicial discretion.

Refusal here was not wrong.

Exceptions overruled.
Judgment for the State.

CHARLES E. MILLETT, TREASURER OF CITY OF BANGOR

vs.

HAYES & CO., INC.

Penobscot. Opinion, February 21, 1933.

MUNICIPAL ORDINANCES. AMENDMENTS.

The limited use of a portion of a basement of a building for the storage of oil is not a violation of an ordinance forbidding the erection, construction or maintenance of a building to be used as a gasoline filling station without first procuring a license therefor.

An amendment to an ordinance as finally stated controls the amendatory words. An act or ordinance providing that a prior act or ordinance shall be amended "so as to read as follows" repeals by necessary implication all of the section sought to be amended which is not reënacted.

In the case at bar, defendants may fairly be said to have made use of the building or at least a small part of it in connection with their gasoline filling station, but in no sense of the word can it be said that they "maintained" the building for that purpose.

On report. An action of debt to recover a penalty for operating and maintaining a gasoline filling station on private property without license or permit from the municipal officers as required by Chapter 13, as amended, of the ordinances of the City of

Bangor. After the testimony had been taken out the case was by agreement of the parties reported to the Law Court for its determination on so much evidence as was legally admissible. Judgment for the defendant. The case fully appears in the opinion.

Ballard F. Keith, for plaintiff.

Fellows & Fellows,

Terrence B. Towle, for defendant.

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

PATTANGALL, C. J. On report. Action of debt to recover a penalty under a city ordinance which provides that "no person shall erect, construct or maintain any building to be used as a public garage or gasoline filling station within the city limits . . . until a permit and license so to do has been issued to him by the municipal officers, who are hereby authorized to grant the same"; and which further provides that "Any person who shall operate or maintain any public garage or gasolene filling station without first complying with the above provisions, and who has not been granted a license so to do, shall be liable to a penalty not exceeding fifty dollars for every day he thus uses and maintains said garage or gasolene filling station."

Two issues are raised: (1) Whether or not the admitted acts of respondent were within the prohibition of the ordinance; and (2) whether or not the ordinance is valid.

We think that the first question must be answered in the negative and, therefore, it becomes unnecessary to consider the second.

The evidence is brief. The oral testimony of one witness, supplemented by documents and admissions, makes up the entire record. There is no dispute as to the facts. Such disagreement as exists concerns the inferences to be drawn from them.

It appears that defendant operated two gasoline pumps located on leased land in close proximity to a small two-story building, the second floor of which was occupied as a tenement. The first floor and basement were occupied in part by a firm of plumbers and in part by the defendant corporation, which neither had title to the building in whole or in part nor occupied as lessee nor, so far as the record shows, as a tenant at will. Its occupancy was limited to

storing certain drums of oil in the basement, keeping six glass containers of oil on a shelf and a cash register on a counter in a room on the street floor in which the plumbing firm also kept tools and merchandise. Defendant's manager sometimes, but not usually, stayed in this room when not engaged in serving customers. There was also a sign attached to one corner of the building which read "Fuel Oil Here" and on another corner a hose and a sign "Air." On the other side of the building there was a platform on which cars could be placed and by its side a pressure grease gun. On both of the windows which faced the street and on the street door were painted signs referring exclusively to business conducted by the plumbers, who also had a salesroom and office on the street floor, in which was installed a telephone listed in their names.

Defendant may fairly be said to have made use of the building or at least a small part of it in connection with its gasoline filling station, but in no sense of the word can it be said that it "maintained" the building for that purpose.

The ordinance in question here was enacted in 1927. It was amendatory of a former ordinance which read, in part, as follows: "No person shall erect, construct or maintain any building to be used as a public garage within the city limits nor alter any building already erected for such use nor use any building or structure for such purpose until a permit or license has been issued to him by the municipal officers who are hereby authorized to grant the same."

The important differences between the old ordinance and the new were that in the latter the words "gasoline filling station" were added after the words "public garage" and the words "nor use any building or structure" were omitted.

We are not called upon to decide whether or not on this record defendant might have been held guilty had the new ordinance corresponded with the old in every respect excepting the addition of the words "gasoline filling station." It does not so read. Plaintiff argues that the omission of the words quoted above was inadvertent and relies on the fact that the amendment was adopted in the following form:

"Be it ordained by the city council of the city of Bangor as follows:

Section 1. Chapter 13 of the Ordinances of the City of Bangor is hereby amended by adding after the words 'Public Garage' wherever the same may appear in any of the four sections of said chapter, the words 'or gasolene filling station' so that said chapter as amended shall read as follows:

Public Garages or Gasolene Filling Stations.
Chapter 13.

Section 1. No person shall erect, construct or maintain any building to be used as a public garage or gasolene filling station within the city limits, nor alter any building or structure for such purposes, until a permit and license so to do has been issued to him by the municipal officers who are hereby authorized to grant the same. To obtain such permit he shall first notify the building inspector and submit to him detailed plans and specifications of the structure to be thus constructed, altered or used. . . ."

Whether the amendatory words or the amendment as finally stated governs when they are inconsistent has been the subject of controversy, but we think the weight of opinion and the better reasoned position is that taken by this Court. In *Howard* v. *R. R. Co.*, 86 Me., 387, 29 A., 1101, 1102, the Court, speaking through former Chief Justice Peters, discussed the question in the following language:

"It may be said that no rule of universal application prevails as to whether the amendatory or the amended words shall govern the construction where there is a repugnancy between them. One clause may clearly show the legislative intent, and the other not. The consistency of either one may overrule the absurdity of the other. The real intention is to be ascertained if it can be. But the rule of interpretation which governs in cases generally, where any doubt or uncertainty exists, is that the last words control all preceding words for the purpose of correcting any inconsistency of construction. . . . Courts have quite uniformly held that where statutes have

been amended 'so as to read,' in a particular way, the statute as amended repeals or defeats all previous provisions inconsistent with it. . . ."

This view was reiterated and emphasized in *Stuart* v. *Chapman*, 104 Me., 22, 70 A., 1069, 107, where the Court said: "It is a familiar principle of statutory construction that a statute providing that a certain section of a prior act shall be amended 'so as to read as follows' repeals by necessary implication all of the section of the prior act which is not re-enacted."

Considering these precedents, we feel bound to regard the ordinance as having been amended so as to exclude from the list of forbidden acts the mere use of a portion of a building in the manner and to the extent shown by this record.

Judgment for defendant.

STATE OF MAINE *vs.* CORNELIUS D. SHEA.

Hancock. Opinion, March 1, 1933.

CRIMINAL LAW. NEW TRIALS.

A motion for a new trial on the ground of newly discovered evidence can not be demanded as of right, and can be granted only when certain conditions appear. The evidence supporting such a motion must be material and not merely cumulative or impeaching. It 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. It must be such as will probably change the result, if a new trial is granted.

In the case at bar, it can not be said that due diligence was exercised and failed to produce certain witnesses at the trial, four months after the assault. It does not appear that upon new trial the evidence of the two missing witnesses would change the result.

Respondent, tried upon an indictment for assault and battery, was found guilty. To the admission of certain testimony, exception was seasonably taken by the respondent, and after verdict, a motion for new trial upon the ground of newly discovered evidence

was filed. Exception overruled. Motion overruled. Judgment for the State. The case fully appears in the opinion.

Percy T. Clarke, County Attorney for the State.

Edward P. Murray, for respondent.

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

BARNES, J. After indictment, trial and verdict of guilty of the crime of assault and battery respondent brings his case to this court, on an exception to the admission of evidence, and on motion to have the verdict set aside on the ground of newly discovered evidence, with record of the same.

The assault is alleged to have been committed on May 19, 1931. Trial was had at the September term of that year.

The record shows that the complaining witness, hereinafter called the complainant, was a blacksmith, doing business in a shop off Oak Street in the city of Ellsworth; that he worked for a while in the shop, after supper, on the evening of May 19, Carrol S. Johnson assisting him; that, at about half past nine, that evening, he, Johnson and Albert J. Clark were in the shop when respondent drove his car in the driveway, near to the shop, and finding the door of the shop closed and made fast, went to the nearest side window to look within; that by the time respondent reached the window the light in the shop had been turned off; that respondent presented a glowing flashlight to the window and a missile, flung from within, shattered the window. As to these preliminary facts there is no dispute.

Respondent testified that he had left his home that evening, driving his car, had picked up three men off the street soon after seven o'clock; had entertained them with talk and smoking and had driven them about the city for more than two hours, turning off Oak Street into the shop driveway for the purpose of having a draw-bar shortened.

Complainant testified that respondent came to the shop because he "had lost a three-gallon can of alcohol, and thought I stole it."

Johnson testified to the events of the evening, before the shop door was opened, and stated that respondent was at the shop, "to recover a three gallon-can of alcohol."

He was then asked by the State's attorney, "And what do you know about the three-gallon can of alcohol?"

Objection to this question was noted, overruled, and exception was taken. Then followed:

"Q. Tell us what you know about the three-gallon can of alcohol which you have testified to? You know what reason Shea, the respondent, had for coming to the premises that night?

A. It was taken off his premises.

Q. By whom?

A. Albert Clark.

Q. Who was in the shop?

A. He was at the time I was there.

Q. How do you know Albert Clark took it off?

A. I saw him take it off.

Q. And where was the alcohol carried?

A. Brought to the shop, but Sinclair wouldn't let him keep it there."

The report contains evidence as to drinking in the shop that evening; and the knowledge of the witness, brought out by the question which was objected to, was material.

The exception fails.

On motion for a new trial on the ground of newly discovered evidence, this Court has recently stated that it is not demanded of right and can be granted only when certain conditions appear. "The evidence supporting such a motion must be material and not merely cumulative or impeaching. It 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. It must be such as will probably change the result," if a new trial is granted. *Bolduc* v. *Garcelon*, 127 Me., 482, 144 A., 395, 396.

The respondent did not deny felling complainant to the ground, after the latter had opened the shop door, and inflicting grievous wounds on his head, nor did he deny that he struck with a heavy revolver. He claimed, however, that complainant was the aggressor, and attempted to justify in self defense.

Two witnesses were examined on the motion. One, Clark, who was in the shop and yard during the struggle, gave testimony that is only cumulative. The other, Young, testified in direct contra-

diction to the State's witnesses on two points of slight significance. But his testimony that he lay asleep in a chamber only a few feet from the shop door, and heard nothing of the fight would appeal only to the credulous; while what he said as to blood spots and the shop door being unlocked on the night of the alleged assault, would not in our opinion outweigh testimony of the late sheriff and Mr. Lovell.

Clark was a well-known character in Ellsworth, son of the then street commissioner.

He was subpoenaed to testify for the State on May 21, 1931, but left the city that morning.

Young had for eleven years made his home with the Mrs. Clement who lived in the house nearest the blacksmith shop, where complainant washed his wounds that night. It can not be said that due diligence was exercised and failed to produce these men at the trial, four months after the assault.

We can not believe that upon new trial the evidence of these two would probably change the result.

Exception overruled.
Motion overruled.
Judgment for the State.

D. CARL WARD, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE.

Kennebec. Opinion, February 23, 1933.

WILLS. EVIDENCE.

The failure of a testator to include as a beneficiary a wife, or a son, or a daughter, or even a near relative is a fact of importance in determining his state of mind toward such individual, who would under normal conditions be the natural object of his bounty.

The inclusion by a testator of an outsider as one of the objects of his bounty

is evidence of friendship between them. The omission of a close friend is not under ordinary circumstances evidence of any want of friendship.

In the case at bar, the omission of Mrs. Longley's name in the will of Mrs. Ward had no tendency to refute the statement in the testator's will that Mrs. Longley and his wife were warm friends. The ruling excluding the will was correct.

On exception to the exclusion in the Supreme Court of Probate of a certain instrument known as the will of Cora Luce Ward, offered by the appellant. Exception overruled. The case fully appears in the opinion.

McLean, Fogg & Southard, for appellant.
Robert A. Cony,
Samuel Titcomb,
George W. Heselton, for proponent.

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

THAXTER, J. This case heard in the Superior Court was a probate appeal. Certain questions were submitted to the jury, one of which involved the issue whether the execution of the will of one Andrew D. Ward and the codicil thereto was the result of undue influence on the part of Addie B. Longley, the principal beneficiary. Another called for an answer as to the testator's soundness of mind. The jury found for the proponents of the will, and a decree in accordance with their verdict was entered by the presiding Justice. To the exclusion of certain evidence offered by the contestants an exception was taken, and this is the only error claimed and argued before this Court.

The testator left an estate of approximately $45,000, about half of which came to him through a waiver by him of the provisions of the will of his wife, who died a few years before him. The fifth paragraph of the testator's will reads as follows:

> "All the rest, residue and remainder of my property, of whatever kind or nature, and wherever located or found, be it real, personal or mixed property, I give, devise and bequeath to my present housekeeper, Addie Blanchard Longley,

wife of Theodore W. Longley, Sr., in recognition of her willingness to come into my home and aid in making the later days of my life happy and comfortable, and also in recognition of the warm friendship that existed between her and my deceased wife."

The will of Mrs. Ward offered in evidence by the appellants, after providing for certain minor bequests to her husband and certain charities, left the major part of her estate to relatives. No mention of Mrs. Longley was made in the will. Counsel for the appellants contend that this omission has a tendency to refute the allegation in the testator's will that there was a warm friendship between his housekeeper and his wife, and that it also shows that the testator, in making the provision for Mrs. Longley, made possible in part by reason of money received from his wife's estate, was not really carrying out the desires of his wife.

As to the latter contention it is only necessary to say that the testator makes no claim that his bequest to Mrs. Longley was to carry out the wishes of his wife. He bequeathed her property which properly belonged to him and gave two reasons for doing so, first, because she had come into his home and taken care of him, and secondly, because of her friendship with his wife.

As to the first claim counsel argue very strenuously that the fact that Mrs. Longley was not mentioned by Mrs. Ward in her will is evidence that no such friendship as alleged by Mr. Ward existed. We do not think so. The failure of a testator to include as a beneficiary a wife, or a son, or a daughter, or even a near relative is a fact of importance in determining his state of mind toward such individual, who would under normal conditions be the natural object of his bounty. Wigmore on Evidence, Section 229. Likewise where property is disposed of to one outside of the immediate family circle, the reason for the gift may be shown to contradict a claim of unsound mind or undue influence. *In re Wells' Will*, 95 Vt., 16, 113 A., 822; *Glover* v. *Hayden*, 4 Cush., 580. The truth is that the inclusion by the testator of an outsider as one of the objects of his bounty is evidence of friendship between them. The significance of such a gift is that it is unusual. The converse, however, does not hold, and the omission of a close friend from a will is not,

under ordinary circumstances, evidence of any want of friendship. Fortunately in this life the basis of such relationship between individuals is usually not the hope or expectation by them of material gain.

The fact that Mrs. Ward chose to leave her property to relatives and omitted to include Mrs. Longley in her will has not even a remote bearing on the question of their friendship. The ruling excluding the will from evidence was correct.

Exception overruled.

WILLIAM H. ROUSE *vs.* DORIS SCOTT.

Aroostook. Opinion, February 27, 1933.

MOTOR VEHICLES. NEGLIGENCE. BURDEN OF PROOF. VERDICTS.

The driver of an automobile turning across a way upon which he is driving to enter a way intersecting from the opposite side, must pass to the right of the intersection of the medial lines of the ways as required by R. S., Chap. 29, *Sec.* 74.

Failure to obey this rule of the road is prima facie *proof of negligence.*

Such a violation of the law does not absolutely establish liability, but creates a presumption which, nothing else appearing, is sufficient to sustain the burden on the plaintiff of proving the defendant's negligence.

The plaintiff in an action on the case for negligence not only has the burden of establishing the negligence of the defendant, but also his own due care.

Thoughtless inattention in the operation of a motor vehicle on the highway spells negligence.

A verdict can not stand upon a finding which results from sympathy or a misconception of the law and the facts of the case.

In the case at bar, contributory negligence was the controlling issue. Upon the plaintiff's own account of his conduct leading to his injury his failure to see the defendant's car turning across the street in front of him and into his path can only be attributed to his thoughtless inattention, without which the collision could have been avoided. His failure to exercise due care was manifest and was a proximate cause of his injuries.

On exceptions and general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by plaintiff, the operator of a motorcycle, in collision with an automobile driven by the defendant. To the denial of defendant's request for a directed verdict exception was seasonably taken, and after the jury had rendered a verdict for the plaintiff in the sum of $5,690.00, a general motion for new trial was filed by the defendant. Motion sustained. New trial granted. The case fully appears in the opinion.

A. S. Crawford, Jr., for plaintiff.

Bernard Archibald, for defendant.

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

STURGIS, J. In this action on the case for negligence, the defendant reserved an exception to the denial of her motion for a directed verdict and filed a general motion for a new trial.

The evidence clearly shows that the defendant, on the evening of August 29, 1931, drove her Chevrolet roadster northerly on Court Street in Houlton, slowed down or stopped nearly opposite Leonard Street, which intersects from the west and she was about to enter, then proceeded slowly across Court Street and had reached the gravel shoulder beyond the tarvia when her car was struck by the motorcycle which the plaintiff was driving southerly on the right-hand side of Court Street. The car and motorcycle were badly damaged. The plaintiff was seriously injured.

In turning her car across Court Street, the defendant passed, not to the right, but to the left of the intersection of the medial lines of the ways in violation of the Motor Vehicle Law. R. S., Chap. 29, Sec. 74. This was *prima facie* evidence of her negligence. *Bolduc* v. *Garcelon*, 127 Me., 482, 144 A., 395. And while the failure of the defendant to observe the law of the road does not establish absolutely her liability, the presumption created is sufficient, nothing else appearing, to sustain the burden which was on the plaintiff to prove the defendant's negligence. *Dansky* v. *Kotimaki*, 125 Me., 72, 74, 130 A., 871.

It is not necessary, however, to consider the correctness of the finding of the jury on this issue. The plaintiff not only had the

burden of establishing the negligence of the defendant, but also that he himself was free from negligence which was a contributing proximate cause of the collision. The controlling question here is whether he has proved his own due care.

Upon his own admissions, the plaintiff was driving his motorcycle at least twenty-five miles an hour when it struck the defendant's car, and this had been his speed for some little distance. When about sixty-six feet from the point of collision, he saw the defendant's car coming towards him on the opposite side of the street, but paid no particular attention to it further and did not notice it was swinging across the street until, as he expresses it, "we were right together." He says that he then had neither time nor opportunity to reduce his speed or do more than swing his motorcycle slightly to the left.

There can be no doubt that the beams of the headlights of the defendant's car, as she turned it, were thrown directly into the plaintiff's line of vision as he came towards her from the opposite direction, and clearly indicated the left-hand swing of the car. The evidence is that the turn and the crossing of the street was made slowly with the car in low gear. The plaintiff's view of the street ahead was unobstructed and he insists that his vision was not at all impaired by the beating rain. Upon the plaintiff's own account of his conduct, and no evidence more favorable to his case appears in the record, his failure to notice the defendant's car from the time it was on the right-hand side of the street until it had crossed almost to the point of collision can only be attributed to his thoughtless inattention, without which he would have seen the car coming into and across his path and, by a proper operation of his motorcycle, could have avoided the accident. A motor vehicle operator is bound "to use his eyes to see seasonably that which is open and apparent, and take knowledge of obvious dangers. When he knows, or reasonably ought to know, the danger, it is for him to govern himself suitably. Thoughtless inattention on the highway, as elsewhere in life, spells negligence." *Callahan* v. *Bridges Sons*, 128 Me., 346, 349, 147 A., 423, 424.

We think the jury committed a manifest error in giving a verdict for the plaintiff in this case. He was grievously injured, but on this record was himself negligent. A great sympathy for his suffering

and misfortune can not set aside the settled rules which govern his right of recovery, nor can a verdict stand upon a finding which results from a misconception of the law and the facts of the case. We are convinced that this verdict rests on the one error or the other and can not be sustained.

It is unnecessary to pass upon the exception to the refusal of the trial Judge to direct a verdict. The defendant is entitled to a new trial. It is granted on her General Motion.

Motion sustained.
New trial granted.

MAGLOIRE MORIN *vs.* GEORGE CARNEY.

STELLA B. CARNEY *vs.* MAXIME MORIN.

GEORGE W. CARNEY *vs.* MAXIME MORIN.

Aroostook. Opinion, March 10, 1933.

MOTOR VEHICLES. NEGLIGENCE. JURY FINDINGS. VERDICTS.

Where, in a civil action, on an issue of negligence, a defendant is shown to have violated a valid statutory regulation, enacted in behalf of and to protect a plaintiff as one of the public, such is evidence from which, if uncontrolled by direct proof or circumstances, the jury may find a defendant negligent.

Mere skidding of a motor vehicle is not evidence of negligence.

If, on review, the jury is found to have returned a verdict against the evidence or the weight thereof, the Court should set the verdict aside and grant a new trial.

In the cases against Mr. Morin, the fact that an accident occurred was, in itself, no evidence of his negligence. The wheel tracks and the glass were too clear and certain to admit of dispute. Taken in aspect most favorable to the plaintiffs Carney, a reasonable preponderance of all the evidence did not sustain the verdict returned for them.

A fair preponderance of the facts and circumstances adduced by the plaintiff Morin, established that, when the cars collided, the Carney car was not on its side of the road.

This was presumptive evidence of the violation of a legal duty, the weight, influence or force of which was not counteracted by the proof on the other side. In each instance the finding of the jury was manifestly unwarranted.

Three actions on the case to recover damages for personal injuries and for property damage sustained in collision of automobiles of Magloire Morin and of George W. Carney. To the exclusion of certain testimony, plaintiff Morin seasonably excepted and after the jury had rendered a verdict against him in all three cases, filed a general motion for new trial in each case. Exceptions overruled. Motions sustained. Verdict set aside. New trials granted. The cases fully appear in the opinion.

J. Frederic Burns, for Magloire Morin.

A. S. Crawford, Jr., for Carneys.

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

DUNN, J. These three actions were tried together. The accident from which they arise occurred when two automobiles, destined oppositely, collided on the highway between Masardis and Ashland, at a point known as Doak Pitch. The day, December 4, 1930, was clear; the hour was quarter after three in the afternoon. Magloire Morin — plaintiff in the first of the above-entitled cases, and defendant (under the name of Maxime Morin) in the other two — was driving his Ford automobile toward Ashland, that is, northerly on the practically north and south road. Another man was riding with him. In the other suits, the respective plaintiffs, George W. Carney and Stella B. Carney, are husband and wife. Mr. Carney owned the Chevrolet automobile in which they were riding; it was progressing southerly. An adult son, Henry Carney, was driving, Mr. Carney was seated next his son, and Mrs. Carney was on the rear seat, another guest passenger sitting beside her.

Mr. Morin sues Mr. George Carney for personal injuries and property damage. On the trial, an exception to the exclusion of a conversation was noted and allowed. A witness, being examined in rebuttal, was asked to state what Henry Carney (who witnessed for his father) had told him. Objection was interposed. The judge said, in gist, that if the answer would go to contradiction of Henry

Carney's testimony, the evidence would be admissible; otherwise not. Counsel stated "it certainly has some bearing on what Mr. Carney said in direct examination; it has to do with the rate of speed of the car." Counsel did not, however, so far as the bill of exceptions discloses, indicate what he expected to prove. Whether the answer would have had any probative force cannot, therefore, be known. *Johnson* v. *Day*, 78 Me., 224, 3 A., 647. The exception must be overruled.

Mr. Morin alleges, as actionable negligence, the operation of his adversary's car at an illegal, unreasonable, and excessive speed; the negligent loss of control of the vehicle; and proximately resultant injury and damage. The jury returned a general verdict for the defendant. It decided, in effect, that the burden resting upon the plaintiff to prove negligence was not sustained. Mr. Morin filed a general motion for a new trial. Discussion of this motion, and of the motions filed by him as party defendant in the cases by Mr. and Mrs. Carney, respectively, will be had together.

Of the persons in the Carney car, apparently only Mrs. Carney was seriously injured. The jury awarded her damages, for personal injuries, in the sum of five thousand dollars. Her husband, for reimbursement of expenses incurred because of her injury, to compensate him for the loss of her services and companionship, and for property damage, recovered a verdict for fifteen hundred dollars.

The same exception as in the first case, except that here the defense is the excepter, was taken in each of these cases. Error not affirmatively appearing in either bill, the exceptions are overruled. *Johnson* v. *Day*, supra.

The stating of certain further facts seems essential to consideration of the cases on the merits.

The road, one of graveled surface, in open country, was twenty feet wide. There was evidence that it was frozen, and, on the east side, rough and rutted, due to the operation of trucks. Though this condition may have retarded travel, the road was not impassable. In some places the snow was two inches deep; in others it had blown off, exposing a partial coating of ice. The opposite, or west side of the road, was relatively smooth. Mr. Morin was, and for some distance had been, driving on this side of the high-

way, which, until the car that proved to be Mr. Carney's approached, was otherwise unobstructed.

The allegations of negligence against Mr. Morin are, in brief, that despite the fact that the Carney car was, of legal right, in continuous forward movement on the west side of the road, he (Morin) did not seasonably turn to the right of the middle of the traveled part, that the cars might pass without interference. R. S., Chap. 29, Sec. 2. The statute provides, in its application to present day traffic, what course shall be pursued by a motor vehicle when approaching to meet another; it defines what each driver shall himself do, and may expect of others; these being among the purposes of the law of the road.

Where, in a civil action, on the issue of negligence, a defendant is shown to have violated a valid statutory regulation, enacted in behalf of and to protect a plaintiff as one of the public, such is evidence from which, if uncontrolled by direct proof or circumstances, the jury may find a defendant negligent.

Mr. and Mrs. Carney claim that because of Mr. Morin's failure to exercise ordinary care and bring his car from west of the median line to east of that line of the road, soon enough and far enough, he fell short of the performance of that duty which he owed to them as travelers on the same public way.

The claims lack sufficient substantiation. The testimony relied upon may not be said to justify the jury findings.

When the cars came within seeing distance, Mr. Carney's was at the crest of the pitch. It was on the west, or, in common expression, "its own" side of the road. Mr. Morin's car, on the same side, was ascending the pitch. The grade, in the phrase of the surveyor, was three per cent.

The place of accident is of importance.

Mrs. Carney, in her testimony, conveys little information. She says the car (which she first saw about one hundred feet away) continuing directly toward them, she became greatly alarmed, and thinks she closed her eyes. She might have lost consciousness, as she has no memory of the collision.

The husband testifies that when, from the hilltop, the on-coming car was seen, the brakes were applied to his car, causing it to swerve and skid, and to turn toward the center of the road; and

that, after going fifty or sixty feet, it there struck the Morin vehicle.

The minimum estimate of the speed of the Carney car is in the testimony of its driver, who witnesses that the rate was thirty miles an hour. A witness in the Morin car says forty to forty-five miles an hour.

Mr. Carney and his son are in substantial agreement that the Morin car was not started to the east side of the road until it was about fifteen feet away. Mrs. Snow, the other passenger with the Carneys, was not called to the stand.

Mr. Morin testifies that when he saw the Carney car on top of the hill, his own car was (on the surveyor's measurements) one hundred and sixty-eight feet to the southward. On his version, which finds corroboration in the testimony of his companion, he at once turned his car for the east side of the road; the other car veered from the westerly side and came "right at" them, whereupon he (Morin) "stepped on the gas." The right-hand front wheel of his car, it is in evidence, was beyond the ditch on the east side of the road when struck by the Carney car. The impact, to continue recital from the evidence, was just back of the left front wheel. When stopped, the Morin car was completely off the highway, and twelve feet within a former schoolhouse yard. From a point in the road opposite where the car is testified to have been, to the crest of the hill — as the plan measures — is one hundred and sixteen feet.

This tends to negative contention that the accident happened on Mr. Morin's "wrong side" of the road. Strong if not conclusive circumstances are that the wheel tracks indicate the accident to have been where Mr. Morin places it, and that broken glass from his automobile fell without the highway and within the old school yard.

Counsel for the Carneys, seeing the force of this mute evidence, does not attempt to explain it, but stresses that there was conflicting testimony in regard to a disputed question of fact.

A jury is the arbiter of facts; it determines credibility of witnesses, and renders its verdict. Juries, like other earthly tribunals, have always exhibited a full share of human frailty; sympathy, rather than an impartial weighing of the evidence with reference

to the burden of proof, sometimes sways judgment. If, on review, the jury is found to have returned a verdict against the evidence or the weight thereof, the court should set the verdict aside and grant a new trial. The right to do this is a historic incident of trial by jury.

In the cases against Mr. Morin, the fact that an accident occurred is, in itself, no evidence of his negligence. The wheel tracks and the glass are too clear and certain to admit of dispute. Taken in aspect most favorable to the plaintiffs, a reasonable preponderance of all the evidence does not sustain the verdicts returned for them.

The mere skidding of a motor vehicle is not evidence of negligence. *King* v. *Wolf Grocery Co.*, 126 Me., 202, 137 A., 62. In the absence of anything to show the conditions which existed at the time, or of the manner in which the Carney car was being operated, the fact of its skidding would not alone tend to prove the driver negligent. *King* v. *Wolf Grocery Co.*, supra.

But that is not the case of *Morin* v. *Carney*. A fair preponderance of facts and circumstances, as adduced by the plaintiff, who had the burden of proof, establishes that when the cars collided, the Carney car was not on its side of the road. This is presumptive evidence of the violation of a legal duty, the weight, influence or force of which is not counteracted by the proof on the other side. *Coombs* v. *Mackley*, 127 Me., 335, 143 A., 261.

This Court is avoiding the three verdicts. It is not, in the view of the Court, that the jury might have, in any of the cases, found otherwise; but that, in each instance, the finding of the jury was manifestly unwarranted. *Lemieux* v. *Heath*, 116 Me., 55, 100 A., 1.

In each case, the motion is sustained, and a new trial granted.

Motions sustained.
Verdicts set aside.
New trials granted.

BERTHA E. FERRIS' CASE.

Piscataquis. Opinion, March 10, 1933.

WORKMEN'S COMPENSATION ACT. ADMINISTRATION. PROOF.

On appeals respecting the administration of the Workmen's Compensation Act, cognizance is taken of questions of law only.

An award in a compensation case cannot rest merely upon imagination or possibility, or upon a choice equally compatible with an accident and with no accident. However, it is not necessary that facts be proven to any higher degree than that necessary under the settled rule of finality (except in cases of fraud) of decisions of fact. Probative evidence of essential elements, though slight, yet sufficient to make a reasonable man conclude in the petitioner's favor on the vital points, will suffice.

Death need not be shown to have resulted from a sole source. Death resulting from the concurrence of an accident and a disease is compensable.

If, by weakening resistance, or otherwise, a compensable injury so influences the progress of an existing disease as to cause death, the proof in that regard need not establish more.

If, as in the case at bar, the petitioner's evidence, with its logical inferences, is, on the fundamental issue of causal relation between compensable injury and death, reasonably convincing, the requisite degree of proof is attained, notwithstanding that opposing evidence is of even greater weight.

The issue before the Commission in the case at bar, was whether competent evidence reasonably supported the allegation that the result in question came from the source alleged. The negation of every other possibility of death except that by accidental means was unnecessary. There was sufficient evidence, if its credibility was favorably determined, to substantiate the allegations of the petition, that death resulted from compensable injury.

On appeal from the decree of a sitting Justice affirming a decree of the Industrial Accident Commission denying compensation to the petitioner. Appeal sustained. Decree reversed and case remanded to the Industrial Accident Commission without prejudice to further proceedings under the Workmen's Compensation Act. The case fully appears in the opinion.

J. S. Williams, for petitioner.
E. F. Littlefield,
William B. Mahoney,
Theodore Gonya, for respondent.

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

DUNN, J. In this case, a dependent widow claimed compensation for the death of her husband, a workman who had sustained compensable injury. The issue raised by the answer was whether death was the result of the industrial hurt. The claim was rejected by the Industrial Accident Commission, one Commissioner alone sitting; thereupon, a Justice of the Superior Court entered, as the statute requires, a decree to enforce such decision. R. S., Chap. 55, Sec. 40. This appeal was made, bringing forward the record. On appeals respecting the administration of the Workmen's Compensation Act, cognizance is taken of questions of law only.

The name of this workman was Lemuel O. Ferris. He had employment in a mill of the Old Town Woolen Company, at Guilford, as a card room helper. On November 6, 1930, while taking waste from a cylinder, a wire scratched his right thumb. Incapacity began, as a consequence, on November 10, 1930. On that day the injured man was attended by a physician. The doctor testified that the right thumb of his patient was scratched (looking as if by a comb), and filled with pus. There were red streaks running up the hand and arm. A few days afterward, an abscess which had developed on the forearm was opened. Fever gradually subsided. The wound appearing healed, Mr. Ferris was permitted to report for work. This he did on December 1, 1930. Later, on that same day, the doctor again treated him, being called to his house. The next day the patient said that his right hip was painful; on examination, it appeared inflamed. Treatment was for rheumatism. On December 5, another physician took over the case.

The first physician, while on the witness stand, expressed the opinion that in the light of subsequent developments, the condition of the patient's hip was the beginning of an infection there. He stated that the sick man had a scab on his left elbow; it had been

painted with an antiseptic called "mercurochrome," and did not then require treatment.

The new physician found Mr. Ferris delirious; his temperature was 103 or 104. He complained of severe pain in his right hip; his right arm and shoulder were red and swollen. A scar on the right hand was recently healed; there were scabs with pus beneath them on the left elbow and hip. The man was vomiting, and had diarrhea. The second day symptoms were much worse — the swelling continuing, and a poisonous condition of the whole system existing. On the third day pustules had formed in the mouth and throat, and pus was being coughed, as from the lungs. The diagnosis was septic pyemia, which could be attributed to traumatic infection in the thumb.

On December 12, a third physician was called, in consultation. He witnessed that there were numerous sores on Mr. Ferris' body, that his heart sounds were weak and feeble, his temperature high, and his mind wandering. It was evident, he testified, that the man was dying. To a question on cross-examination, the witness answered that if prior to hurting the thumb, there had been a sore on the workman's hip, it would be impossible to say which was the cause of the blood poisoning. In connection with his other testimony, the witness plainly meant that in such case he could not determine the precise origin.

Mr. Ferris died December 14, 1930. The cause of his death was given as general septicaemia, with inflammation of the lining of the cavities of the heart superimposed.

Witnesses for the defendant gave testimony that two or three weeks before the injury to his thumb, the employee, who was their fellow workman, had a boil on his left hip. The dead man's widow and son testified, in rebuttal, that they had not known of any such affliction.

The defense called to the witness stand a physician who had neither seen the man who sickened and died, nor had to do with his case. It was ruled that the knowledge and experience of the witness had fitted him to give expert testimony on the medico-legal questions which the case involved.

During the cross-examination, the Commissioner interrupted to ask:

"Is it possible, Doctor, for any physician, in view of the case as outlined in the record, to say with any degree of certainty the source from which this infection came?"

The witness answered:

"I don't believe anyone could say definitely that it came from either one of the possible sources to the exclusion of the other."

The Commissioner, in his findings, makes no specific reference to the testimony of the medical witnesses who had treated the patient, or that of him called in consultation. What they observed, what their diagnoses were, how they treated him, and what the results were — or their opinions as to the causing of the condition and the ultimate effect — are not set forth in the findings.

The question put to the expert, and his answer thereto, are recited at length. The Commissioner then concludes:

"A painstaking review of all the testimony properly before us leads to the conclusion that it is impossible to say with any degree of certainty, the source of the infection which caused Mr. Ferris' death. Any attempt to state the source, under the conditions presented, would be pure conjecture."

The claimant had the burden of proving that the scratching of her husband's thumb, and the setting in of septicaemia, caused or contributed to his death.

An award in a compensation case cannot rest merely upon imagination or possibility, or upon a choice equally compatible with an accident and with no accident. However, it is not necessary that facts be proven to any higher degree than that necessary under the settled rule of finality (except in cases of fraud) of decisions of fact. R. S., Chap. 55, Sec. 36; *Mailman's Case*, 118 Me., 172, 106 A., 606; *Anne Martin's Case*, 125 Me., 49, 130 A., 857; *Mamie Taylor's Case*, 127 Me., 207, 142 A., 730; *Farwell's Case*, 128 Me., 303, 147 A., 215. Probative evidence of essential elements, though slight, yet sufficient to make a reasonable man conclude in the petitioner's favor on the vital points, will suffice. *Westman's Case*, 118 Me., 133, 106 A., 532; *Mailman's Case*, supra; *Gray's Case*, 120 Me., 81, 113 A., 32. But the rational mind must not be left in such uncertainty that these elements are not removed from the realm of fancy. *Marshall* v. *Owners of Steamship*

Wild Rose [1910], A. C., 486; *Sponatski's Case*, 220 Mass., 526, 108 N. E., 466.

Death need not be shown to have resulted from a sole source. Death resulting from the concurrence of an accident and a disease has been held to be compensable. *Healey's Case*, 124 Me., 54, 126 A., 21. So the acceleration of a previously existing disease to a mortal end, sooner than otherwise it would have come, has been held in Massachusetts to be compensable. *Fisher's Case*, 220 Mass., 581, 108 N. E., 361. The death of an employee, thrown from a horse and dragged, was held, on the evidence, to have been caused from hastening disease from which, preceding such accidental injury, the employee had temporarily recovered. *Lachance's Case*, 121 Me., 506, 118 A., 370.

If, by weakening resistance, or otherwise, a compensable injury so influences the progress of an existing disease as to cause death, the proof in that regard need not establish more. *Mailman's Case*, supra; *Orff's Case*, 122 Me., 114, 119 A., 67.

In a common-law action, a plaintiff, upon whom the law casts the burden of proof, is entitled to a verdict of a jury, or, in an equity case, a finding by a judge, if the evidence preponderates to his side. The Industrial Accident Commission, as an administrative or quasi-judicial tribunal, occupies a plane where, by legislative provision, the preponderance of evidence rule is without application. If, in a case like this at bar, the petitioner's evidence, with its logical inferences, is, on the fundamental issue of causal relation between compensable injury and death, reasonably convincing, the requisite degree of proof is attained, notwithstanding that opposing evidence is of even greater weight. *Mailman's Case*, supra; *Farwell's Case*, supra.

It is insisted, in the brief for the respondent, that the finding by the Commissioner is final and conclusive. *Gauthier's Case*, 120 Me., 73, 113 A., 28. No such rule prevails where, as here, the finding and decree are against the claimant. *Orff's Case*, supra.

The issue before the Commission was whether competent evidence reasonably supported the allegation that the result in question came from the source alleged. The negation of every other possibility of death except that by accidental means was unnecessary. *Westman's Case*, supra.

The present record contains testimony which, if the trier of facts favorably determines its credibility, would, with circumstantial inferences, sufficiently substantiate the allegations of the petition, that death resulted from compensable injury.

The appeal is sustained. The decree from which the appeal was taken is reversed, and the case remanded to the Industrial Accident Commission without prejudice to further proceedings under the Workmen's Compensation Act.

So ordered.

INHABITANTS OF BUCKSPORT *vs.* ALBERT C. SWAZEY.

Hancock. Opinion, March 15, 1933.

ACTIONS. TAXATION. EVIDENCE.

R. S., CHAP. 13, SEC. 23, CHAP. 14, SEC. 1.

In an action of debt for taxes, it is not necessary that the assessment contain a particular description of the property to be taxed, nor that separate valuations be made in case there are several parcels.

Evidence of undervaluation of other taxable properties is not admissible. If such were the fact, it is not a defense to this action.

Under Revised Statutes, Chap. 13, Sec. 23, it not appearing that the assessors had, in the case at bar, received notice of the division of the real estate of John M. Swazey, deceased, or the names of his several heirs or devisees, the defendant, as an heir of his father's estate, was liable for the whole tax assessed against him.

It not appearing that the Town voted to fix the date when taxes for the year 1931 should be payable or that interest should be collected thereafter as provided in Revised Statutes, Chap. 14, Sec. 1, no interest was allowable.

On report. An action of debt for taxes. After the plaintiff's evidence was taken out the case was by agreement of the parties reported to the Law Court for its determination, upon so much of the evidence as was legally admissible. Judgment for the plaintiff in the sum of $459.98 and for its costs. The case fully appears in the opinion.

Fellows & Fellows, for plaintiff.
Fred L. Mason, for defendant.

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

STURGIS, J. This action of debt for taxes is reported to this Court for final determination. The case stated includes facts agreed upon and a transcript of testimony. Judgment is to be rendered on so much of the evidence as is legally admissible.

The defendant is sued for a tax amounting to $432.58 assessed in the plaintiff town in 1931 upon his real estate, and also for a tax of $27.40 for that year assessed upon land which his father, John M. Swazey, then deceased, had formerly owned. He attacks the sufficiency of the assessments and attempts to avoid payment of the taxes by showing an undervaluation of other taxable property in the town.

The defendant's real estate was listed for assessment in the records by parcels, each being described generally as to character and location with specification of buildings, if any, and such designating names as had attached. In numerous instances the acreage of the land was stated. The appraisal value of each lot was recorded, but the tax was assessed on the aggregate valuation. The assessment against the estate of John M. Swazey was upon one parcel of real estate also listed by general description.

This is not a case where the defendant's person or property is levied upon by direct warrant or where a forfeiture may ensue, but is a proceeding for the collection of taxes by suit. In this form of action it is not necessary that the assessment contain a particular description of the property to be taxed nor that separate valuations be made in case there are several parcels. *Rockland* v. *Farnsworth*, 111 Me., 315, 319, 89 A., 65; *Foxcroft* v. *Camp-meeting Association*, 86 Me., 78, 29 A., 951; *Rockland* v. *Ulmer*, 84 Me., 503, 24 A., 949; *Cressey* v. *Parks*, 76 Me., 534.

The evidence in support of the defense that, as a result of undervaluation of other taxable properties, the defendant was overrated, was not legally admissible. If such were the fact, the remedy lies in another proceeding. The defense is not open in this action.

Greenville v. *Blair*, 104 Me., 444, 446, 72 A., 177; *Dover* v. *Water Co.*, 90 Me., 180, 38 A., 101.

The defendant is liable for the tax assessed upon his own real estate under the general provisions of law relating to taxes. It not appearing that the assessors of Bucksport have received notice of the division of the real estate of John M. Swazey, deceased, or the names of his several heirs or devisees, the defendant, as an heir of his father's estate, is liable for the whole tax assessed against it. R. S., Chap. 13, Sec. 23.

The record does not show that the Town voted to fix the date when taxes for 1931 should be payable or that interest should be collected thereafter. R. S., Chap. 14, Sec. 1. No interest is allowed. *Athens* v. *Whittier*, 122 Me., 86, 90, 118 A., 897; *Snow* v. *Weeks*, 77 Me., 429, 1 A., 243. Judgment for the taxes assessed must be entered. Demand before suit being admitted, costs are allowed.

Judgment for the plaintiff in the sum of $459.98 and for its costs.

STATE OF MAINE *vs.* ROBERT DAY.

York. Opinion, March 18, 1933.

CRIMINAL LAW. R. S. CHAP. 135, SEC. 22.
CONSTRUCTION OF STATUTES.

Sec. 22, Chap. 135, R. S. 1930, was enacted for the purpose of suppressing commercialized vice.

It has no application to a case in which nothing more is involved than transportation of a female person with intent to commit fornication.

It is not to be assumed that the legislature intended to transform a misdemeanor into a felony simply because the commission of the offense was preceded by an automobile ride.

That which appears to be within the letter of the statute may not be within its spirit nor expressive of the obvious purpose of its authors.

It is the duty of this Court to give force to the spirit and intent of statutes. It is only by following this course that imperfectly or carelessly expressed legislation may be rescued from absurdity.

In so doing, the Court is not legislating. It is merely following the dictates of common sense and enforcing the true will of the legislature.

In the case at bar, the statute was designed to protect society against an abhorrent evil. It was not enacted for the purpose of placing an effective weapon in the hands of blackmailers nor for punishing the perpetrator of a minor offense with undue and extraordinary severity.

On exceptions by respondent. Respondent tried under an indictment for violation of Sec. 22, Chap. 135, R. S., was found guilty. After verdict and before judgment a motion in arrest of judgment was duly filed. To the denial of this motion exception was taken. Exceptions sustained. Indictment quashed. The case fully appears in the opinion.

George D. Varney, County Attorney for the State.

Ralph W. Hawkes,

Lester H. Willard, for respondent.

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

PATTANGALL, C. J. Exceptions to overruling motion in arrest of judgment directed to the insufficiency of an indictment based on Sec. 22, Chap. 135, R. S. 1930, on which respondent was presented for trial, a verdict of guilty having been returned.

The indictment charged that "Robert Day of Lebanon in the County of York, laborer, on the fifth day of May in the year of our Lord one thousand nine hundred and thirty-two at Sanford in said County of York, with force and arms did then and there knowingly cause to be transported by means of a conveyance, to wit a motor vehicle, across said State, to wit from said Sanford to Lawrence in the Commonwealth of Massachusetts, a female person to wit, one Myrtle Berry of said Lebanon, for an immoral purpose to wit for the purpose of having sexual intercourse with her, the said Myrtle Berry."

The objections to the indictment set forth in the motion were:

1. The indictment in said cause charges no offence under the law of this State.

2. Sec. 22 of Chap. 135 of the Revised Statutes of Maine does not and was not intended to apply to a case where a man transports a female for the purpose of having sexual intercourse with her himself.

3. The words "any other immoral purpose" in the above statute mean any other immoral purpose in furtherance of the act made a felony by this statute, to wit, transportation for the purpose of prostitution.

The statute under which the indictment was brought provides that,

> "Whoever knowingly transports or causes to be transported, or aids or assists in obtaining transportation for, by any means of conveyance into, through, or across the state, any female person for the purpose of prostitution or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such female person to become a prostitute shall be punished by imprisonment for not less than two years, nor more than twenty years. Such person may be prosecuted, indicted, tried, and convicted in any county in or through which he shall have transported or attempted to transport any female person as aforesaid."

That this statute was enacted for the purpose of suppressing commercialized vice seems clear. As construed by the Court below, it is applicable to the case of one who transports a female person by any conveyance across any portion of the state with intent to commit fornication or adultery. It may be assumed in the instant case that the intended act was fornication, there being no suggestion that either party was married.

The punishment for committing fornication is fixed by Sec. 7, Chap. 135, R. S. 1930, at imprisonment for not more than sixty days and fine not more than one hundred dollars.

The argument that the statute is properly applicable to the facts alleged is based on the words "or other immoral purpose,"

and the undeniable proposition that fornication is immoral. We do not think that such a construction of the statute is justifiable. It is hardly conceivable that the legislature intended that a misdemeanor should be transformed into a felony simply because the commission of the offence was preceded by an automobile ride.

"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U. S., 457; *Reiche* v. *Smythe*, 13 Wall., 162; *Silver* v. *Ladd*, 7 Wall., 219. The rule that these cases illustrate is valuable. It rescues legislation from absurdity. It is the dictate of common sense. It is not judicial legislation; it is seeking and enforcing the true sense of the law notwithstanding its imperfection or generality of expression. There is danger in extending a statute beyond its purpose, even if justified by strict adherence to its words. "The letter killeth but the spirit giveth life." It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences if it can be done and preserve the purpose of the law.

This statute was designed to protect society against an abhorrent evil. It was not enacted for the purpose of placing an effective weapon in the hands of blackmailers nor for punishing the perpetrator of a minor offence with undue and extraordinary severity. Yet such would be the result if the ruling below were upheld.

Exceptions sustained.
Indictment quashed.

VIRGINIA G. FAXON *vs.* DANIEL N. BARNEY.

York. Opinion March 22, 1933.

REFERENCE. EQUITY.

Reference of disputes is governed by the provisions of our statutes and consent alone can not confer jurisdiction. The words of the statute authorizing trial by referees, where the parties consent, of all cases in the Superior Court apply only to civil cases.

The jurisdiction of the equity judge can not be delegated to others. The provisions of our statutes do not authorize a reference of an equity case.

On appeal by defendant. A Bill in Equity seeking to abate a nuisance. By agreement of the parties the cause was referred to two referees who found for the plaintiff, their report being accepted by the presiding Justice of the Superior Court and a decree entered. Appeal sustained. Decree below reversed. Case remanded for appropriate proceedings. The case fully appears in the opinion.

Spinney & Spinney, for plaintiff.

Stewart & Hawkes, for defendant.

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

THAXTER, J. This is a bill in equity which prays for a mandatory injunction to compel the defendant to abate a nuisance which the plaintiff claims exists by reason of the maintenance by the defendant of a concrete driveway across the plaintiff's land. After the filing of an answer the case was referred by agreement of the parties to two referees who on July 15, 1932 found that the plaintiff's bill should be sustained and that a mandatory injunction should issue. The Justice of the Superior Court to whom this report was presented accepted it, and entered a decree in accordance with the findings of the referees. From this decree the defendant has appealed.

The reference of disputes is governed by the provisions of our statutes, and consent alone can not confer jurisdiction on referees.

Appeal of Chaplin, 131 Me., 187, 160 A., 27. Under the original statutory provision, now embodied in R. S. 1930, Chap. 122, Sec. 1, parties to a cause by agreement could submit to referees any controversy which might have been the subject of a personal action. This obviously did not authorize the submission of a bill in equity. *Butler* v. *Mace*, 47 Me., 423. R. S. 1930, Chap. 96, Sec. 94, first adopted in 1879, Chap. 88, Laws 1879, authorizing the appointment of referees by the court, though somewhat broader in its terms than the then existing statute providing for references by consent, was likewise not intended to apply to bills in equity. The words there used authorizing the trial by referees where the parties consent of all cases in the Supreme Judicial or Superior Court apply only to civil cases.

The jurisdiction of the equity judge, who may enter orders requiring the performance of certain acts, who may impose restraints, who is called upon to exercise discretion, can not be delegated to others. The reference in equity to a master, as provided by statute and rule of court, is an entirely different procedure. The master assists the court in some proceeding incidental to the progress of the cause. Whitehouse: Equity Practice, Sec. 463. The statutory reference in effect transfers the cause to another tribunal.

Though this case comes before us on an appeal from a decree of the presiding Justice entered after the acceptance of a report of referees, it is nevertheless apparent that the entry of such decree was merely an incident in the acceptance of such report, and was not intended as an exercise of the independent judgment of an equity judge based upon his own conclusions as to law and fact.

Whatever may have been the practice in the past we feel that from now on the provisions of our statutes must be held not to authorize the procedure followed in this case.

Appeal sustained.
Decree below reversed.
Case remanded for
appropriate proceedings.

MASSACHUSETTS BONDING AND INSURANCE COMPANY

vs.

H. J. PETTAPIECE.

Knox. Opinion March 28, 1933.

EXCEPTIONS. RULES OF COURT.

Exceptions to the acceptance of a report of referees, when permitted by the rule of reference must be in conformity to Rule XXI of the Rules of the Supreme and Superior Courts, which requires that the objection to the report of the referees must be filed in writing. Non-compliance with this rule renders exceptions invalid.

On exceptions by plaintiff. An action on the case to recover on certain alleged promissory notes. The cause was referred to a referee with right to except as to question of law reserved. To the acceptance of the report of the referee defendant excepted, but not by written objection. Exceptions overruled. The case sufficiently appears in the opinion.

Myer Epstein,

C. S. Roberts, for plaintiff.

J. H. Montgomery, for defendant.

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

BARNES, J. On exceptions. An action on instruments declared to be promissory notes was referred, with right to except as to questions of law.

Report was filed in due course. No objection, in writing, to the report of referee was filed or presented. Report was accepted at the term next after filing, and exceptions allowed.

Rules of Court are binding on Justices of the Superior Court. *Camp Maqua Y. W. C. A.* v. *Poland*, 130 Me., 485, 157 A., 859; *Lincoln* v. *Hall*, 131 Me., 310, 162 A., 267.

Because of non-compliance with No. XXI, Rules of Supreme and Superior Courts, requiring objection to report of a referee to be

filed in writing, nothing is gained from the exceptions. It may be added that probably the application of the rule entails no hardship on the excepting party.

Exceptions overruled.

FIRST AUBURN TRUST COMPANY *vs.* CARRIE E. AUSTIN ET AL.

Androscoggin. Opinion March 29, 1933.

EQUITY. DESCENT.

The interest of a wife in the real estate of her husband comes to her at his decease, under our statutes, by descent. So long as the husband lives she has a mere inchoate, contingent right in his real estate.

Such right may never ripen into title. If she die before her husband, it is lost.

She may bar her right; or she may release it.

She may release her right, such as it then is, during the lifetime of her husband by a deed with covenants of warranty, but a mere release or quitclaim deed is not sufficient to pass her rights or convey title.

In the case at bar, the quitclaim deeds which Mrs. Austin, the wife of the bankrupt executed, passed no title of value to the homestead.

On appeal by defendant. A Bill in Equity brought to reach a wife's interest in lands of her husband before his decease. The sitting Justice entered a decree sustaining plaintiff's contention. Appeal was thereupon filed by defendant. Appeal sustained. Decree below reversed. The case fully appears in the opinion.

George C. and Donald W. Webber, for plaintiff.

Herbert C. Holmes, for defendants.

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

BARNES, J. This is a cause in equity, coming forward on appeal from a decree of a Justice of the Superior Court.

Defendant, Carrie E. Austin, is a married woman. Her husband, Charles D. Austin, was adjudicated bankrupt on February 9, 1931.

Before that date he had become indebted to the plaintiff, as evidenced by his notes, in amount aggregating about $2600.00, and Mrs. Austin was an endorser of the notes.

Suit was brought on the notes, in October, 1931, and an execution issued against Mrs. Austin for the amount due.

Of this she has paid no part. Title to several parcels of land passed to Mr. Austin's trustee in bankruptcy.

The homestead farm of the bankrupt consisted of forty acres, containing the farm buildings, and another portion. The forty acres, most valuable part of the real estate, was entailed to Charles D. Austin for life, with remainder to his three daughters, so that upon sale by the trustee no bidder could be found for the homestead except Mr. Austin. For months sale was impossible, but, on February 15, 1932, the trustee sold his official interest in the homestead to purchasers produced by the Austin family, and on the same day Mrs. Austin released her rights therein by quitclaim deeds to the grantees of the trustee, and the homestead was turned over to the daughters with a bond for a deed.

The trustee did not avail himself of the method provided by statute for determining the value of the interest of the bankrupt's wife in the homestead. R. S., Chap. 89, Sec. 19.

He made computation and determined the value of such interest to be $380.00.

Promptly thereafter plaintiff brought the process herein, a creditor's bill, to reach this sum as payment on its execution against Mrs. Austin, and joined all proper parties as defendants.

Mrs. Austin received no money or other valuable consideration for her deed.

The bill alleges that fraud actuated the wife, and prays for a decree ordering the trustee and others to pay to it such $380.00 together with $30.00 additional, similarly computed to be the wife's interest in other parcels of land, by her released to other purchasers.

In his findings of fact the Justice makes no mention of fraud, and we find no evidence thereof.

However, he decreed that the bill be sustained, and that the purchasers of the homestead should pay to plaintiff the $380, with costs.

From the decree appeal was duly taken, and the decisive issue is whether a wife's interest in the real estate of her husband, bankrupt but still living, is to be appraised by a court in equity and appropriated to a creditor plaintiff.

The interest of a wife in the real estate of her husband comes to her at his decease, under our statutes, by descent. So long as the husband lives she has a mere inchoate, contingent right in his real estate.

Such right may never ripen into title. If she die before her husband, it is lost.

She may bar her right; or she may release it.

Such right she may bar by joining with him in a conveyance of real estate, or in a subsequent deed, or in a deed with the guardian of the husband: or by her sole deed. R. S., Chap. 89, Sec. 9.

She may release her right, such as it then is, during the lifetime of her husband by a deed with covenants of warranty. But by simple release deeds, such as were given by Mrs. Austin in this case, no title to real estate passed. She had nothing which she could convey, so long as her husband lived.

Her conveyances passed title to nothing of value in the homestead.

Appeal sustained.
Decree below reversed.

ANNA CHAPUT *vs.* ADELARD J. LUSSIER.

MARIE CHAPUT *vs.* ADELARD J. LUSSIER.

JOSEPH CHAPUT *vs.* ADELARD J. LUSSIER.

(*Two Cases*)

Androscoggin. Opinion April 1, 1933.

CARRIERS. MOTOR VEHICLES. NEGLIGENCE.

A common carrier in the modern sense includes a carrier of passengers as well as one of goods. Carriers of passengers are not held responsible as insurers of the safety of those whom they transport, as common carriers of goods are. They are, however, bound to exercise care and diligence for the comfort and safety of their passengers.

The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract. Liability, though it arises out of contract, is for negligence. The obligation is wider than any that could be based on mutual assent.

The doctrine of respondeat superior has no application to the relation existing between a common carrier and passengers.

No person is ever absolved from exercising reasonable care for his own safety simply because he is a passenger for hire.

The rule that a passenger shall exercise due care for his own safety applies as between a passenger and a common carrier by automobile.

The control of a taxicab passenger over the driver is restricted to giving directions as to destination.

In the case at bar, there was no such privity between the defendant and Lussier as to base liability on the principle that the master shall respond for the acts of his agent or servant. Defendant undertook to carry the plaintiff, not as an insurer, but in the exercise of the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken. He owed the implied duty, arising out of his contract and imposed by law, of exercising the strictest care consistent with the reasonable performance of that contract.

In performing the transportation contract, Gagne was the servant of the defendant. Whether he drove, or not, he was in the taxicab, with authority of supervision and control. In driving the cab, and carrying the Chaputs, neither Gagne nor Lussier was the servant of the passengers. The manner of operating the cab was not for the passengers to direct. There was no common enterprise. The women were mere passengers. They might not tell Lussier what he should do. His operation of the taxicab was not subject to direction by the persons who were injured.

On exceptions by defendant. Four actions on the case to recover damages for personal injuries sustained by two of the plaintiffs, arising out of the over-turning of an automobile in which Anna Chaput and Marie Chaput were riding as passengers, and by plaintiff Joseph Chaput, the husband of Anna Chaput and father of Marie Chaput, a minor, for compensation for loss of services, society and for expenses sustained by him as a result of said injuries. To the acceptance of the referee's report, favorable to the several plaintiffs, defendant seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Clifford & Clifford,
Frank T. Powers,
John Marshall, for plaintiffs.
Benjamin L. Berman,
David V. Berman, for defendant.

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

DUNN, J. These four actions by three different plaintiffs against one defendant are in this court on defendant's exceptions to the acceptance of referees' reports, adverse to him. Two of the cases, those by Anna Chaput and Marie Chaput, were once before presented on their exceptions. An issue in the references, concerning which evidence had been introduced, having been left undecided, the exceptions were sustained. *Chaput* v. *Lussier*, 131 Me., 145, 159 A., 851. This opened the questions in each case anew. The lower court recommitted the cases to the same referees. This time the referees heard and considered not only these, but two other actions against the same defendant. These are by Joseph Chaput, the husband of Anna Chaput, and the father of Marie Chaput, a minor. Findings were favorable to the several

plaintiffs. No award of damages is the subject of attack, except as a whole; the contention of the defendant is the want of legal basis for any award.

The women plaintiffs, while being carried in a taxicab of the defendant, suffered personal injuries. They sue for damages; the younger woman, whose age when injured was nineteen years, prosecutes by her father as next friend. The suits by him individually, for compensation for loss of services, society and companionship, and for expenses, involve the same underlying issues as do the cases by the women.

There was evidence from which the referees could find that the defendant held himself as a common carrier of passengers, by taxicab service, for hire or reward. He owned taxicabs, which he was licensed to operate, for the general accommodation of the public, in transporting persons between termini designated by the caller of the taxicab, for fares agreed upon or usually charged. He did business as the American Diamond Taxi Company; he had a stand, and an office with telephone connection, and taxicabs and drivers who responded to calls to take people where they wanted to go. There was ample evidence to warrant the inference that the defendant was a common carrier. This being true, he assumed all the obligations incident to that calling. See Hutchinson on Carriers (3rd ed.) Secs. 48, 49.

A common carrier in the modern sense includes a carrier of passengers as well as one of goods. Hutchinson on Carriers, Sec. 890. Carriers of passengers are not held responsible as insurers of the safety of those whom they transport, as common carriers of goods are. They are, however, bound to exercise care and diligence for the comfort and safety of their passengers.

The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract. Liability, though it arises out of contract, is for negligence. The obligation is wider than any that could be based on mutual assent. Williston on Contracts, Sec. 1113.

Defendant's taxicab came to plaintiffs' house, in answer to a telephone call, late in the afternoon of November 23, 1930, to carry the husband and father to a town some miles distant, and to

take the women and one Lucien Lussier (a friend of the girl, and brother to the defendant) there and back. The fare, which was fixed in advance at six dollars, appears to have been payable upon full performance of the contract of transportation. The referees were justified in believing, from the evidence, that the women entered the taxicab in the character and relation of passengers.

Leo Gagne, an employee of the defendant, was the regular driver of the taxicab. He reported with it. The defendant himself testified that he had given Gagne orders not to allow anyone else to drive the cab. That there had been such an order is not shown to have been known to the plaintiffs. However, instructions of the master to his servant do not govern the situation.

On learning where the vehicle was to be driven, Gagne asked Lucien Lussier if he had been over the route. Lucien said that he knew the road well, whereupon Gagne asked him to drive; he took the wheel. He had a chauffeur's license, and was experienced in the driving of automobiles. Gagne and Miss Chaput sat on the seat with Lucien on the outward journey, Mr. and Mrs. Chaput occupying the back seat. After leaving Mr. Chaput at his destination, Leo took his place in the rear seat, Miss Chaput remaining in front. On the return trip, with Lucien still operating the cab, the accident occurred.

The respective declarations allege negligence in the operation of the taxicab, by Lucien, in the middle of the road, at an excessive rate of speed, in a careless and reckless manner, and swerving it to the right, suddenly and without warning, so that it skidded and crashed into an approaching car, and bumped and slid along the highway, with a broken wheel, for a long distance, finally tipping over, with proximate disaster. Operation is alleged to have been by request of, and in the presence of Gagne, and in consequence of his careless and reckless neglect.

On rounding a curve in the road (the time now being about nine o'clock), two or three automobiles were seen approaching. There was evidence of tendency to prove that the lights on these cars were first visible at the estimated distance of about one thousand feet, save for a moment when "they were in a hollow." Or, as another witness puts it, in effect, a dip in the grade the cars were making obscured view, but only for an instant. The second of these

cars was trying to pass the first. It either had accomplished, or was about to accomplish this, on the summit of the not steep elevation, when it came into collision with the taxicab, the injuries to Mrs. Chaput and Miss Chaput directly resulting.

A finding was warranted, from conflicting evidence, that the cab was being driven at an unduly high rate of speed, in the center of the road. Miss Chaput testified that her mother (who was so seriously injured as to be unable to attend on the trial), twice spoke to Lucien, shortly before the accident happened, saying that he was going too fast, and asking that he slacken speed. He did slow the cab, but only temporarily. Gagne made no attempt to control the operation of the vehicle; he did nothing; he said nothing.

The doctrine of respondeat superior has no application to the relation existing between a common carrier and passengers. *Pittsburg, etc., Railway Company* v. *Hinds*, 53 Pa., 512, 91 Am. Dec., 224. There was no such privity between the defendant and Lucien Lussier as to base liability on the principle that the master shall respond for the acts of the agent or servant. *Copp* v. *Paradis*, 130 Me., 464, 157 A., 228. The only ground of liability is a negligent violation of the contract for the carriage of the women in the taxicab. Defendant undertook to carry them, not as an insurer, but in the exercise of the highest degree of care compatible with the practical operation of the machine in which the conveyance was undertaken. *Libby* v. *Maine Central Railroad Company*, 85 Me., 34, 26 A., 943; *Maxfield* v. *Maine Central Railroad Company*, 100 Me., 79, 60 A., 710; *Pomroy* v. *Bangor & Aroostook Railroad Company*, 102 Me., 497, 67 A., 561. The negligence of the defendant, or what, in a legal sense, constitutes the same thing — that of his servant in charge of the taxicab — is the gist of action; and so it is laid in the respective declarations. The referees could have properly concluded that the servant, and therefore the defendant, was negligent.

The defendant is answerable in damages unless (a) contributory negligence, or (b) the rule applicable to a joint or common enterprise, precludes recovery.

In an action counting on negligence, the plaintiff must show a case clear of contributory negligence.

No person is ever absolved from exercising reasonable care for

his own safety simply because he is a passenger for hire. *Ouellette* v. *Grand Trunk Railway Company*, 106 Me., 153, 76 A., 280. A passenger in a stagecoach is held to the exercise of ordinary care to avoid injury, and if he fails to use such care, and thereby directly contributes to his injury, he cannot recover although there was negligence on the part of the carrier. *Keith* v. *Pinkham*, 43 Me., 501. A taxicab is held to constitute a hackney coach. *Dion* v. *Drapeau*, 254 Mass., 186, 150 N. E., 14. The rule that a passenger shall exercise due care for his own safety applies as between a passenger and a common carrier by automobile. *Garrow* v. *Seattle Taxicab Company*, 135 Wash., 630, 238 P., 623, 45 A. L. R., 293.

The plaintiffs were not the guests of the owner of the taxicab. The rule as to a guest who rides without exercising any care for his own safety finds no application here. Were that rule applicable, proof that the guest used proper care for his own safety would meet it. To the persons physically injured, the defendant owed the implied duty, arising out of his contract and imposed by law, of exercising the strictest care consistent with the reasonable performance of that contract. *Knight* v. *Portland, etc., Railroad Company*, 56 Me., 234. If Gagne exceeded his authority as an employee in selecting a substitute driver, and thus did wrong toward his employer, that would not relieve the latter from liability to the plaintiffs. The fact that Lucien was placed at the wheel did not change the relation between the defendant and the Chaputs. The defendant could not stand by to receive the benefits of the operation of his taxicab as a public conveyance, and in case of negligent injury to passengers, avoid responsibility on showing that the employee who had been sent with the cab disobeyed orders.

In performing the transportation contract, Gagne was the servant of the defendant. Whether he drove, or not, he was in the taxicab, with authority of supervision and control. In driving the cab, and carrying the Chaputs, neither Gagne nor Lucien Lussier was the servant of the passengers. The manner of operating the cab was not for the passengers to direct. The control of a taxicab passenger over the driver is restricted to giving directions as to destination. *Rea* v. *Checker Taxi Company*, 272 Mass., 510, 172 N. E., 612. See, too, *Wood* v. *Maine Central Railroad Company*,

101 Me., 469, 64 A., 833. The women were comparatively passive parties. *State* v. *Boston & Maine Railroad Company*, 80 Me., 430, 15 A., 36.

Contributory negligence is always a question for the arbiters of fact, when there is any doubt as to the facts, or the inferences to be drawn from them.

There was testimony that Mrs. Chaput protested the rate of speed, twice, and asked that the car be slowed. Whether, as a passenger for hire, it was incumbent upon her, in care for her own safety, to do this, is not the point; there is testimony that she did remonstrate. Additional protests by her or her daughter, would not, for anything on this record, have resulted in more than did the two protests. Indeed, constant suggestions as to the detail of the management of a motor vehicle often do more harm than good. *Keller* v. *Banks*, 130 Me., 397, 156 A., 817.

There was evidence that, at the time of the collision, the taxicab was on the wrong side of the road. If the law of the road was violated without fault of these suing passengers, their presence in the taxicab at the time of the violation would not prevent their maintaining actions against the defendant. His negligence is here measurable by his duty as a common carrier, not by his duty to other users of the highway. *Singer* v. *Martin* (Wash., 1917), 164 P., 1105. As between the passengers and the carrier, the road regulation was for the protection of the passengers. *Rea* v. *Checker Taxi Company*, supra.

It was for the referees to say whether, on the whole, the passenger plaintiffs were using such attention and vigilance as would the ordinarily prudent person under all the circumstances. Their decision was rested upon evidence. *Hovey* v. *Bell*, 112 Me., 192, 91 A., 844.

Nor was there a common enterprise. The women were mere passengers. They might not tell Lucien Lussier what he should do. His operation of the taxicab was by request of the defendant's servant, who was not subject to direction by the persons who were injured.

Exceptions overruled.

E. LINWOOD JORDAN ET AL *vs.* JOHN A. MCKAY.

Cumberland. Opinion April 29, 1933.

PLEADING AND PRACTICE. WRITS. CONSTITUTIONAL LAW.

On the overruling of a motion in abatement, the defendant has a right to answer over. On his failure to do so it becomes the duty of the Court to enter a default and proceed to close the case by assessing damages.

Attachment of a chip as certified to in the officer's return is a legal fiction, but such nominal attachment is a sufficient compliance with the provision of the statute providing for the service of a summons when goods or estate are attached.

The service of a writ on a resident defendant in the mode prescribed in the statute by leaving a summons at his last and usual place of abode, gives the Court jurisdiction to enter a judgment against him and is not in violation of the due process clause of the XIVth amendment to the constitution of the United States.

In the case at bar, the officer's return sets forth the attachment of a chip as the property of the defendant, and the leaving at his last and usual place of abode a summons for him to appear and answer at court as therein commanded. Such practice has had the sanction of our Court for many years.

On exceptions by defendant. An action on the case for money alleged to be due plantiffs from defendant. A motion was filed by the defendant to dismiss the case because of defective service. Motion was overruled and exceptions taken. At a subsequent term default was entered and hearing was had on damages which were assessed against the defendant. To these proceedings defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Raymond S. Oakes, for plaintiff.

John A. McKay, pro se.

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

THAXTER, J. This is an action on the case for money alleged to be due the plaintiffs by the defendant. On the first day of the return term the defendant duly filed a motion to dismiss setting

forth that because of defective service the Court was without jurisdiction. This motion was overruled and exceptions were taken. At the succeeding term over the defendant's protest, a default was entered against him, and a hearing was had in damages, which were assessed in the sum of $314.18. To all of these proceedings the defendant excepted.

The practice followed in this instance was in strict accord with the provisions of the statute. On the overruling of his motion in abatement, the defendant had the right to answer over. R. S. 1930, Chap. 96, Sec. 37. On his failure to do so it was the duty of the Court to enter a default and to proceed and close the case by assessing the damages. Not till then could the cause be properly certified to the Law Court. R. S. 1930, Chap. 91, Sec. 28. *Klopot* v. *Scuik*, 131 Me., 499, 162 A., 782. The exceptions, taken to the procedure followed are accordingly without merit.

The service objected to in this case was made in the usual manner. The officer's return sets forth the attachment of a chip as the property of the defendant and the leaving "at his last and usual place of abode a summons for him to appear and answer at Court as therein commanded." The defendant contends that service so made is a violation of rights guaranteed him under the 14th amendment to the constitution of the United States, in that he has been denied due process of law, and furthermore that there has been no compliance with the provisions of R. S. 1930, Chap. 95, Sec. 17, in the service made on him because the officer's return shows no attachment of goods or estate of the defendant before the leaving of the summons.

The attachment of a chip as certified to in the officer's return is a legal fiction, but such nominal attachment is a sufficient compliance with the provision of the statute providing for the service of a summons when goods or estate are attached. *Swift* v. *Hawkens et als*, 103 Me., 371, 69 A., 620.

The service of a writ on a resident defendant in the mode prescribed by the statute by leaving a summons at his last and usual place of abode gives to the Court jurisdiction to enter a personal judgment against him. *Abbott* v. *Abbott*, 101 Me., 343, 64 A., 615. Nor is such procedure in any sense a denial of due process of law. *Santiago* v. *Nogueras*, 214 U. S., 260.

The citation of authorities to sustain a practice which for years has had the sanction of our court would seem to be almost superfluous. As the defendant, however, has had the temerity to raise the point we herewith render our opinion on it.

Exceptions overruled.

DOROTHY A. FARRELL, PRO AMI *vs.* ALEXANDER HIDISH.

JOHN B. FARRELL *vs.* ALEXANDER HIDISH.

Cumberland. Opinion May 1, 1933.

NEGLIGENCE. PARENT AND CHILD. MOTOR VEHICLES.

The mere fact that children of tender years are allowed to walk along a public way is not of itself sufficient proof of negligence on the part of those entrusted with their care.

Small children have a right to light, air and exercise; and the children of the poor can not be constantly watched by their parents.

No hard and fast rules as to the care of children can be laid down, and the financial condition of the family and other cares devolving upon the parents are always to be considered.

A mother engaged in her household duties who permits a child three and a half years old to walk on the street accompanied by her ten year old sister is not guilty of negligence in so doing.

In the case at bar, negligence of defendant having been clearly proved and the defense of contributory negligence being eliminated by the age of the injured person, verdicts for defendant must have been based on the theory of negligence on the part of the mother imputed to the child. The record furnishes no basis for such a conclusion.

On exceptions and general motion for new trial by plaintiffs. Actions on the case brought by John B. Farrell as father and next friend of Dorothy A. Farrell, against the defendant, for injuries suffered by Dorothy A. Farrell by reason of being struck by

a motorcycle operated by defendant, and by John B. Farrell personally for expenses incurred by him for medical treatment of his daughter. Trial was had at the November term of the Superior Court for the County of Cumberland. The jury rendered verdicts for the defendant. To the refusal of the Court to give certain instructions defendant seasonably excepted, and after the jury verdicts filed general motions for new trials. Motions sustained. The cases fully appear in the opinion.

Frederic J. Laughlin, for plaintiffs.
Theodore Gonya,
Henry C. Sullivan,
Nunzi Napolitano, for defendant.

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

PATTANGALL, C. J. Motion and exceptions by plaintiffs. These actions were brought on behalf of a child three and one-half years of age to recover damages for injuries sustained by her when struck by a motorcycle operated by defendant, and by her father for expenses incurred in her behalf.

While the child was walking on a public way sixteen feet wide, within two or three feet of the sidewalk, defendant entered the street at a point about one hundred feet distant and proceeded on his way directly toward the little girl, making no effort to avoid striking her. It was broad daylight. There was no obstruction between them. The space between the child and the opposite sidewalk was thirteen feet in width. It is almost incredible that, in view of these facts, he failed to avoid coming in contact with her. The only excuse he gave for his conduct was that he did not see her. Such a statement is an admission of negligence and we have no doubt but that the jury reached a correct conclusion on this point. The child's age eliminated the defense of contributory negligence.

The verdicts must have been predicated on the theory, strongly urged by the defense, that the mother who permitted the child to go upon the street was guilty of negligence in so doing, and that her negligence imputed to the child excused that of the defendant.

The evidence furnishes no basis for such a conclusion. The mere fact that children of tender years are allowed to walk along a public way is not, of itself, sufficient proof of negligence on the part of

those entrusted with their care. "Small children have a right to light, air and exercise and the children of the poor can not be constantly watched by their parents." 1 Thompson on Negligence, 306. "No hard and fast rules as to the care of children can be laid down and the financial condition of the family and other cares devolving upon the parents are always to be considered." *Grant* v. *B. R. & E. Co.*, 109 Me., 133, 83 A., 121, 123.

The Farrell family consisted of a father, mother and five children. They occupied a second floor tenement so located that the street furnished the sole opportunity for out-door exercise by the children. Their means were limited. They employed no servants. The mother, engaged in her household duties, permitted the child to leave the house accompanied by her sister ten years of age. The children had been absent only about ten minutes when Dorothy was struck by the motorcycle.

To hold that on these facts the mother failed to exercise the degree of care required of her would be to place an unreasonable burden on the parents of children living in the tenement districts of cities and industrial towns.

Assuming that proper instructions were given by the presiding Justice on this phase of the case, the jury must have misinterpreted or disregarded them or failed to appreciate the evidential force of the conceded facts. The verdicts are manifestly wrong. The exceptions need not be considered.

Motions sustained.

GLADYS GROSS' CASE.

Knox. Opinion May 4, 1933.

WORKMEN'S COMPENSATION ACT. TIPS.

In a Workmen's Compensation Case, in computing average weekly wage or earnings, tips received by a waitress from patrons of the restaurant, may properly be added to the compensation paid her by the employer.

A Workmen's Compensation Case. On appeal by respondent from a decree of a sitting Justice affirming a decree of the Industrial Accident Commission, awarding compensation to the petitioner and including as a part of her average weekly earnings tips which she received as a waitress in a restaurant. Appeal dismissed. Decree affirmed. Court below to fix employee's expenses on appeal. The case fully appears in the opinion.

Charles T. Smalley, for petitioner.

Charles J. McGraw,

William B. Mahoney, for respondent.

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

DUNN, J. A restaurant waitress sustained injury, resulting at first in total, and later in partial incapacity, and entitling her to compensation, which was awarded. In accordance with a provision of the Workmen's Compensation Act (R. S., Chap. 55, Sec. 40), a Justice of the Superior Court entered an enforcing decree. The appeal of the employer brings the case here.

The question on appeal is whether, in ascertaining average weekly wages or earnings, the inclusion of tips — received from patrons of the restaurant by the waitress, and retained by her — constitutes legal error.

There was no disputed fact in the case.

The contract of employment contemplated the payment, weekly, by the employer to the employee, of $6.00; besides, the employee was to be furnished meals, to the amount of $3.00; any tips she might receive should be her own. The tips received averaged $8.13 a week.

The Industrial Accident Commission (only one member sitting) ruled that the tips constituted a part of the earnings of the injured employee. Including the tips, the employee's average weekly wages, at the time of the accident, were $17.13.

The Maine Compensation Act uses the term "wages, earnings or salary." R. S., *supra*, Sec. 2, Par. IX. The word "earnings" occurs in the English act. St. 6 Edward VII., C. 58, Sched. 1 (2) (a). This word has been interpreted, before the passage of our own act, to include tips. *Penn.* v. *Spiers & Pond, Ltd.* (1908), 1 K. B., 766; *Great Northern Railway* v. *Dawson* (1905), 1 K. B., 331;

Knott v. *Tingle Jacobs & Co.*, 4 B. W. C. C., 55. In Massachusetts, under a statute which defines "average weekly wages" as "the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury," tips may properly be regarded as part of the average weekly wages. *Ethel Powers' Case*, 275 Mass., 515, 75 A. L. R., 1220, 176 N. E., 621. Ruling Case Law says in substance that tips, sanctioned by the employer, though not direct wages or earnings, should be taken into consideration under workmen's compensation acts, in making an award for injury or death. 28 R. C. L. (Perm. Supp.), Sec. 108. This work cites, as supporting authority, *Great Western R. Co.* v. *Helps* (1918), A. C., 141, Ann. Cas., 1918B, 1120.

The following cases also hold that, where an employee was accustomed to receive a constant amount in tips, and this was taken into consideration by his employer in fixing his wages, the tips, being an incident of the employee's service, should, in computing average weekly wage, be added to the regular wages paid him by his employer: *Sloat* v. *Rochester Taxicab Co.*, 163 N. Y. S., 904, affirmed without opinion in 221 N. Y., 491, 116 N. E., 1076; *Bryant* v. *Pullman Co.*, 177 N. Y. S., 488, affirmed without opinion in 228 N. Y., 579, 127 N. E., 909, certiorari granted; *Pullman Co.* v. *State Ind. Commission*, 254 U. S., 624, 65 Law ed., 444, and then dismissed per stipulation, 254 U. S., 666, 65 Law ed., 465; *Kadison* v. *Gottlieb*, 233 N. Y. S., 485. No broad distinction between the word "earnings" and the word "wages" is apparent. *Sloat* v. *Rochester Taxicab Co.*, supra.

The English act merely substitutes, in certain cases, workmen's compensation for common-law liability, enforceable in the same way, but without the requirement of insurance. Insurance by all subscribing employers is compulsory in Massachusetts. G. L., Chap. 152, Sec. 1 (6). In New York, Laws of New York (1913), Chap. 816, Art. 3, Sec. 50, the employer (a) need not insure at all if he establishes his own solvency to pay probable losses; (b) may insure under the state fund; (c) may insure with an insurance company. Under our own act, Section 6, an assenting (private) employer must carry industrial accident insurance; or, on satisfying the Industrial Accident Commission of his financial ability, and depositing cash, securities, or a surety bond, to the approval of

said Commission, he may, while such approval continues, be a self-insurer. The differences between the Massachusetts act, on the one side, and those of England and New York, on the other side, were held by the Massachusetts Court to be significant, but not of decisive consequence, in respect of *Ethel Powers' Case*, supra.

That conclusion is adopted, in the instant case, with full approval.

A further provision of our act is that in determining the compensation to be paid, benefits received from any other source than the employer shall not be taken into consideration. Section 18.

Argument is that in figuring average wages or earnings, the statute excludes tips as a factor. The meaning of the provision, in connection with the section as a whole, and with other provisions of the act, clearly enough is that if the employee has savings, or individual insurance, or advantage, or gain, independent of his contract of employment, the basis of computing the amount of compensation is not thereby affected. The statute contemplates that compensation is to be paid for diminished capacity to earn wages. *Capone's Case*, 239 Mass., 331, 132 N. E., 32; *Johnson's Case*, 242 Mass., 490, 136 N. E., 563; *Sensk's Case*, 247 Mass., 232, 141 N. E., 877.

The reason for the rule that tips may be considered in arriving at average weekly wages is thus stated in *Sloat* v. *Rochester Taxicab Co.*, supra:

> "The employee could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer, similar in effect to board, lodging, or rent furnished, in addition to money wages paid . . . The whole theory of tipping . . . is an exaction made or permitted by the employer, so that his patrons shall help him pay the wages which is fairly due from him to his employee."

There is an intimation in the English decisions that the rule does not extend to tips which are illicit, or which involve or encourage a neglect or breach of duty, or which are casual and sporadic, and trivial in amount. Annotation, *Ethel Powers' Case*, 75 A. L. R. at p. 1224.

The present case does not come within any of these categories. Had it not been proper for the employee to have retained the tips, they would have belonged to the employer. The ruling of the Industrial Accident Commission, that the tips received by the employee were a part of, or in the nature of earnings, and hence entitled to consideration in allowing compensation for injury, was free from error.

Appeal dismissed.
Decree affirmed.
Court below to fix employee's expenses on appeal.

KATHERINE P. WILSON, ADM'X

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Cumberland. Opinion May 4, 1933.

DEATH. INSURANCE. PRESUMPTIONS.

Absence from his home or residence for a period of seven years without having in any way been heard from, gives rise to the presumption of death and places the burden of proof on one asserting the contrary.

The presumption of death is by no means of equal strength at all times and in all situations. It is not to be rigidly observed without regard to the conditions under which departure from home took place. Each case must depend upon its own facts. These may, with reason, account for absence and silence without the hypothesis of death. The rule, which has limitation, is to be applied with caution.

In the case at bar, evidence did not uphold the presumption of death. The facts disclosed, and the things attending the central act of leaving his home, warrant a finding that the death of Harry T. Wilson had not been proved.

On report. An action of assumpsit to recover from the defendant on three policies of insurance issued on the life of the plaintiff's

husband. The insured disappeared from his home in Pownal on March 4, 1921. Plaintiff was appointed administratrix of her husband's estate by the Probate Court, for the County of Cumberland, April 15, 1932, under the provisions of R. S., Chap. 76, Sec. 23. Judgment for the defendant. The case fully appears in the opinion.

Skillin, Dyer & Payson,

Harry C. Libby, for plaintiff.

Charles J. Nichols, for defendant.

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

DUNN, J. This case is presented on a report. The facts are agreed. The action is on three policies of insurance issued by the defendant company on the life of Harry T. Wilson. Each policy is payable to the executors or administrators of the insured upon due proof of his death during the continuance of the policy.

Wilson deserted his wife, who, in her representative capacity as administratrix, is plaintiff in this action, on March 4, 1921. He left Pownal, the town of his domicile and of the family home, in his automobile, which is shown as under chattel mortgage. He was accompanied by another man's wife. The agreed statement recites that she was not a relative of his, either by blood or marriage, nor related to his own wife. The two went to Lynn, Massachusetts, where the automobile was sold. Next, the woman writes the deserted wife, from Los Angeles, California. The letter bears date May 10, 1921; it was one week in transit. The writer said she did not "really know where he (Harry) went" from Lynn, but that "he talked most favorably of the north and possibly Canada." No other information respecting the whereabouts of her husband appears to have been received by Mrs. Wilson. His brothers and sisters have heard nothing from him, nor has his pastor. His parents are dead. Any further inquiry is not stated.

When the insured disappeared, he was almost thirty-eight years old. The mortality tables give a person of that age a life expectancy of twenty-nine years.

Premiums on the insurance policies were payable weekly. The insured himself paid none after going away. Payments by his wife, and extensions, kept two policies in force until June 1, 1930, and the third until November 1, 1931.

A statute provides that when a person entitled to, or having an interest in personal property of the value of at least twenty dollars, disappears — disappearance being followed by absence for at least seven years without being heard from — and the presumption of his death is alleged, letters testamentary, or of administration shall issue after notice and hearing. Laws of 1929, Chap. 95, R. S., Chap. 76, Sec. 23. The statute, besides validating payments to executors and administrators, fixes the rights of persons known to be living, in the estates of persons determined presumably dead.

The plaintiff was appointed administratrix of her husband's estate in proceedings under the aforesaid statute, by the Probate Court in his home county (Cumberland), on April 15, 1932. The Probate Court, it may be noted, has never adjudicated that Harry T. Wilson was actually dead. Actual death was not the subject-matter presented to that court.

The plaintiff offers no direct evidence of the death of the insured, relying upon the presumption of death arising from his absence, unheard from, or of, during more than seven years. The presumption of death has been said to be a genuine one. Wigmore, Evidence, Sec. 2531.

"Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man, will be assumed by presumption of law. The burden of proof lies upon the party alleging the death of the person; but, after an absence from his home or place of residence, seven years, without intelligence respecting him, the presumption of life will cease, and it will be incumbent on the other party asserting it, to prove that the person was living within that time." Howard, J., in *Stevens* v. *McNamara*, 36 Me., 176, 178. See also, Woerner, Law of Administration, *444; Thayer, Preliminary Treatise on Evidence, 319; Stephen, Evidence, 149; Wigmore, Evidence, *supra*; 2 Chamberlayne, Modern Law of Evidence, p. 1347; Jones, Commentaries on Evidence, 302; 17 C. J., 1167; *Loring* v. *Steineman*, 1 Met., 204; *Davie* v. *Briggs*, 97 U. S., 628, 24 Law ed., 1086. The following cases also support the general rule that a presumption of death arises in the case of one who is absent, and from whom no tidings have been received for the full period of seven years: *White* v. *Mann*, 26 Me., 361; *Kidder* v. *Blaisdell*, 45 Me., 461, 467; *Went-*

worth v. *Wentworth*, 71 Me., 72; *Johnson* v. *Merithew*, 80 Me., 111, 13 A., 132. As it is usual for living persons to be heard from, directly or indirectly, by persons having an interest in them, the lack of any news indicates their non-existence. Wigmore on Evidence, Sec. 158. Such indication shifts the duty of producing evidence to the opponent.

The presumption of death is by no means of equal strength at all times and in all situations. *Hyde Park* v. *Canton*, 130 Mass., 505, 509. See too, *Chapman* v. *Kimball*, 83 Me., 389, 22 A., 254. It is not to be rigidly observed without regard to the conditions under which departure from home took place. Each case must depend upon its own facts. These may, with reason, account for absence and silence without the hypothesis of death. Talbot, Pet'r, 250 Mass., 517, 146 N. E., 1. The rule is to be applied with caution, and it has limitations. Matter of Wagener, 128 N. Y. S., 164. Of course, there may be a strengthening of the rule. *Chapman* v. *Kimball*, supra. Circumstances may justify a finding of death before, or they may be such as to give rise to no such presumption, either at or after the expiration of seven years. Matter of Wagener, *supra.*

The issue of importance that the plaintiff must ultimately establish, by a fair preponderance of all the evidence, in this case, is the death of the insured. The facts disclosed, and the things attending the central act of leaving his home, warrant a finding that the death of Harry T. Wilson has not been proved.

According to the terms of the report, the mandate must be,

Judgment for defendant.

CAMP EMOH ASSOCIATES *vs.* INHABITANTS OF LYMAN.

York. Opinion May 4, 1933.

TAXATION. CHARITABLE CORPORATIONS.

Property is not exempt from taxation merely because it is owned by a benevolent and charitable institution. Freedom from assessment extends only to property which the institution occupies or uses for its own purposes.

Legislative enunciation exempts certain corporations created and existing with the consent of the State of Maine, from taxation, the exemption being restricted to property which such corporate bodies own and use for their own purposes.

Immunity from assessment depends, not upon simple ownership and possession of property, nor necessarily upon the extent, or length, of the actual occupancy thereof, although this is entitled to consideration, but upon exclusive occupation of such a nature as, within the meaning of the statute, contributes immediately to the promotion of benevolence and charity, and the advancement thereof.

In the case at bar, the burden was on the plaintiff to establish its right to exemption. The fact that the property was not in actual use on the first day of April, 1930, was immaterial, actual use on the day of the assessment not being the test. Neither was the source from which it obtained its property or funds nor the limitations of the classes of persons for whose benefit the property and funds were applied of importance. There was sufficient evidence of the actual appropriation of its property for the benevolent and charitable purposes for which the plaintiff corporation was incorporated. The real estate should not have been assessed.

On exception by defendant. An action for money had and received to recover from the defendant money paid by the plaintiff under protest to redeem property from taxes levied by the defendant on such property for the year 1930. Exemption from taxation was claimed by the plaintiff. The jury found for the plaintiff. To certain rulings of the presiding Justice, defendant seasonably excepted. Exception overruled. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

Waterhouse, Titcomb & Siddall, for defendant.

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

DUNN, J. The plaintiff corporation was organized July 25, 1929, under Chapter 62 of the Revised Statutes, 1916 (Chap. 70, 1930). It has no capital stock, and no provision for making dividends and profits. In 1930 it owned real estate in the town of Lyman. It appears to have had no other property.

In assessing the general property for the support of government, the Lyman assessors laid a tax against defendant's realty, that it might bear a proportionate share of the common burden. The tax was computed on a valuation of $13,500.00. The assessment itself was $607.50. The property was sold for delinquency, by the collector of taxes. After sale, and within the redemption period, plaintiff paid the tax, with interest and accrued charges, under protest that the property was exempt, and the whole tax unauthorized and illegal.

This action of assumpsit was begun to recover back the amount so paid. The action is grounded on a statute which provides tax exemption for "the real and personal property of all benevolent and charitable institutions, incorporated by the (this) state." R. S., Chap. 13, Sec. 6, Par. III. What a "benevolent" institution is, if it differs from one that is merely "charitable," may be difficult to say. *Maine Baptist Missionary Convention* v. *Portland*, 65 Me., 92.

The case was heard before the Superior Court. There was no dispute with respect to the facts. Whether or not, within the meaning of the statute, the plaintiff was using the taxed estate for purposes entitling exemption, was the point in controversy. Judgment was for the plaintiff. The defendant excepted.

Property is not exempt from taxation merely because it is owned by a benevolent and charitable institution. Freedom from assessment extends only to property which the institution occupies or uses for its own purposes. R. S., *supra*; *Ferry Beach Park Ass'n* v. *City of Saco*, 127 Me., 136, 142 A., 65.

On March 18, 1930, by its deed of that date, of which the Lyman assessors had actual notice, the Ladies Helping Hand Auxiliary to the Home for Jewish Children (a Massachusetts corporation which had owned the real estate and been taxed therefor in 1929), conveyed the property to the plaintiff. The same persons apparently comprised the boards of directors of the grantor and grantee cor-

porations. Evidence warrants inference, as the judge in the lower court notes, that a motive of incorporation in Maine was to obtain immunity from taxation.

The main purpose and design of the plaintiff, as set forth in its certificate of organization, is that of acquiring and holding real and personal property for the erection and support of a camp, or camps, to be conducted without profit, for the care, maintenance, and assistance of poor and indigent Jewish children, on such terms and subject to such limitations as the board of directors may determine. The certificate defines no territorial restriction.

That the members of the plaintiff corporation are not permanently resident in Maine, and that of the officers only the clerk resides in the State, are not matters of consequence. The individual members, as natural persons, are merged in the corporate identity, the domicile of which is Lyman. It meets requirements, even in the case of a business corporation, that the clerk be resident within the jurisdiction. R. S., Chap. 56, Sec. 32.

The corporation has on its land a group of camps. During July and August, 1930, upwards of two hundred and fifty children were at the camp, by assignment or invitation, all but one of the children having come from outside this State.

The assignment of children was chiefly, perhaps entirely, by an affiliate organization in Boston, from the Jewish public. Parents or friends of the children might, and some did, make contributions in their behalf; but principally, care and training, and shelter and food, and all things else, were furnished and supplied by the plaintiff, freely, and without the expectation of reward. Money to defray expenses was derived for the most part from donations; other moneys came from entertainments or fairs.

At the end of the season, the camp was closed, not to be opened again until the next year. The property, it is true, was not in actual use on the day of the assessment, i.e., the first day of April, 1930. To hold that to secure exemption, it must have then been in actual use, would ignore the spirit and intendment of the law. Actual use on that particular day is not the test.

The evidence clearly shows that the plaintiff is a "benevolent and charitable institution incorporated by the state." It is entirely immaterial what influenced the organization of the corporation.

And, certainly, that it was organized in Maine, because its incorporators were suited with our laws, or wished to receive the benefit of them, should not be used against it to debar it of its rights under those laws. It may be that our legislation as to exemption is too broad, but that constitutes no reason why it should not be enforced with an equal hand. The wisdom of the statute is for the Legislature, not the Court, to consider. Legislative enunciation exempts certain corporations created and existing with the consent of the State of Maine, from taxation, the exemption being restricted to property which such corporate bodies own and use for their own purposes.

Immunity from assessment depends, not upon simple ownership and possession of property, nor necessarily upon the extent, or length, of the actual occupancy thereof, although this is entitled to consideration, but upon exclusive occupation of such a nature as, within the meaning of the statute, contributes immediately to the promotion of benevolence and charity, and the advancement thereof.

The statute enacts that a corporation such as this shall be considered benevolent and charitable, without regard to the sources from which it gets its property or funds, or limitations in the classes of persons for whose benefit the property and funds are applied. R. S., *supra.*

The burden was on the plaintiff to establish its right to exemption. *Bangor* v. *Masonic Lodge*, 73 Me., 428. There was sufficient evidence of the actual appropriation of its property, for the purposes for which the plaintiff corporation was incorporated. The real estate should not have been assessed. No reversible error was committed by the lower court. The exception, therefore, is overruled.

Exception overruled.

WALTER D. STEWART *vs.* REED V. JEWETT.

Penobscot. Opinion May 8, 1933.

MOTOR VEHICLES. INVITED GUEST. NEGLIGENCE. DAMAGES.

It is for the jury to determine from facts found and inferences logically drawn therefrom, whether the driver of a motor vehicle who lost control of his car while passing another automobile, exercised the degree of care, requisite to the performance of his duty to his invited guests, in the operation of his automobile.

A jury verdict in excess of what may be regarded as reasonable remuneration for pain and suffering, will not be sustained.

In the case at bar, the jury finding was clearly in excess of what should have been a reasonable remuneration for suffering, and loss of earnings and other proper items of damage.

On general motion for new trial by defendant. An action on the case to recover damages for injuries sustained by plaintiff, an invited guest, in an automobile driven by defendant, and occasioned by the automobile, while being driven by the defendant, colliding with a tree on the road side. The jury found for the plaintiff and assessed damages in the sum of $4,600.00. A general motion for a new trial was thereupon filed by the defendant. Motion granted unless plaintiff shall remit so much of the verdict as exceeds the sum of $2,756.23. The case fully appears in the opinion.

Thompson and Ball, for plaintiff.

James M. Gillen, for defendant.

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

BARNES, J. After verdict for the plaintiff (damages $4,600.00, for injury suffered in an automobile accident), defendant brings his case to this Court, on motion to have the verdict set aside as not just, and because the damages are excessive.

It is a guest case, plaintiff an invited passenger, defendant driving his automobile when the accident occurred.

The time was October 11, 1931, a little before noon of a fair day, and the place, outside the gutter of a third-class highway, fifteen feet wide, in the town of Crawford.

Three passengers occupied the rear seat of the automobile, plaintiff in the middle; and another passenger sat at the driver's right. On descending ground, moving at moderate speed, defendant overtook and passed another automobile. Upon turning to his right to regain the better part of the travelled way, defendant lost control of his machine, and the trip ended with the automobile broken, after collision with an apple-tree on the roadside, fifty feet or more beyond the place where defendant passed the other car.

Parties and witnesses are estimable men, of excellent reputation. Plaintiff testified, "we shot over to the right hand side of the road in front of the other car, travelled along the ground side of the ditch until we brought up on the tree . . . It seemed as tho it went across the front of the other car at a very fast rate."

One of the witnesses, who was seated in the rear of the automobile gave the same testimony: "It swerved slightly to the left and then again to the right and run off the road."

The defendant testified: "I don't believe I was going over twenty miles an hour when I was behind his car because his car was going very slowly; but I speeded my car up and in its movements from the time I passed that car until I went off the road, the momentum increased some . . . I wished to pass. I turned to the left. The Ford car was clinging pretty closely to the center of the road. I turned to the left and I approached the side of the road on the south, and, as I approached that side of the road, my car gave way on the left. I felt my car giving way, and fearing an accident, I turned my wheel to the right, bringing myself into the middle of the road. I swerved my wheel too far, and as a result I moved very close to the side of the road, and would have gone off then except that I turned my wheel again and came too far over to the south side, or the left hand side, as we proceeded; and I again swerved my car.

"You will remember that from where I passed the Ford it was a downgrade, so that my car was probably increasing its speed as I moved along . . . I went off the road almost directly in front of that stone" (indicating stone at the right of the road).

There is no testimony with regard to defendant signalling that he was about to pass the driver ahead, and, "clinging pretty closely to the center of the road," except this: "And do you remember whether or not you blew your horn for him to get over?" Answer "Yes."

On this evidence it was for the jury to balance the probabilities and determine from facts found and inferences logically drawn whether the defendant had exercised the care, and the degree of care, requisite to the performance of his duty to his invited guests, in the operation of the automobile.

The jury found the defendant remiss. In legal phrase, they found him negligent; and assessed damages.

The injury proven was to the larger of the leg bones of the left leg, near the upper end.

The testimony is indefinite and confusing. To the physician who took the X-ray pictures they "give the impression of having been hit by something and the outer layer of bone tissue broken in. * * * pushed down and in rather than up, * * * the surface of the bone, the outer layer, has been injured." The physician testified, "A piece of this bone was broken, the upper end of the big bone of the lower leg."

Plaintiff was perhaps sixty-four years of age at the time of the accident. For about forty years he had been in the Railway Mail Service, earning $2,600.00 a year.

He was confined to his bed for nine weeks; after some further time, moved about with the aid of crutches, then of a cane till the next January.

He does not assert that he suffered acute pain, rather: "I say 'ached' as distinguished from 'pain'. That is not as severe."

On May 21, 1932, he returned to the Bangor-Calais run in the Mail Service. When asked whether plaintiff would in future be in pain at times, the doctor replied "Possibly, if he gets over-tired."

It is agreed that wages lost, for time out, amounted to $1,589.84
Cash disbursement in course of recovery 166.39
To the sum of these two items, the jury added $2,843.77. Such a sum seems clearly in excess of what should have been regarded as remuneration for suffering, loss of future earnings and other proper items of damage not enumerated.

The jury would have been justified in assessing one thousand dollars instead of the figures last given.

The motion must be granted unless, within thirty days of date hereof, plaintiff shall remit so much of the verdict as exceeds the sum of $2,756.23.

So ordered.

WILLIAM H. BURNS *vs.* WILLIAM L. HASKELL.

Androscoggin. Opinion May 24, 1933.

JURY FINDINGS. VERDICTS.

A jury finding not based on the evidence, but upon sympathy, will be set aside.

In the case at bar, from the only professional evidence adduced, it appeared that the treatment given by the defendant was correct and proper under the circumstances, and resulted in an excellent recovery on the part of the plaintiff. The witness found nothing whatsoever to criticize in the defendant's conduct of the case. His testimony was uncontradicted. The jury was not justified in disregarding it.

On general motion for new trial by defendant. An action brought by plaintiff to recover damages which he alleges he suffered through the alleged malpractice of the defendant, a physician and surgeon. Trial was had at the January term of the Superior Court for the County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $5,000. A general motion for new trial was thereupon filed by the defendant. Motion sustained. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

Herbert E. Locke,

Fred H. Lancaster, for defendant.

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

PATTANGALL, C. J. General motion. Verdict for plaintiff. Action to recover damages for injuries sustained by reason of alleged malpractice on the part of a physician and surgeon.

Plaintiff, a man weighing two hundred and five pounds, fifty-three years old, having an artificial left leg, slipped on the sidewalk and sustained a severe and involved injury to his right ankle, the fibula being fractured, a piece of the tibia broken off, and the maleolus broken off at its base. It was denominated professionally as a "complicated Potts fracture." He was treated by defendant in the hospital and at his home for about eighteen months prior to the bringing of this action.

Witnesses called for plaintiff consisted of himself, three neighbors, whose testimony consisted largely of confirmation of the fact that plaintiff suffered pain and discomfort in a marked degree, and a surgeon of apparent intelligence and reliability. Plaintiff's testimony consisted of a general complaint of the treatment accorded him, contradictory in a degree, somewhat rambling and indefinite, and in a considerable part not pertinent to the issues defined by the pleadings.

The testimony of the surgeon, elicited largely in cross examination, is decisive on the point of liability and absolutely negatives the theory that plaintiff's present disabilities are the result of defendant's negligence. He testified that he had never seen a similar fracture treated so as to procure a perfect result, that considering the nature of the injury and the age of the patient the result in the instant case was excellent, that the ankle was straightened about seventy-five per cent, and that the treatment described by plaintiff was correct. Summarizing his testimony, he found nothing whatsoever to criticize in defendant's conduct of the case.

It is difficult to understand why, in view of this testimony, the only professional evidence adduced, the case should have been submitted to a jury. Although it appeared that the surgeon who was called as a witness by plaintiff had been summoned by defendant and the important features of his evidence were in answer to questions propounded by the attorney for the defense, neither his professional knowledge nor his integrity was attacked. He was apparently frank, unprejudiced, unbiased and fair in all of his statements. His testimony stood uncontradicted. The verdict assumes

it to be of no value whatever. The jury was not justified in disregarding it. Its finding must have been based solely upon sympathy. There is no foundation for it in the evidence.

Motion sustained.

J. WILL LEAVITT *vs.* THE YOUNGSTOWN PRESSED STEEL COMPANY.

York. Opinion June 2, 1933.

BILLS AND NOTES. PRINCIPAL AND SURETY. JUDGMENTS.

A negotiable note given for a simple contract debt is prima facie *deemed a payment or satisfaction thereof, but the rule is otherwise when its application would impair security held by the creditor.*

A judgment of a court of competent jurisdiction can not be attacked collaterally.

The rule that a binding extension of time given to a principal discharges his surety has no application when the extension complained of consists of a mere continuance of a pending case from term to term.

In the case at bar, the principal issue raised might have been properly considered in the original hearing but, not having been presented before the referee whose report was later accepted and upon whose findings judgment was based and issued, the doctrine of *res judicata* was justifiably invoked by this defendant.

On appeal by defendant from a decree of a sitting Justice sustaining plaintiff's bill in equity and enjoining defendant from enforcing the conditions of a certain bond given to release an attachment of personal property on which the plaintiff had signed as surety. Appeal sustained. Case remanded for further proceedings. The case fully appears in the opinion.

Waterhouse, Titcomb & Siddall, for plaintiff.

Ralph M. Ingalls,

Franklin B. Powers,

Edward J. Harrigan, for defendants.

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

PATTANGALL, C. J. Equity. Appeal by defendant, who sold certain merchandise to the American Specialty Manufacturing Company and, failing to receive payment therefor, sued to recover the purchase price. The personal property of the debtor company was attached on a writ dated May 14, 1929, the attachment being released by the delivery of a statutory bond signed by the plaintiff as surety on May 20, 1929.

There was a dispute in connection with the amount due from the Manufacturing Company and a settlement of the differences between it and defendant was discussed by their counsel. As a result, it was agreed that the Manufacturing Company should be given a considerable discount on the original bill; and on October 1, 1930, a promissory note for $2,546.09, payable in three installments, the last of which came due April 1, 1931, was executed by the Manufacturing Company and delivered to defendant. Nothing was ever paid on this note; and in the spring of 1931 the Manufacturing Company became bankrupt.

Before the note was given, the original suit had been referred and at the January term of the Superior Court, 1931, the referee filed a report under date of December 17, 1930, stating that the case had been adjusted and that he had been directed to return the report to the Court with the stipulation that the case be entered "Neither party, no further action." This report was not formally accepted and appears to have been entirely disregarded in the subsequent proceedings. The suggested docket entry was not made, the rule was re-issued at the May term, apparently under the original order of reference, and on June 25, 1931, the referee heard the case. There being no appearance for the Manufacturing Company, it was defaulted and damages assessed in the sum of $2,700. This report was accepted as of the May term and judgment entered thereon. Thirty days after the rendition of this judgment, defendant demanded payment of the amount due from plaintiff and threatened to bring suit unless its demand was complied with. The bill before us prays that it be enjoined from so doing and that the bond in question may be cancelled and decreed void, plaintiff's contention being that the note was given and received in full payment for the debt of the Manufacturing Company and that defendant, by accepting the note and also by extending the time of payment

without plaintiff's knowledge or consent, discharged him from liability as surety on the bond. The Court below sustained the bill and permanently enjoined defendant from enforcing or attempting to enforce the conditions of the bond against plaintiff. It is from this decree that defendant appealed.

Plaintiff's claim that the note was given and received in satisfaction of defendant's original demand against the Manufacturing Company is denied by defendant, which insists that the note was accepted conditionally and unless paid in full was not intended to affect the situation in any way. The evidence bearing on this controversy is meager and unsatisfactory, but defendant's position is very much strengthened by the presumption invoked by it on the authority of *Kidder* v. *Knox*, 48 Me., 555; *Paine* v. *Kimball*, 53 Me., 54; *Bunker* v. *Barron*, 79 Me., 66, 8 A., 253; *Bryant* v. *Grady*, 98 Me., 395, 57 A., 92; *Roy* v. *Belleviau*, 118 Me., 495, 108 A., 70; *Clark* v. *Downes*, 119 Me., 252, 110 A., 364; *Delano Mills Co.* v. *Warren et als*, 123 Me., 408, 123 A., 417; all holding that while a negotiable note given for a simple contract debt is *prima facie* deemed a payment or satisfaction thereof, the rule is otherwise when its application would impair security held by the creditor. In the instant case, defendant had ample security for the payment of the debt due it from the Manufacturing Company and in the absence of definite proof of its intention to abandon that security and rely wholly upon the unsecured note which it received, its claim that it accepted the note conditionally seems reasonable.

Defendant does not rest here, however, but goes farther and says that whether or not the note was intended in satisfaction of the original claim should not be considered in these proceedings but is a matter which should properly have been presented before the referee, if at all, and that his findings, fixing the liability of the Manufacturing Company, having been accepted and approved by the Court and having ripened into judgment, dispose of the question adversely to plaintiff's principal and, therefore, to plaintiff as surety.

Plaintiff admits in his brief that "any legal judgment against the original defendant would doubtless bind Mr. Leavitt on his bond"; and defendant, accepting this concession at face value, rejoins by saying, "That is precisely what we have — a legal judg-

ment against the original defendant. There is not the slightest taint of illegality about it, and none has ever been intimated either directly or indirectly. No review or direct attack on it has ever been sought and it cannot be attacked collaterally."

There is, unquestionably, force in this reply. That a judgment can not be attacked collaterally, either in equity or law, is too well established to admit of argument. *Coffin* v. *Freeman*, 84 Me., 535, 24 A., 986; *Blaisdell* v. *York*, 110 Me., 500, 87 A., 361; *Rose* v. *Parker*, 116 Me., 52, 99 A., 817; *Graney's Case*, 123 Me., 571, 124 A., 204. The Court below had no authority to go into the first question raised by plaintiff's pleadings, and we have no right to consider it here. It is plainly *res judicata.*

Plaintiff invokes another ground of relief. He relies on the principle that a binding extension of time given to a principal discharges the surety who has not consented thereto. This well established rule does not seem to us to be applicable here. The condition of the bond upon which plaintiff became surety was that "within thirty days after the rendition of judgment, he will pay to the plaintiff or his attorney of record the amount of said judgment." The fact that the pending case was continued from term to term while a possible adjustment was being attempted was not an extension of time within the meaning of the rule.

Appeal sustained.
Case remanded for
further proceedings.

DYAR SALES & MACHINERY COMPANY *vs.* VITO MININNI.

York. Opinion, June 15, 1933.

R. S., CHAP. 96, SEC. 129. PLEADING AND PRACTICE.

The word "itemized," referring to an account annexed, under the provisions of Chap. 96, Sec. 129, R. S., requires a specific statement. General charge, such as "repairs as ordered" is too indefinite and does not conform to the meaning of the statute.

Affidavits made outside Maine, for use in Maine, are not receivable in evidence unless there be authentication of the signature of the attesting officers. The statute provides the exclusive method.

An ex-parte affidavit differs from a deposition in that the adverse party does not have notice or opportunity to cross-examine. To raise such an affidavit to the plane of evidence, strict compliance with legislative prescription is indispensable.

The certification by the clerk, of his belief that the notarial signature is genuine, though it states the reason for such belief, is not explicit in character. To be effectual, the certificate should recite, as a fact, the genuineness of the signature.

In the case at bar, a clerk of a Massachusetts court of record certifies that he is well acquainted with the handwriting of the subscribing notary "and verily believes that the signature to the said proof or acknowledgment is genuine." The clerk does not certify directly to the fact of genuineness. Certification is confined to his belief. This is not sufficient.

On exceptions by defendant. An action of assumpsit on an account annexed. The issue involved the validity and sufficiency of an affidavit to the account annexed made by the secretary of the plaintiff corporation. The court ruled the affidavit sufficient. To this ruling defendant excepted. The jury rendered a verdict for the plaintiff in the sum of $811.04. Exceptions sustained. The case fully appears in the opinion.

Connolly and Welch, for plaintiff.

Joseph R. Paquin, for defendant.

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

DUNN, J. This action, in which exceptions were noted and allowed, was assumpsit, by a corporation, on account annexed to the writ. To establish plaintiff's main case, counsel offered in evidence the affidavit of its secretary. R. S., Chap. 96, Sec. 129.

The statute making *ex parte* affidavits permissible in proof is in these words:

"In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a

true statement of the indebtedness existing between the parties to the suit with all proper credits given, and that the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statement made in such affidavit, and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence. When the plaintiff is a corporation, the affidavit may be made by its president, secretary or treasurer. If the said affidavit be made before a notary public using a seal without the state, his authority as a notary public to act and to administer an oath shall be certified thereto and the genuineness of his signature certified by a clerk of a court of record or by a deputy or assistant clerk of the same and have the seal of said court attached thereto."

Defendant seasonably objected to the admission of the affidavit, on the grounds (1) that the account annexed to the writ is not itemized; (2) that, having been sworn without the State, i.e., in Massachusetts, there is no accompanying certificate of a court clerk, sufficiently verifying the genuineness of the signature of the magistrate before whom the affidavit purports to have been made.

Whether the affidavit was admissible was a question for the court. If admissible, probative force would be for the jury. *Mansfield* v. *Gushee*, 120 Me., 333, 114 A., 296; *Fishing Gazette Pub. Co., Inc.* v. *Beale & Gannett Co.*, 124 Me., 278, 127 A., 904.

The trial judge, on striking out certain debits, ruled that the account itemized the rest. The defendant saved the point. That the authentication of the magistrate's signature conformed to statutory requirement was also ruled. This point, too, was saved.

The affidavit, being allowed, was introduced in evidence. Plaintiff then rested.

Motions by the defense, to withdraw a plea of recoupment, and to direct a verdict for the defendant, were overruled. Exceptions were taken. These exceptions are without merit. The first motion was addressed to judicial discretion. *Barden* v. *Douglass*, 71 Me., 400. To the decisions of a judge, in matters of discretion, exceptions do not lie. *Moody* v. *Hinkley*, 34 Me., 200. The second motion was premature. At the trial of a civil action, a motion for a directed verdict comes at the close of all the evidence.

The defense submitted no evidence.

The judge, on ordering a verdict for the plaintiff, allowed the defendant an exception.

These are the debit items in the original account:

1931	June 20	To Lanterns and Crowbars	$ 17.31
	July 10	To Lantern Globes	3.50
	Nov. 2	To 2 — Plows	1,170.00
	Dec. 10	To Plow Repairs as ordered	3.75
	Dec. 18	To Blades	20.00
1932	Feb. 10	To Merchandise ordered	36.40
	Feb. 10	To Blade	11.50
	Feb. 10	To Plow Repairs as ordered	18.00
			$1,280.46

Those stricken out were (beginning at the top) the first, fourth, sixth, and eighth.

The word "itemized" exacts specific narration. A general charge, such as "repairs as ordered" is too indefinite. The exception is sustained.

The next exception goes to the admissibility of the affidavit.

Affidavits made outside Maine, for use in Maine, are not receivable in evidence unless there be authentication of the signature of the attesting officers. The statute provides the exclusive method. R. S., *supra.*

An *ex-parte* affidavit differs from a deposition in that the adverse party does not have notice or opportunity to cross-examine. To raise such an affidavit to the plane of evidence, strict compliance with legislative prescription is indispensable.

In the case at bar, a clerk of a Massachusetts court of record certifies that he is well acquainted with the handwriting of the subscribing notary "and verily believes that the signature to the said proof or acknowledgment is genuine." The clerk does not certify directly to the fact of genuineness. Certification is confined to his belief.

In equity pleading, an allegation upon belief does not allege facts. *Bailey* v. *Worster*, 103 Me., 170, 68 A., 698. The certification by the clerk of his belief that the notarial signature is genuine, though it states the reason for such belief, is not explicit in

character. To be effectual, the certificate should recite, as a fact, the genuineness of the signature.

This exception is sustained.

The further exception of utter want of evidential basis for a plaintiff verdict now presents:

What the affiant swears is that the account correctly states the debits, and that, all credits deducted, the balance there shown is due and unpaid. The oath supports the account as it appears, in completeness, in the writ. That oath never was intended to support an amended account, asserting a different debt situation. A dictum suggesting this will be found in *Sawyer* v. *Hillgrove*, 128 Me., 230, 237, 146 A., 705. The exception is good.

Exceptions sustained.

PERCIVAL P. BAXTER

vs.

GEORGE E. MACGOWAN, JR., ADMINISTRATOR.

FRATERNITY COMPANY

vs.

GEORGE E. MACGOWAN, JR., ADMINISTRATOR.

Cumberland. Opinion, June 24, 1933.

PLEADING AND PRACTICE. DEMURRER.

The day, month and year of each item of an account annexed must be stated.

Time, however, is not an essential element in a cause of action resting upon an account annexed. It is a matter of form which need not be proved as alleged. Uncertainty in the pleading as to time may be properly taken advantage of by special demurrer.

The office of a declaration is to make known to the opposite party and the Court the claim set up by the plaintiff.

The account annexed is a part of the declaration and its adequacy must be tried by the same tests.

An account annexed is a detailed statement of items of debt and credit, or debt growing out of contracts.

Specifications under the common counts in assumpsit are no part of the counts. Insufficiency or uncertainty in the specifications can not be raised by demurrer. The remedy is by motion under Rule XI of the Supreme Judicial and Superior Courts.

A mere statement of sundry amounts of money had and received in given months and years, without further particulars, does not sufficiently inform the defendant of the claim set up by the plaintiff.

In the case at bar, the defendant's special demurrer reached this defect and should have been sustained. Overruling the demurrer to the first count in the plaintiff's writ was not harmless error.

The allegation that the plaintiff filed his "claim here declared on" in the Registry of Probate in accordance with the requirements of the statute, viewed from the standpoint of pleading, must be construed to mean that a statement of a cause of action was filed which, if proved, would sustain the count.

The defendant can not, under Revised Statutes, Chap. 96, Sec. 139, defend an action based on the promise of his intestate, alleged to have been made on the Lord's Day, by a demurrer which, admitting the facts set forth in the declaration, fails to show that the consideration received by the intestate has been restored.

The misdescription of the defendant's intestate as "the defendant" in an action brought against the defendant in his representative capacity was obviously a clerical error. The intendment of the declaration being clearly discernible, the defect is immaterial.

The count on an account stated is, in itself, sufficient. The specifications attached are not demurrable.

On exceptions by defendant. Two actions of assumpsit for money had and received, tried together. To the overruling of special demurrers filed by the defendant, exceptions were taken. In each case exceptions to the overruling of special demurrer to the first count of the declaration sustained. The cases fully appear in the opinion.

Charles J. Nichols, for plaintiffs.

Ralph O. Brewster, for defendant.

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

STURGIS, J. These cases, although distinct and several in their facts, involve the same principles of law and may properly be considered in a single opinion.

Baxter v. *Macgowan, Jr., Administrator.*

The plaintiff, in this suit to recover an alleged indebtedness due him from the defendant's intestate, states his cause of action in two counts, the first in the form of an account annexed, and the second for money had and received and also for money found to be due on an account stated. The defendant's demurrer, directed specially to each count, was overruled. Exceptions were reserved.

The first fifty-one items in the account annexed, varying only in the month, year and amount, are in this form:

"To money had and received in July 1926 $91.50."

The aggregate of these items is $7,690.60, but credit allowances leave a balance of $548.91.

The final item of the account is as follows:

"To money had and received for rental collected from tenant Woodhill & Hatch at Building at 84 and 86 Union Street, Portland, Maine, for use and occupation of the building between the dates of July 1, 1930 and September 22, 1930, $30.00."

The total amount claimed by the plaintiff is $578.91.

The plaintiff alleges that the defendant's intestate on September 21, 1930, being indebted to the plaintiff in the sum of $578.91 according to the account annexed, then and there promised to pay the same on demand. It is also set forth that on September 22, 1930, the intestate died. The account annexed bears the date of January 29, 1932, but the items which make it up are undated. The defendant specially assigns this uncertainty in the declaration as a cause of demurrer. The inconsistency of the pleading is apparent. If the date of the account annexed attaches by reference to its items, they, each and all, accrued after the death of the intestate and his alleged promise to pay them. This defect is fatal on special demurrer. *Chitty on Pleading*, 16th Am. Ed., 353. If the date given may be rejected as impossible and the account and all its items deemed undated, uncertainty in another form appears. Although time is not an essential element in an action on an account

annexed and need not be proved as alleged, the day, month, and year when each item of the account accrued should appear. This defect, being as to form only, is reached by a special demurrer. *Hare* v. *Dean*, 90 Me., 308, 312, 38 A., 227; *Wellington* v. *Small*, 89 Me., 154, 36 A., 107.

The office of a declaration is to make known to the opposite party and the Court the claim set up by the plaintiff and the adequacy of the account annexed, which is a part of the declaration, comes within the same general rule and must be tried by the same test. *Peabody* v. *Connolly*, 111 Me., 174, 176, 88 A., 411. "An account is a detailed statement of items of debt and credit or of debt growing out of contracts." *Turgeon* v. *Cote*, 88 Me., 108, 33 A., 787. The last item of the plaintiff's account annexed, except as to time, is stated in sufficient detail to inform the defendant of the claim made against his intestate and to permit him to prepare his defense, but all the preceding items lack certainty. We are not of opinion that a mere statement of sundry amounts of money had and received in given months and years, without further particulars, sufficiently informs the opposite party of the claim set up by the plaintiff. The defendant's special demurrer to the items of the first count reaches this defect and should have been sustained. Overruling the demurrer permitted a recovery on items which were not well pleaded. The error was not harmless. 6 *Encyc. Pl. & Pr.*, 368. The sufficiency of this form of pleading was not considered in *Levee* v. *Mardin*, 126 Me., 133, 136 A., 696.

The form of the declaration in the second count for money had and received is in substantial accordance with long-established precedent. The defendant's complaint that the attached specifications are insufficient can not be raised by demurrer. Specifications are no part of the common counts. *Bank* v. *Copeland*, 72 Me., 220, 222; *Bean* v. *Fuel Co.*, 124 Me., 102, 104, 126 A., 285. If the defendant desires further specifications, he must proceed by motion under Rule XI of the Supreme Judicial and Superior Courts.

The plaintiff alleges under his count for money had and received that he filed his "claim here declared on" in the Registry of Probate in compliance with Revised Statutes, Chap. 101, Sec. 14. Viewed from the standpoint of pleading, with which we are here concerned, this allegation must be construed to mean that a statement of a

cause of action was filed which, if proved, would sustain the count. *Bank* v. *Copeland*, supra. On its face, the declaration in this respect is sufficient.

The defendant can not, on this demurrer, avail himself of the fact that the time alleged in the second count of the declaration is September 21, 1930, and the Lord's Day. The demurrer, admitting the facts set forth, nowhere shows that the consideration received by the defendant's intestate has been restored. Failing in this, the defendant is barred from defending an action on the promise. R. S., Chap. 96, Sec. 139; *Bank* v. *Kingsley*, 84 Me., 111, 24 A., 794; *Wheelden* v. *Lyford*, 84 Me., 114, 24 A., 793.

One only of the other causes of demurrer to the count for money had and received needs consideration. In stating his cause of action, the plaintiff referred to the intestate as "the defendant," whereas the action is brought against his administrator. It is clear, however, that the intestate is intended to be referred to and the misdescription is purely a clerical error. "The intendment of the declaration as a whole is clearly discernible from the language used and that is all that the rules of pleading require. To give effect to a clerical error, despite the proof that it is an error and against the true intent and meaning of the declaration as a whole, would not only be repugnant to common sense but a refinement even of the theories of the old writers upon pleading." *Penley* v. *Record*, 66 Me., 414, 417.

The causes of demurrer directed to the declaration of account stated involve no principles of law not already considered under the count for money had and received. The specifications are the same and, by the same rule, not open to demurrer. *Bank* v. *Copeland*, supra; *Bean* v. *Fuel Co.*, supra. The count itself is well pleaded.

Fraternity Company v. *Macgowan, Jr., Administrator.*

In this action also to recover an indebtedness alleged to be due from the defendant's intestate but to this plaintiff corporation, the defendant's special demurrer was overruled and exceptions reserved. The declaration here is in all respects similar to that used in the case just considered and the same causes of demurrer are assigned. The first items of the account annexed, seventy-three in number, are all also of inconsistent date, or entirely without date,

and stated merely as "To money had and received" in a certain month and year and for a given amount. The remaining items of the account, otherwise well pleaded, show the same uncertainty as to time. The insufficiency of this form of pleading has been pointed out. The demurrer should have been sustained.

The second count also for both money had and received and an account stated with specifications attached is, on its face, well pleaded. It is, in practical effect, a duplicate of the corresponding count in the declaration in the accompanying action and the causes of demurrer there assigned appear here. The rules of law already stated are again applicable and sustain the ruling below on the demurrer to this count.

In each case, the entry made is

Exceptions to overruling special demurrer to the first count of the declaration sustained.

MARY A. WARD, ADMINISTRATRIX

vs.

MAINE CENTRAL RAILROAD COMPANY.

Washington. Opinion, June 26, 1933.

FEDERAL EMPLOYERS' LIABILITY ACT. RAILROADS. NEGLIGENCE.

MASTER AND SERVANT.

Under certain circumstances, it is the duty of the employer to warn the employee of dangers to which he is or may be subjected. This duty is not, however, absolute. Its existence depends upon the age, understanding and experience of the employee and the character of the danger.

In order to create a duty of warning and instruction, the danger must be one that is known to the employer and unknown to the employee, there being no such duty if it is obvious or if the employee possesses knowledge of the risk to which he is subjected.

The rule requiring an employer to instruct his employee and to warn him is only for the purpose of supplying him with information which he is not presumed to have, and if it is shown that the employee did in fact possess the knowledge, the failure to warn can in no sense be said to be the proximate cause of the injury; and if not the proximate cause of the injury, there can not be actionable negligence.

The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand; and if he neglects to observe the perils of his employment, the fault is his own, not that of the employer.

Applying these well established legal principles to the case at bar, the defendant must be acquitted of negligence. The Court adheres to the view expressed in *Ward, Admrs.* v. *M. C. R. R. Co.*, 131 Me., 396, that the sole proximate cause of the death of plaintiff's intestate was his own lack of due care.

On report. Action on the case brought in the name of the plaintiff under the Federal Employers' Liability Act, for her benefit and the benefit of the minor children of the plaintiff's intestate. Judgment for defendant. The case fully appears in the opinion.

Hinckley, Hinckley and Shesong, for plaintiffs.

Perkins & Weeks,

Harold H. Murchie, for defendants.

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

PATTANGALL, C. J. On report. Action brought under Federal Employers' Liability Act for the benefit of the widow and children of plaintiff's intestate who was instantly killed while employed by defendant in construction work on a bridge on its line. The statute relied upon is admittedly applicable.

Since a full statement of the facts in the case will be found in *Ward, Admrx.* v. *R. R. Co.*, 131 Me., 396, 163 A., 273, it is unnecessary to repeat them here.

In that opinion every issue raised by the pleadings was finally decided with the exception of one which was not properly before the Court at that time but which is now presented for our consideration.

Plaintiff's writ contained a count declaring that defendant was negligent in that its superintendent failed to inform plaintiff's intestate that the train which struck and killed him was on its way to the point of contact where it might be expected to arrive in fifteen or twenty minutes. At the original trial the presiding Justice declined to submit this question to the jury on the ground that the evidence submitted was not sufficient to support the allegation. Exception was noted but, verdict being for plaintiff, was not brought forward.

The verdict having been set aside and new trial ordered, the parties elected to present the case again on the old record, on report, so that this Court might pass upon the undecided question. The evidence relating to it fails to establish negligence on defendant's part and we are obliged to adhere to the view formerly expressed by us that the sole proximate cause of the death of plaintiff's intestate was his own negligence.

It appears that the superintendent knew of the movement of the train, that after having received the information he was at or near the compressor about which deceased was working, and that the facts were not communicated to plaintiff's intestate; but we can neither conclude that the omission constituted negligence nor that, even if such were the case, it was the proximate cause of the injury which followed.

Plaintiff's intestate, an experienced railroad worker, employed on that job for several days, knew that the train was likely to come along at any moment. He had a plain view for several hundred feet of the track over which it must pass to reach the point where he stood. He was near the end of the bridge over which the train must proceed and upon which no one could safely walk while the train was crossing. His familiarity with the surroundings and his knowledge of the danger incident to the situation were such that no word of warning was necessary to prevent him from following the course of action which resulted in his death.

Under certain circumstances, it is the duty of the employer to warn the employee of dangers to which he is or may be subjected. This duty is not, however, absolute. Its existence depends upon the age, understanding and experience of the employee and the character of the danger. In order to create a duty of warning and

instruction, the danger must be one that is known to the employer and unknown to the employee, there being no duty of warning and instruction if it is obvious or if the employee possesses knowledge of the risk to which he is subjected. The rule requiring the employer to instruct his employee and to warn him is only for the purpose of supplying him with information which he is not presumed to have, and if it is shown that the employee did in fact possess the knowledge, the failure to warn can in no sense be said to be the proximate cause of the injury; and if not the proximate cause of the injury, of course there can not be actionable negligence. The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand; and if he neglects to observe the perils of his employment, the fault is his own, not that of the employer. It is unnecessary to cite authorities in support of these well established legal principles. Applying them to the instant case, we reach the result above stated.

Judgment for defendant.

GERTRUDE P. STAPLES *vs.* W. CHARLES LITTLEFIELD.

York. Opinion, June 26, 1933.

REFEREES. PLEADING AND PRACTICE.

Reports of Referees are only open to attack on certain definite lines and according to certain definite procedure. When cases are referred without conditions or limitations, Referees are final judges of both fact and law, in the absence of fraud, prejudice or mistake, and objections to their findings based on those grounds must be filed in writing before their report is accepted to entitle the aggrieved party to a hearing before this Court.

When cases are referred with the right of exception reserved as to matters of law, the same procedure is followed as to objections and the excepting party is confined to those specifically set out by him at nisi prius.

The contention that there was no evidence before the Referees tending to establish the position of the party in whose favor decision was rendered raises a question of law.

There is no obligation on the part of the Court to study the evidence presented to Referees for the purpose of ascertaining on which side the preponderance lies or what testimony is most entitled to credence. Questions of fact once settled by Referees are finally decided if supported by any evidence. They are the sole judges of the credibility of witnesses and the value of their testimony.

When parties to a controversy submit their cause to a tribunal of their own choosing, they invest it with authority to decide questions of fact. They are bound by its findings, no fraud, prejudice, misconduct or obvious error appearing.

On exceptions to the report of Referees. The question at issue was title to a parcel of land claimed by both parties.

Exceptions overruled. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

Ray P. Hanscom,

Robert B. Seidel, for defendant.

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

PATTANGALL, C. J. Exceptions to acceptance of report of Referees. Real action, plea general issue with brief statement disclaiming title to a portion of the premises declared upon. Referred under Sec. 94, Chap. 96, R. S. 1930, with right of exceptions reserved. Referees reported in favor of plaintiff. Defendant filed objections in writing to the acceptance of the report, in accordance with Rule XXI. Presiding Justice accepted report. Defendant's exceptions were filed and allowed.

Reports of Referees are only open to attack on certain definite lines and according to certain definite procedure. When cases are referred without conditions or limitations, Referees are final judges of both fact and law, in the absence of fraud, prejudice or mistake, and objections to their findings based on these grounds must be filed in writing before their report is accepted to entitle the aggrieved party to a hearing before this Court.

When cases are referred with the right of exception reserved as to matters of law, the same procedure is followed as to objections and the excepting party is confined to those specifically set out by him at *nisi prius.*

In the instant case, the right of exceptions was reserved and Rule XXI was complied with. Defendant is, therefore, properly before this Court to be heard on such matters as are put in issue by the objections filed by him.

The first of these is that there was no evidence before the Referees tending to establish plaintiff's contentions. This raises a question of law upon which plaintiff is entitled to be heard. The remaining objections relate entirely to alleged fraud, prejudice and misconduct on the part of the Referees. They are absolutely unsupported by evidence or reasonable inference. They do not demand serious consideration and may be summarily dismissed without discussion or analysis.

Returning to the first objection — the rule is too well established to require more than passing mention that if there is any evidence to support the findings of fact by Referees, exceptions will not lie. We are not, therefore, obliged to study the voluminous report of the evidence in this case for the purpose of ascertaining on which side the evidence preponderates or what testimony we regard as most entitled to credence. Questions of fact once settled by Referees, if their findings are supported by any evidence, are finally decided. They and they alone are the sole judges of the credibility of witnesses and the value of their testimony. The parties to this controversy submitted their cause to a tribunal of their own choosing. To it they entrusted, without limitation, the power to decide questions of fact. Having chosen to go to that tribunal, they cannot now be heard upon the merits of this Court so long as there was produced before the Referees any evidence upon which could be based a decision.

The case involved a dispute as to the location of a division line between the properties of the litigants. It required a study of various deeds. The location of certain monuments and the monuments themselves were described by several witnesses. Some of these monuments were still in existence. Surveyors testified as to measurements bearing upon the probable location of such of them as had

disappeared. Old plans were referred to. The Referees visited the locus, thus acquiring at first hand valuable information.

The parties were agreed as to one bound. Both made that the starting point of their surveys. The distance from that to the next bound was also agreed upon, but they disagreed as to the point to which the measurement carried them. In fact they were then approximately six feet apart, the respective lines representing two sides of a triangle eighty-eight feet long with a base of six feet. Proceeding to the next bound, they approached very nearly together at the terminus of a line about fifty-three feet in length. It will be seen then that the serious issue between the parties was the location of the second monument. Plaintiff contended that this bound was marked by an iron pipe. Defendant contended that it was marked by an iron hub. It was not claimed that either was an ancient landmark but that the one or the other replaced the original monument, the location of which was in dispute.

The evidence bearing upon this point was voluminous and conflicting. Regardless of the result which this Court might reach were the case before us on report, it is sufficient under the circumstances that the responsibility of deciding the controversy was, by voluntary act of the parties, placed upon the Referees who decided it, not without evidence but we assume in accordance with their best judgment after considering all of the evidence. We are without authority to reverse their decision.

Exceptions overruled.

ROBERT N. CORTHELL *vs.* SUMMIT THREAD COMPANY.

Androscoggin. Opinion, June 26, 1933.

CONTRACTS.

A contract, in order to be binding, must be sufficiently definite to enable the Court to determine its exact meaning and fix exactly the legal liability of the parties.

Indefiniteness may relate to the time of performance, the price to be paid, work to be done, property to be transferred, or other miscellaneous stipulations of the agreement.

If the contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable.

If the terms of the agreement are uncertain as to price, but exclude the supposition that a reasonable price was intended, no contract can arise.

A reservation to either party to a contract of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it merely illusory.

In the case at bar, the contract of the parties as written indicates that both promised with contractual intent, the one intending to pay and the other to accept a fair price for any inventions that might be turned over.

"Reasonable recognition," as here used, seems to have meant what was fair and just between the parties, that is, reasonable compensation.

The fact that the parties coupled with the provision for reasonable recognition to the plaintiff the reservation that the "basis and amount of recognition (was) to rest entirely with" the Company "at all times" did not render the promise purely illusory.

The Company was not free to do exactly as it chose. It was bound in good faith to determine and pay the plaintiff the reasonable value of what it accepted from him. This it did not do.

The Court holds the plaintiff entitled to recover a reasonable compensation for his inventions turned over to the defendant, under his count in *indebitatus assumpsit.*

The Court is of the opinion that these inventions were reasonably worth $5,000 at the time they were turned over to the defendant, and the plaintiff should recover accordingly.

On report. An action of special assumpsit to recover damages sustained by the plaintiff through an alleged breach of a written contract entered into between the plaintiff and defendant. Judgment for the plaintiff for $5,000 and interest from the date of the writ. The case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

George W. Abele,

Verrill, Hale, Booth & Ives, for defendant.

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

STURGIS, J. In this action, the plaintiff declares in special assumpsit for the breach of a written contract and adds the general money counts with specifications. The plea is the general issue. The case comes forward on report.

The Summit Thread Company, the defendant in this action and hereinafter referred to as the Company, is a cotton yarn finisher with executive offices in Boston, Massachusetts, and a mill and machine shops in East Hampton, Connecticut. It manufactures spools, bobbins and other receptacles for winding threads, as also various devices which, to stimulate and retain trade, it loans to its customers for use with its products.

Sometime prior to the spring of 1926, Robert N. Corthell, the plaintiff, then employed by the Company as a salesman, perfected and patented two bobbin case control adjuncts and a guarding attachment for thread cops, especially adapted for use in stitching machines in shoe shops, and offered to sell them to the Company. A thirty-day option, taken but not exercised, led to a conference which involved not only the purchase of these inventions, but also future patents which might be taken out by the plaintiff, his remuneration for them and his salary as a salesman. The result was that, on March 31, 1926, the contract in suit was executed. The preambulary provisions of the agreement recite the giving and the reception of the option already referred to, the plaintiff's demand for increased salary, and then read as follows:

> "Whereas, the Summit Thread Company being desirous at all times to be fair and reasonable, now makes the following proposition, which was accepted by the said Corthell, in a rough form at East Hampton, Connecticut, on March 23, 1926.
>
> That beginning on April 1, 1926, the Summit Thread Company agrees to pay R. N. Corthell a salary of $4,000 per annum, for a period of five years, which is $620 additional to Corthell's present salary and that, in event of any distribution of Profits as covered by the Memorandum of Agreement relative to the Distribution of Profits which might be coming

to the said Corthell, then the above $620 is to be deducted from whatever the amount coming to him is.

IN CONSIDERATION, of the above, Robert N. Corthell agrees to accept $3,500 from the Summit Thread Company for the three patents mentioned in this agreement, the receipt of which is acknowledged by Corthell's signature to this agreement, and

FURTHERMORE, in consideration of the increased salary to Corthell for five years and the payment of $3,500 to Corthell for the three patents, R. N. Corthell agrees that he will turn over to the Summit Thread Company, all future inventions for developments, in which case, reasonable recognition will be made to him by the Summit Thread Company, the basis and amount of recognition to rest entirely with the Summit Thread Company at all times.

ALL of the above is to be interpreted in good faith on the basis of what is reasonable and intended and not technically."

The certificate accompanying the report stipulates that the case is to be decided upon so much of the evidence as is legally admissible. The facts already stated are not in controversy. The following summary sets out the findings on other issues.

During the term of the contract, no question was raised by either party to it as to the validity or the binding effect of its several provisions. The plaintiff continued as a salesman for the Company, covering the same New England territory and particularly the shoe shop trade. Within five months after the contract was signed, he turned over a new invention for development. The Company was marketing thread on a spool or "cop" called the Summit King Spool, made up by attaching a smooth frusto-conical wooden base to a tubular fibre core. As an improvement, the plaintiff conceived the idea of grooving the head or base of the spool, making corrugations thereon which would prevent thread convolutions from dropping as they unwound. This invention was brought to the attention of the officers of the Company, data and drawings furnished and, upon application by the General Manager and through his assignment, the Company, on October 18, 1927, took out Letters Patent No. 1,646,198.

On April 27, 1927, the plaintiff filed an application on a bobbin

controlling adjunct for sewing machine shuttles. This adjunct, composed of an annular sheet metal head provided with a tube or tubular shank to fit the bore of a thread cop, had fixed to its outer surface a thin spring of resilient sheet metal and was made with the object of taking up the thrust or side play of the thread bobbins used in stitching machines in shoe factories. The plaintiff assigned this patent to the Company and on January 8, 1929, it obtained Letters Patent No. 1,698,392.

A further invention made by the plaintiff and turned over to the Company consists of a celluloid disc with a boss in the center used in Singer I. M. shuttles, so-called, to confine the bobbin ready wound with thread in the chamber, the boss acting as a hub for the bobbin to turn on, keeping it steady as the machine runs and the thread is unwound. This was also a device particularly adapted to use in shoe shops and was patented by the Company.

Finally, the plaintiff turned over for development what seems to be termed in the trade as a S. C. B. bobbin with celluloid or paper discs fastened to the tube by four ears pressed down in the center. This was made for use in all sewing machines using ready-wound bobbins. It has never been patented and its patentability is doubtful.

The plaintiff has never received any compensation for these inventions. He turned them over to the Company in accordance with the terms of his contract, and it owns them and the patents which have been issued. Prior to the expiration of the contract, the plaintiff requested "recognition," but received only assurances that he would be fixed up all right and finally that the matter of his compensation would be taken up when a new contract was made. When, on April 1, 1931, the contract expired, it was not renewed and, at the end of July, following, the plaintiff's employment was terminated.

No contention is made that the term "reasonable recognition," as used in the contract under consideration, means other than reasonable compensation or payment for such inventions as the plaintiff turned over. The point raised is that coupled with the reservation that the "basis and amount of recognition to rest entirely with" the company "at all times" leaves "reasonable recognition" to the unrestricted judgment and discretion of the Com-

pany, permitting it to pay, as it here claims the right, nothing at all for the inventions which it has received, accepted and now owns. It is contended that the vagueness and uncertainty of these provisions relating to the price to be paid renders the contract unenforcible. To this is added the claim that the inventions were worthless and the plaintiff has suffered no damage.

There is no more settled rule of law applicable to actions based on contracts than that an agreement, in order to be binding, must be sufficiently definite to enable the Court to determine its exact meaning and fix exactly the legal liability of the parties. Indefiniteness may relate to the time of performance, the price to be paid, work to be done, property to be transferred or other miscellaneous stipulations of the agreement. If the contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable. If the terms of the agreement are uncertain as to price, but exclude the supposition that a reasonable price was intended, no contract can arise. And a reservation to either party of an *unlimited* right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it, as it is termed, merely illusory. *Williston on Contracts*, Vol. 1, Secs. 37 et seq. See Extended Note, 53 L. R. A., 288 et seq.; 13 C. J., 266 and cases cited.

It is accordingly held that a contract is not enforcible in which the price to be paid is indefinitely stated as the cost plus "a nice profit," *Gaines* v. *Tobacco Co.*, 163 Ky., 716, 174 S. W., 482; "a reasonable amount from the profits," *Cauet* v. *Smith*, 149 N. Y. S., 101; "a sum not exceeding $300 during each and every week," *United Press* v. *New York Press Co.*, 164 N. Y., 406, 58 N. E., 527; "a fair share of my profits," *Varney* v. *Ditmars*, 217 N. Y., 223, 111 N. E., 822, 823; and "a due allowance," *In re Vince* (1819), 2 Q. B., 478.

On the other hand, in *Brennan* v. *The Assurance Corporation*, 213 Mass., 365, the agreement of a contractor to "make it right with" a laborer who had been injured, if he was not able to resume work at the end of six weeks, was held not void for indefiniteness, the words "make it right" meaning fair compensation in money for the injuries received.

In *Silver* v. *Graves*, 210 Mass., 26, 95 N. E., 948, recovery was allowed on the defendant's promise to the plaintiffs that, if they would withdraw their appeal in the matter of the probate of a will, he would "make it right with (them) with a certain sum" and "give (them) a sum of money that would be satisfactory." The terms "right" or "satisfactory" were held there to mean what ought to satisfy a reasonable person or what was fair and just as between the parties.

In *Noble* v. *Burnett Co.*, 208 Mass., 75, 94 N. E., 289, the plaintiff's intestate agreed to produce certain formulas and to permit their use for manufacturing purposes, the contracting firm to manufacture and put upon the market compounds made in accordance with any of these formulas which they believed capable of yielding a profit and to pay the intestate "a fair and equitable share of the net profits." The contract was held to be sufficiently certain as to the price to be paid to be enforced.

In *Henderson Bridge Co.* v. *McGrath*, 130 U. S., 260, a promise to pay "what was right" was held, if made with a contractual intent, to be a promise to pay a reasonable compensation, and not too indefinite.

The views of Judge Cardozo in the dissenting opinion in *Varney* v. *Ditmars*, supra, p. 233, are instructive. He seems to be in accord with the cases last cited and to hold the opinion that, if parties manifest, through express words or by reasonable implications, an intent on the one hand to pay and on the other to accept a fair price, a promise to pay a "fair price" is not, as a matter of law, too vague for enforcement, and such damages as can be proved may be recovered.

In the instant case as in those last cited, the contract of the parties indicates that they both promised with "contractual intent," the one intending to pay and the other to accept a fair price for the inventions turned over. "Reasonable recognition" seems to have meant what was fair and just between the parties, that is, reasonable compensation. The expression is sufficiently analogous to those used in the Massachusetts and concurring cases which have been cited to permit the application of the doctrine, which they lay down, to this case. We accept it as the law of this jurisdiction.

"Reasonable recognition," as used by the parties, was, as already noted, coupled with the reservation that the "basis and amount of recognition (was) to rest entirely with" the Company "at all times." Nevertheless, the contract was "to be interpreted in good faith on the basis of what is reasonable and intended, and not technically." In these provisions, we think, the parties continued to exhibit a contractual intent and a contemplation of the payment of reasonable compensation to the plaintiff for his inventions. The Company was not free to do exactly as it chose. Its promise was not purely illusory. It was bound in good faith to determine and pay the plaintiff the reasonable value of what it accepted from him. It not appearing that it has performed its promise in this regard, it is liable in this action and the plaintiff may recover under his count in *indebitatus assumpsit*. *Bryant* v. *Flight*, 5 M. & W., 114; *Williston on Contracts*, Sec. 49.

The evidence indicates that the S. C. B. bobbin disc has no real value. It is doubtful if it is patentable and its use might expose the Company to suits for infringement of other patents. The corrugated spool head, however, effected, indirectly at least, a continuation of the Company's monopoly in the Summit King Spool, and the bobbin controlling adjunct and the bossed disc patents brought and held profitable customers in the shoe trade. The utility and value of these inventions for the stimulation and retention of trade is apparent, and why production and distribution were discontinued does not satisfactorily appear. The election of the Company to abandon their use does not measure their worth. We are of opinion that, at the time these inventions were turned over to the defendant, they had a reasonable value of $5,000 and the plaintiff should recover accordingly. The Writ was dated March 5, 1932. Interest from that date must be added. The entry is

Judgment for the plaintiff for $5,000 and interest from the date of the Writ.

IN RE HUME.

Kennebec. Opinion, June 30, 1933.

PLEADING AND PRACTICE. COURTS.

In a criminal cause a motion for a new trial on the ground of newly discovered evidence, filed in the Superior Court after the mandate of the Appellate Court had finally ended the original case, is without avail. In such instance the Superior Court has no jurisdiction.

On exceptions. A motion to vacate a judgment of conviction of crime in the Superior Court, because of fraud and perjury on the part of the complaining witness at the trial. The motion set forth new evidence discovered since the rendition of the judgment. To the refusal of the presiding Justice to entertain the motion, the petitioner excepted. Exception overruled. The case sufficiently appears in the opinion.

Harvey D. Eaton, for petitioner.

H. C. Marden, County Attorney, for the State.

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

DUNN, J. At the trial, on an indictment for crime, exceptions were saved. After a jury verdict of guilty, sentence was imposed, notwithstanding the exceptions, as the statute requires. R. S., Chap. 146, Sec. 26. The respondent moved the trial court (the Kennebec Superior Court), at a term subsequent to the certification by the Law Court of its rescript overruling the exceptions and awarding judgment for the State (131 Me., 458, 164 A., 198), to vacate, set aside, and declare the conviction and sentence (which is still being served) to be without force and effect.

The motion alleged newly discovered evidence that, in certain of his testimony, the principal witness for the government committed perjury. Consideration of the motion was ruled unauthorized. The correctness of that ruling is the sole subject at issue.

The ruling was free from legal error. Not having been filed until after the mandate of the appellate court had finally ended the original case, the motion was too late. A revocation of the conviction and sentence would have been in a court having no jurisdiction. Seventeenth Rule of Court, 129 Me., 503; *State* v. *Cole*, 123 Me., 340, 122 A., 871. See, too, *State* v. *Mallios*, 129 Me., 482, 149 A., 626.

Exception overruled.

STATE OF MAINE *vs.* MRS. FRED MERRILL.

Somerset. Opinion, July 5, 1933.

CRIMINAL LAW. PLEADING AND PRACTICE. DEMURRER. WORDS AND PHRASES.

It is unnecessary to use the word "unlawfully" in a complaint or indictment when it is manifest that the statute in its general terms alleges an unlawful offense.

Misnomer may properly be raised only by plea in abatement, not by demurrer.

"Kindling a fire" and "building a fire" are equivalent phrases. It is not necessary that the exact words of a statute be used in a complaint or indictment, provided that equivalent words are used.

When an act is forbidden in a particular locality, the complaint or indictment must allege that it was committed in that locality.

An allegation that respondent "did kindle a fire out of doors in the woods on a date during the period proclaimed by the Governor when it became unlawful to kindle fires out of doors in the woods" does not sufficiently set out an offense under the provisions of Secs. 38 *and* 39, *Chap.* 11, *R. S.* 1930, *as amended by Chap.* 180, *P. L.* 1931.

On exceptions. Respondent tried on a complaint charging her with a violation of Sec. 39, Chap. 11, R. S. as amended by Sec. 2, Chap. 180, P. L. 1931, filed a demurrer which was overruled. Ex-

ception was seasonably taken. Exceptions sustained. Demurrer sustained. The case fully appears in the opinion.

Thomas A. Anderson,
Clayton E. Eames, County Attorneys for State.
F. Harold Dubord, for respondent.

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

PATTANGALL, C. J. Exceptions to overruling demurrer to complaint charging violation of Sec. 39, Chap. 11, R. S. 1930 as amended by Sec. 2, Chap. 180, P. L. 1931. This section must be read in connection with that preceding it, in order to understand the questions raised by the demurrer.

Sec. 38, Chap. 11, R. S. 1930 as amended by Sec. 1, Chap. 180, P. L. 1931 reads:

> "Whenever, during periods of drought, it shall appear to the governor that hunting or fishing is likely to be a menace to the forests of the state, he may by proclamation suspend the open season for hunting or fishing for such time and in such sections of the state as he may in such proclamation designate, and prohibit smoking and building fires out of doors in the woods for the same time and sections; provided, however, that such suspension of open time shall not prohibit fishing from boats or canoes on ponds, lakes, rivers or thoroughfares."

Sec 39, Chap. 11, R. S. 1930 as amended by Sec. 1, Chap. 180, P. L. 1931 reads:

> "During the time which shall by such proclamation be made a close season, all provisions of law covering and relating to the close season shall be in force, and a person violating a provision of the same shall be subject to the penalty therein prescribed. Whoever, during the close season fixed by proclamation of the governor, as provided in the preceding section, enters upon the wild lands carrying or having in his possession any firearms; or who catches any fish contrary to this act or shoots any wild animal or bird for which there is no close sea-

son otherwise provided by law; or who smokes or builds fires out of doors in the woods, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars and costs for each offense."

The complaint charges that "Mrs. Fred Merrill of Waterville in the County of Kennebec and State of Maine on the twenty-second day of May A.D. 1932 at the Forks Plantation, so-called, in said County of Somerset and State of Maine, did kindle a fire out of doors in the woods, said date being during the period proclaimed by the Governor when it became unlawful to kindle fires out of doors in the woods against the peace of the State and contrary to the form of the statute in such case made and provided."

The points raised by the demurrer are (1) that the complaint did not contain an allegation that the violation of law was committed "unlawfully"; (2) that the name of respondent is "Edna Merrill," not "Mrs. Fred Merrill"; (3) that the charge is for "kindling" a fire, instead of "building" a fire; (4) that the complaint failed to charge that the alleged offense was committed at a place covered by a proclamation of the governor prohibiting the building of fires out of doors in the woods; (5) that the complaint contained no allegation that the necessary proclamation had been issued on the date of the alleged offense; (6) that the revocation of such a proclamation on the date in question was not negatived; (7) that "the charge in the complaint is vague and indefinite, is not formally, fully and precisely set forth as required by law so that the respondent may know and be prepared to meet the exact charge against him."

The first objection is disposed of by *State* v. *Skolfield*, 86 Me., 149, 29 A., 922, which holds that the weight of authority is that the use of the word "unlawfully" is unnecessary where it is manifest that the statute in its general terms declares an unlawful offense.

The second objection could only be raised by plea in abatement. *State* v. *Knowlton*, 70 Me., 201; *Marston* v. *Tibbetts Mercantile Company*, 110 Me., 533, 87 A., 220.

The third objection may be answered by the suggestion that while "kindling" and "building" are not synonymous words, the

phrases "kindling a fire" and "building a fire" are equivalent. "It is not necessary that the exact words of the statute be used in an indictment or complaint, provided that equivalent words are used." *State* v. *Robbins et al*, 66 Me., 324; *State* v. *Cavalluzzi*, 113 Me., 41, 92 A., 937.

Reserving a discussion of the fourth objection, we note that the fifth is waived, that the sixth sets out a matter of defense and that the seventh is general in its terms and if maintainable must be so because some other point raised by the demurrer is sustained.

There is merit in the fourth objection. Respondent is charged with kindling a fire "out of doors, in the woods" at the Forks Plantation on May 22, 1932, which was not, in itself, an unlawful act. The statute confers upon the governor authority to prohibit such an act under certain conditions "for such time and in such sections of the state as he may designate."

The complaint does not recite that the conditions precedent to the right to issue such a proclamation existed or that it was issued at a certain date, effective for a certain time and covering certain sections of the state, or that the place where the alleged offense was committed was included in the territory designated. Without these allegations, no offense is charged.

"If the acts of the respondent described in the indictment are such as might legally be done, no law has been violated and no offense charged." *State* v. *Improvement Co.*, 97 Me., 563, 55 A., 495, 497. "When an act is forbidden in a particular locality, the indictment or complaint must allege that it was committed in such a locality." *State* v. *Turnbull*, 78 Me., 392; *State* v. *Prescott*, 129 Me., 239, 151 A., 426-427.

"It is best for the proper administration of justice that reasonable exactness and precision of statement be required of those officers of the law, selected on account of their professional skill in this behalf." *State* v. *Dodge*, 81 Me., 391, 17 A., 313, 314.

Exceptions sustained.
Demurrer sustained.

STATE OF MAINE *vs.* AMY I. STUART.

Androscoggin. Opinion, July 12, 1933.

CRIMINAL LAW. EVIDENCE. EXPERT WITNESSES.

The statute prohibiting an expression of opinion by the trial judge must be strictly construed.

The prohibition that the presiding Justice shall not express an opinion upon "issues of fact arising in the case" has reference to issues to be determined by the jury.

The competence of an expert witness with respect to his knowledge, his special skill, or experience, that is, whether he possesses the requisite qualifications to enable him to testify as an expert, is a question exclusively for the Court.

In the case at bar, the admission of photographs of the body of the deceased, which appear to have been accurately made and fairly represent the appearance of the body after death, rested solely in the discretion of the presiding Justice.

The fact that the ravages of the acid on the head and body of the deceased, as depicted, were gruesome, did not render the photographs incompetent as evidence.

It not appearing that there was an abuse of judicial discretion in admitting the photographs, an exception did not lie.

The presiding Justice did not express an opinion in violation of R. S., Chap. 96, Sec. 104, when, upon objection by counsel for the respondent that a medical expert, whose opinion had been solicited, was "not competent or qualified to give us an opinion on that particular question," he ruled "That is a matter of argument for the jury as to the competency of the expert. Defense's expert, Dr. Call, was allowed to state his opinion with much less basis to go upon than Dr. Gottlieb."

There was no error in the exclusion of the answer to a hypothetical question propounded to a medical expert which called for a comparison of the chemical reactions of carbolic acid and the phenols of putrefaction.

The Bill of Exceptions shows that testimony had already been introduced in the case which showed without contradiction that all phenols give the same chemical reaction. Further testimony to the same effect would have furnished only cumulative evidence of a fact already proven. It does not appear that the respondent was prejudiced by the exclusion of the answer.

On exceptions. The respondent tried on an indictment for manslaughter was found guilty. To the admission of certain testimony

for the State and to the exclusion of certain testimony for the respondent and to certain rulings of the presiding Justice, respondent seasonably excepted. Exceptions overruled. Judgment for the State. The case fully appears in the opinion.

Frank T. Powers,
A. F. Martin, for the State.
Benjamin L. Berman,
David V. Berman, for respondent.

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

STURGIS, J. About six o'clock in the evening of September 13, 1932, the respondent threw a bowl of carbolic acid at her husband, Otis Stuart, the acid striking him in the face and on his head and chest. He died almost immediately. The respondent was indicted and tried for manslaughter and, although she set up the defense that the acid was thrown accidentally and in self-defense, and the death of her husband resulted from acute alcoholism, the jury returned a verdict of guilty. The case comes forward on Exceptions.

EXCEPTION NO. 1.

The respondent objected to the admission of several photographs of the body of the deceased which were taken on the morning after his death. These pictures appear to have been carefully and accurately made by the photographer and to fairly represent the appearance of the body after death. Necessarily, the photographs depicted the gruesome ravages of the acid, but they were competent evidence and admissible. The propriety of allowing these exhibits to go to the jury and their usefulness as evidence were matters resting solely in the discretion of the presiding Justice. It not appearing that there was an abuse of judicial discretion, an exception does not lie. *State* v. *Jordan*, 127 Me., 116; *State* v. *Hersom*, 90 Me., 273.

EXCEPTION NO. 2.

Dr. Ernest V. Call was permitted to testify as an expert for the defense and gave the opinion that the death of the respondent's husband was due to acute alcoholism rather than the effects of the

acid which struck him. Dr. Julius Gottlieb, a specialist in pathology, who performed the autopsy, and a witness for the State, was also allowed to qualify as an expert and subjected to extended direct and cross examinations upon the medical and chemical questions involved in the case. Near the end of his final direct examination, he was asked:

"Q. Doctor, in your opinion would Otis Stuart have died on the 13th of September last had not that phenol been thrown in his face?"

Counsel for the respondent objected and gave as a summary of his grounds:

"We find that the Doctor, by his own testimony, is not competent or qualified to give us an opinion on that particular question."

The presiding Justice, in ruling, then said:

"That is a matter of argument for the jury as to the competency of the expert. Defense's expert, Dr. Call, was allowed to state his opinion with much less basis to go upon than Dr. Gottlieb."

Exception was reserved on the ground that this statement by the Court was an expression of opinion prohibited by R. S., Chap. 96, Sec. 104.

It is well settled that this statute, if it is not to be held to trench upon the prerogative of the Court, must be strictly construed. *State* v. *Day*, 79 Me., 120, 125. The prohibition is that the presiding Justice shall not express an opinion upon "issues of fact arising in the case." Obviously, the statute has reference to issues to be determined by the jury. It can have no application to questions addressed only to the Court, even if they involve issues of fact.

The competence of an expert witness with respect to his knowledge, his special skill or experience, that is, whether he possesses the requisite qualifications to enable him to testify as an expert, is a question exclusively for the Court. *State* v. *Thompson*, 80 Me., 194, 200; *Marston* v. *Dingley*, 88 Me., 546; *Conley* v. *Gas Light Company*, 99 Me., 57. This is a well-established rule of evidence of which every member of the Bench and Bar is cognizant and fre-

quently applies in the trial of cases. We are confident that, if the stenographic report of the colloquy in controversy is correct, the learned trial Judge, in saying that the competency of the expert was a matter of argument for the "jury," unintentionally substituted "jury" for "judge." We must also assume that this misstatement of the law, if made, was fully corrected in the instructions later given the jury. The presumption is that the presiding Justice in his charge correctly stated all questions of law in issue.

When the remarks complained of were made, the competency of the expert on the stand, not the weight to be given his testimony nor his credibility, was under consideration. The objection of counsel was directed specifically to competency and the reply or comment of the trial Judge seems to have been intended to apply only to that question and capable of no other reasonable interpretation. The comparison made was between the basis upon which Dr. Call had been *allowed* to state his opinion and that established by the evidence in proof of Dr. Gottlieb's qualifications. The sufficiency of the respective qualifying bases was for the Court to determine. If an expression of opinion may be inferred from the language used, it was not upon an issue of fact before the jury.

EXCEPTION NO. 4.

There was no error in the exclusion of the answer to a hypothetical question propounded to Dr. Gottlieb calling for an opinion as to whether the chemical reaction obtained from the phenols of putrefaction in the human body was the same as that of carbolic acid. The Bill of Exceptions shows that the chemist in the case had already testified without contradiction that carbolic acid is one of a number of chemicals known as a phenol and that all the phenols give the same chemical reaction. A reading of the record indicates that the cross-examiner was attempting to confirm the identity of these reactions through this witness, and desired an affirmative answer to his interrogatory. This would have at best furnished cumulative evidence of a fact already proven. The respondent was not prejudiced by the ruling below.

All other Exceptions being waived, the entry is

Exceptions overruled.
Judgment for the State.

FLORENT SANFACON *vs.* H. A. GAGNON AND LEAH M. GAGNON.

Aroostook. Opinion July 12, 1933.

PLEADING AND PRACTICE. EVIDENCE.

In cases heard by the Court without a jury, the right of exception is limited to rulings upon questions of law and does not include opinions, directions, or judgments which are the result of evidence or the exercise of judicial discretion.

If no specific findings of fact are made, it is to be assumed that, upon all issues of fact necessarily involved, the single Justice found favorably to the party in whose favor he decides.

He is the exclusive judge of the credibility of witnesses and the weight of evidence, and only when he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law.

The issue of fact upon which the case at bar turns is whether the plaintiff released the defendants from their liabilities as indorsers.

The finding of the single Justice on that question, being supported by credible evidence, is conclusive upon this Court.

On exceptions by plaintiff. An action on a promissory note tried before a single Justice. To his decision exceptions were taken by plaintiff. Exceptions overruled. The case fully appears in the opinion.

R. W. Shaw, for plaintiff.

J. B. Pelletier,

Bernard Archibald, for defendants.

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

STURGIS, J. The parties to this suit were accommodation indorsers of a promissory note for $2,000 given on August 5, 1931, to the First National Bank of Van Buren and payable four months after date. The plaintiff, having paid the note in full before maturity, took an assignment of it by the indorsement without re-

course of the payee, and here seeks to recover over against his co-indorsers. They plead the general issue and, by a brief statement, set up the defense of payment and a discharge of their liability by release. The case was heard by a single Justice with jury waived. Exceptions to a finding for the defendants brings the case to the Law Court.

A brief summary of the evidence in this case seems sufficient. The maker of the note in controversy was Mary J. Gagnon, the daughter of the plaintiff, and the defendants were the parents of A. J. Gagnon, her husband. On or about April 1, 1931, Mrs. Gagnon purchased a millinery and dry goods store in Madawaska and the original note, of which that in suit is a renewal, was given to help finance this transaction. The business venture was not a success. On July 25, 1931, Mrs. Gagnon, being heavily in debt and pressed by her creditors, gave her father, the plaintiff, a mortgage of $12,000 on her stock of merchandise, household furniture and an automobile, and he undertook to pay her debts and reimburse himself for his own advances. The note at the bank of April 1, 1931, was not paid when it came due, but renewed by a new note which the defendants indorsed. The plaintiff paid this note on December 4, 1931, as already noted.

Witnesses testify that the plaintiff informed the defendants in advance that he was going to take the mortgage from his daughter and assume all her debts. There is evidence that, after the mortgage was given, the plaintiff said that he had assumed these debts and the first note that would be taken care of was the one in controversy. The plaintiff claims that the defendants were originally joint indorsers and agreed to remain liable as co-sureties after he acquired it. He denies that he assumed and agreed to pay the note or release the defendants.

A reading of the briefs indicates that the plaintiff's real complaint is that the decision below was against the weight of the evidence. That question is not open on this review. In cases heard by the Court without a jury, the right of exception is limited to rulings upon questions of law and does not include opinions, directions or judgments which are the result of evidence or the exercise of judicial discretion. *Ayer* v. *Harris*, 125 Me., 249, 250; *Pettengill* v. *Shoenbar*, 84 Me., 104; *Dunn* v. *Kelley*, 69 Me., 145.

Inasmuch as the presiding Justice made no specific findings of fact, it must be assumed that he found for the defendants upon all issues of fact necessarily involved. *Chabot & Richard Co.* v. *Chabot*, 109 Me., 403, 405. He is the exclusive judge of the credibility of witnesses and the weight of evidence, and only when he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law. *Weeks* v. *Hickey*, 129 Me., 339; *Bond* v. *Bond*, 127 Me., 117, 129; *Pratt v. Dunham*, 127 Me., 1; *Ayer* v. *Harris*, 125 Me., 249; *Chabot & Richard Co.* v. *Chabot*, supra. In passing, it may properly be observed that Rule XLII of the Supreme Judicial and Superior Courts, relating to the reference of cases under a rule of court, is in no way involved in this case. The plaintiff's citation of this rule is not in point.

The main issue upon which counsel for all parties direct their arguments and the case seems to have turned in the trial court is whether the plaintiff, in fact, released the defendants from their liabilities as indorsers. The finding of the single Justice on that question is supported by credible evidence and is conclusive upon this Court.

Exceptions overruled.

MAE E. BURNHAM *vs.* RALPH W. BURNHAM.

Lincoln. Opinion July 12, 1933.

HIGHWAYS. EASEMENTS. PRESCRIPTION.

One having a private right of way connecting with a public highway acquires no rights superior to the general public in the public highway.

Discontinuance of the public easement does not enlarge the private easement.

Since prescription presupposes a grant which is lost, the proof of the nature of the grant is to be found in use, and the extent of the right acquired is fixed and determined by the user in which it originated.

In the case at bar, when the town of Boothbay discontinued the road in controversy, it ceased to exist as a public way and the rights of the owner of the fee

in the land upon which it was located, which had been suspended during its existence, were revived and the land was his, discharged of the public easement.

While the old road existed as a public way, the plaintiff enjoyed the right to use the public easement in common with others, but gained no private right of way over it.

The plaintiff's private right of way terminated at the old road. It did not extend into and upon the location of the discontinued public way.

On report on an agreed statement of facts. Action on the case to recover damages for the obstruction of a discontinued town way located on defendant's land. Judgment for the defendant. The case fully appears in the opinion.

Weston M. Hilton, for plaintiff.

George A. Cowan, for defendant.

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

STURGIS, J. Action on the case to recover damages for the obstruction of a discontinued town way located on the defendant's land. The case is reported on an agreed statement of facts.

The piece of road in controversy, although formerly a part of the highway leading from Damariscotta to Boothbay in Lincoln County, was discontinued as a public way on March 14, 1932, when a new road was constructed just south of the old highway location. The plaintiff is the owner of a private right of way which, until the road was discontinued, joined it near the defendant's house. She has used her right of way and, in connection with it, the discontinued public way for more than twenty years for travel and for hauling wood and lumber to her home. The defendant owned the fee in the land on which the old way was located and the title remained in him when it was discontinued. He now bars the plaintiff's passage over this land by a ditch and barrier.

It is stated that the road in controversy was discontinued by vote of the Town of Boothbay at its annual town meeting, and it can be assumed that there was due compliance with all necessary formalities. By this relinquishment of the public easement, the road ceased to exist and the rights of the owner of the fee in the land upon which it was located, which had been suspended during

its existence, were revived and the land was his, discharged of the public easement. *White* v. *Bradley*, 66 Me., 261.

It is agreed that the plaintiff had no right of way over the land on which the old road was located prior to its establishment. While it existed as a public way, she enjoyed the right to use the public easement in common with others, but her use of the street for purposes of travel during that period did not give her a private right of way. *Black* v. *O'Hara*, 54 Conn., 17; *Quincy* v. *Jones*, 76 Ill., 231; *Steamboat Company* v. *Fall River*, 187 Mass., 45; *Webster* v. *Lowell*, 142 Mass., 324, 341; *Wheeler* v. *Clark*, 58 N. Y., 267; *Whaley* v. *Stevens*, 27 S. C., 549, 561.

The plaintiff gained title to her private right of way by prescription, using the same for more than twenty years with the knowledge and acquiescence of the owner of the servient estate. This was determined in *Burnham* v. *Burnham*, 130 Me., 409. Since prescription presupposes a grant which is lost, the proof of the nature of the grant is to be found in use, and the extent of the right acquired is fixed and determined by the user in which it originated. "It is only from the fact that possession amounting to a continuous claim of title has been acquiesced in for the period necessary to give a prescriptive right that the presumption of a grant is afforded. It is obvious, therefore, that the presumed grant can never extend further than the user in which the other party has acquiesced." 9 R. C. L., 788. See *Bowers* v. *Barrett*, 85 Me., 382, 386; *Baldwin* v. *Boston & Maine Railroad*, 181 Mass., 166; *Note Company* v. *Elevated Railroad*, 129 N. Y., 252.

The plaintiff's private right of way as established by prescription, on this record, terminated at the old road. *Burnham* v. *Burnham*, supra. It was not extended by her user of the public way which it entered. We find no principle of law upon which it can be held that the discontinuance of the public easement enlarged the private easement which the plaintiff had then acquired. Upon substantially similar facts, the extension of a private right of way across the location of a discontinued road to which it ran is denied. *Morse* v. *Benson*, 151 Mass., 440. In principle, the case at bar is analogous.

Judgment for the defendant.

City of Biddeford *vs.* Anabel T. Cleary et al.

York. Opinion July 12, 1933.

Taxation. Municipal Corporations. Actions.

The right to bring a suit to collect taxes in the name of a city may only be conferred by directions in writing from the Mayor and Treasurer as provided in R. S., Chap. 14, *Sec.* 64.

Moreover, such directions must contain specific authority to institute an action in the name of the municipality and the names of the particular parties to be sued should be stated.

The power conferred by the statute requires an exercise of judgment and discretion which must be exercised by the persons on whom the law has placed the power and authority to act. It can not be delegated.

The right of a municipality to bring suit upon the bonds of its tax collectors comes from the general power conferred on cities and towns to sue and be sued as bodies corporate. R. S., Chap. 5, *Sec.* 1.

In the case at bar, lacking the requisite particulars, the order in effect, transferred to the treasurer of the city the power to determine whether or not any particular action should be commenced against any delinquent taxpayer. This was an unwarranted delegation of authority.

The right to exercise by the city of Biddeford the power to bring suit upon the bonds of its tax collectors is vested in the governing body created by the charter. Chapter 408, Special Laws 1855.

The city government of Biddeford had undoubted authority to commence and prosecute actions against any and all tax collectors who were delinquent on their commitments and to designate the city treasurer as the person to bring the suits.

However, the determination of whether or not it is expedient to sue any particular collector and whether the action shall be against him individually or upon his bond, with a joinder of his surety, calls for an exercise of judgment and discretion.

The power of determining these questions was vested in the city government and could not be delegated.

The order passed in the case at bar constituted an unlawful delegation of power and conferred no authority on the city treasurer to bring this action.

The ruling below sustaining the plea in abatement and quashing the writ was not error.

Action of debt on a bond given by the defendant as Tax Collector of the City of Biddeford. Pleas in abatement were filed by defendant and her surety, and the plaintiff demurred. The pleas in abatement were sustained, demurrers overruled and the writ quashed. Exceptions were reserved.

Exceptions overruled. The case fully appears in the opinion.

L. P. LaFountaine,

Robert B. Seidel, for plaintiff.

Thomas F. Locke,

Strout & Strout, for defendants.

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

STURGIS, J. Action of debt on the bond given by the defendant, Anabel T. Cleary, as Tax Collector of the City of Biddeford. Pleas in abatement were filed by the defendant and her surety. The Royal Indemnity Company, and the plaintiff demurred. The presiding Justice overruled the demurrers, sustained the pleas in abatement and quashed the writ. Exceptions were reserved.

The case made by the bill of exceptions is that on April 5, 1932, the Board of Aldermen and Common Council of Biddeford passed in concurrence and the mayor approved an order of the following tenor in part:

> "Ordered that the City Treasurer be and he hereby is authorized and instructed to collect all unpaid taxes due the City of Biddeford from past collectors of taxes or delinquent taxpayers, and to institute and prosecute to final Judgment any action or actions that he may legally bring." * *

Under the authority of this order, the Treasurer of Biddeford brings this suit in the name of the city to recover the amount of the taxes committed to the defendant Cleary which remain unpaid.

These facts, although not apparent on the face of the record, are alleged in the pleas in abatement and duly verified in accordance

with Rule V of the Supreme Judicial and Superior Courts. The demurrers admit the facts to be true. Technical defects in the pleadings, if there be any, are waived on the briefs.

The order of the city government conferred no power or authority on the treasurer to institute or prosecute any actions in the name of the city against delinquent taxpayers. The right to bring a suit to collect taxes in the name of a city may only be conferred by directions in writing from the mayor and treasurer. R. S., Chap. 14, Sec. 64. See *Milo* v. *Water Company*, 129 Me., 463. Moreover, such directions must contain specific authority to institute an action in the name of the municipality, and the names of the particular parties to be sued should be stated. *Orono* v. *Emery*, 86 Me., 362, 366; *Rockland* v. *Farnsworth*, 111 Me., 315, 323. Lacking these particulars, the order passed practically transfers to the treasurer of the city the power to determine whether or not any particular actions should be commenced. This the law will not allow. The power conferred by the statute requires an exercise of judgment and discretion and it must be exercised by the persons on whom the law has placed the power and authority to act. It can not be delegated. *Cape Elizabeth* v. *Boyd*, 86 Me., 317; *Rockland* v. *Farnsworth*, supra.

The right of a municipality to bring suit upon the bonds of its tax collectors, however, is not governed by R. S., Chap. 14, Sec. 64. That statute relates only to actions against delinquent taxpayers. Authority to bring this suit comes from the general power conferred on cities and towns to sue and be sued as bodies corporate. R. S., Chap. 5, Sec. 1. The right to exercise that power is vested in the governing body created by the charter. Chapter 408, Special Laws 1855.

The liability of a tax collector on his bond for taxes legally committed to him and uncollected is well established. *Gorham* v. *Hall*, 57 Me., 58; *Norridgewock* v. *Hale*, 80 Me., 326, 334; *Thorndike* v. *Camden*, 82 Me., 39, 45; *Topsham* v. *Blondell*, 82 Me., 152, 155. The city government of Biddeford itself had undoubted authority to commence and prosecute actions against any and all tax collectors who were delinquent on their commitments, and necessarily the actual bringing of suits had to be committed to some officer or agent of the city. There can be no valid objection to the

designation of the city treasurer as the person to perform this duty.

Here again, however, the determination of whether or not it is expedient to sue any particular collector and whether the action shall be against him individually or upon his bond, with a joinder of his surety, calls for an exercise of judgment and discretion. By the rule already stated in connection with actions against taxpayers, the power of determining these questions can not be transferred by the governing body. *Cape Elizabeth* v. *Boyd*, supra; 1 *Dillon's Mun. Corp.*, Fourth Ed., Sec. 96. In the absence of a statute to the contrary, the rule applies, we think, regardless of the particular source from which the authority to act is derived.

The order passed in the case at bar was in effect a general direction to the treasurer of the City of Biddeford to commence and prosecute any appropriate action against any and all collectors who were delinquent. The particular persons to be sued should have been named. Lacking this necessary direction, the order conferred no authority on the treasurer to bring this action. The ruling below sustaining the plea in abatement and quashing the writ was not error.

Exceptions overruled.

MIRNA A. COOK *vs.* RALPH H. COOK.

Franklin. Opinion July 19, 1933.

COURTS. JUDGMENTS. BASTARDY.

Dismissal of a case by order of court is a final judgment.

When a final and valid judgment has been entered and parties are out of court, it does not lie within the power of the presiding Justice at a subsequent term to bring the action forward.

A court may, however, at a subsequent term correct mistakes and rectify false or fraudulent entries, provided that final judgment has not been entered.

The right of a town to be heard in the matter of a settlement between parties to a bastardy action is defined and limited by the provisions of Sec. 8, *Chap.* 111, *R. S.* 1930.

After settlement is made and final judgment entered, a town may not, at a subsequent term of court as a matter of right, demand the restoration of the case to the docket in order to enable it to file objections to the settlement, no fraud or collusion being alleged.

In such a case, the town must act seasonably or forfeit its right to object.

In the case at bar, the town altho offered every opportunity to object to a settlement permitted the parties to make a settlement and carry the case to final adjustment without availing itself of its right to register an objection. Its unfortunate error of omission created the situation.

On exceptions by complainant. To the dismissal of a petition praying that a bastardy case be restored to the docket, exceptions were taken. Exceptions overruled. The case fully appears in the opinion.

Frank W. & Benjamin Butler, for complainant.

Currier C. Holman, for defendant.

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

PATTANGALL, C. J. Exceptions. Respondent charged under the bastardy act with being the putative father of complainant's illegitimate child was arrested prior to a term of the Superior Court held in February 1932, and gave bail for his appearance. The case was regularly entered on the docket at the return term, both complainant and respondent being represented by counsel.

In the course of time, twins were born to complainant and the necessary statement that respondent was their father was made and filed. Prior to the birth of the children, the mother applied to the town in which she had her pauper residence for support for herself and them.

The case had been continued to the May term and further continued to the October term. During vacation a settlement was arrived at, and at the October term the case was dismissed with the approval of the presiding Justice. The town of complainant's resi-

dence had employed an attorney who had unsuccessfully endeavored to arrange a marriage between the parties but who had filed no objection to a settlement and who was not aware that one had been made until after the adjournment of the October term.

At the following term in February 1933, he filed a petition praying that the case be restored to the docket in order that such an objection might be filed. The petition was dismissed and exception taken.

There is no allegation that the settlement was collusively made or that there was any fraud or mistake in the proceedings. The question before us, therefore, resolves itself into the somewhat simple proposition of whether or not after final judgment (and dismissal of such a case by order of court is a final judgment, *Davis* v. *Cass*, 127 Me., 167, 142 A., 377), a *nisi prius* court may at a later term restore the case to the docket in order to permit a town burdened with the support of a pauper mother and her illegitimate children to present its objection to a settlement already made, no fraud or error being alleged.

We are compelled to answer this question in the negative.

The right of a town to be heard in the matter of a settlement between parties to a bastardy action is fixed by the terms of Sec. 8, Chap. 111, R. S. 1930:

> "No woman, whose accusation and examination on oath have been taken by a justice of the peace at her request, shall make a settlement with the father, or give him any discharge to bar or affect such complaint, if objected to in writing by the overseers of the poor of the town interested in her support or the child's."

Until and unless such written objection is made, the parties have an absolute right to make a settlement on their own terms, but the town may file its objection at any time before final judgment. It may delay taking action until the time of trial, *Eames* v. *Gray*, 61 Me., 405; and a settlement agreed upon may be set aside on objection by the interested town if seasonably made. Under the provisions of Sec. 7, Chap. 111, R. S. 1930, the objecting town is entitled to a bond indemnifying it against liability for support of mother and child or, in this particular case, children.

Even after final judgment has been entered at *nisi prius*, we have no doubt but that an objection by the town would be entertained and the case restored to the docket, provided the objection were filed at the term at which judgment was entered; but "when a valid and final judgment has been entered and parties are out of court, it does not lie within the power of the presiding Judge at a subsequent term to bring the action forward. Judicial authority has been then exhausted." *Shepherd* v. *Rand*, 48 Me., 244; *Priest* v. *Axon*, 93 Me., 34, 44 A., 124.

The rule laid down in *Myers* v. *Levenseller*, 117 Me., 82, 102 A., 776, and affirmed in *Sawyer* v. *Bank*, 126 Me., 316, 138 A., 470, does not conflict with this statement of the law. The latter cases stand for no more than that a court may, at a subsequent term, correct mistakes and rectify false or fraudulent entries provided that final judgment has not been entered.

Counsel for the petitioning town cites *Cross* v. *Clement*, 70 Me., 504, in support of its position. That case was restored to the docket after a lapse of several terms, but no valid judgment had been rendered and no final disposition had been made of the cause. The decision followed the doctrine of *Lothrop* v. *Page*, 26 Me., 119, and *West* v. *Jordan*, 62 Me., 485, that when the record of a case is incomplete by reason of an irregular judgment or lack of a final judgment, the court may in its discretion restore it to the docket in order that it may be disposed of finally and regularly.

There is nothing in any of these cases to warrant the assumption that a party to the litigation, as a matter of right, can compel such restoration; certainly nothing that places one not a party of record in a position to demand such action.

The town was not a party to the litigation. Its rights were limited and defined by statute. Until and unless it complied with the terms prescribed therein, it was not entitled to be heard. It did not do so, although every opportunity was presented. It permitted the parties to make a settlement and carry the case to final adjustment without availing itself of its right to register an objection. If the result is to its prejudice, its own unfortunate error of omission created the situation.

Exceptions overruled.

F. CLYDE KEEFE, TRUSTEE *vs.* PEPPERELL TRUST COMPANY.

York. Opinion July 20, 1933.

BANKRUPTCY.

In bankruptcy proceedings, to establish a preferential transfer the trustee must establish five separate propositions. First, the debtor at the time of transfer must have been insolvent, that is with insufficiency of property, at a fair valuation to pay his debts. Second, there must have been a transfer of his property. Third, the transfer must have been within four months prior to his bankruptcy proceedings. Fourth, the effect of the transfer must have been to enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class. Fifth, the preferred creditor must have known this or had reasonable cause to believe it. Failure to prove any of the above facts will preclude a recovery.

In the case at bar, the evidence was insufficient to establish a preferential transfer by the bankrupt.

On report. An action for money had and received, brought by a trustee in bankruptcy to recover alleged preferential transfers. Judgment for the defendant. The case fully appears in the opinion.

John P. Deering, for plaintiff.

Willard and Willard, for defendant.

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

DUNN, J. This case was reserved for final decision on a report of the evidence.

The action is by the trustee in bankruptcy of Ira C. Kates, for the benefit of the bankrupt estate, under subdivisions (a) and (b) of section 60 of the Bankruptcy Law of 1898, (30 U. S. Statutes at Large, 562), as most recently amended by the Act of June 25, 1910, (36 U. S. Statutes, 842), and appearing in 11 USCA, sec. 96. The suit is to recover preferential transfers. Whether there were such is the issue.

The plaintiff has the burden of proof. He must establish, among other things, five separate factual propositions. First, the debtor must then have been insolvent, not in the sense of an inability to defray his bills in the ordinary course of business, but of the insufficiency of his property, at a fair valuation, to pay his debts. Second, there must have been a transfer of his property. Third, the transfer must have been within four months prior to his bankruptcy proceedings. Fourth, the effect of the transfer must have been to enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class; and consequent inequality. Fifth, the preferred creditor must then have known this, or had reasonable cause to believe it. These elements must combine to render a preference voidable. A failure to prove any will preclude a recovery. *Kimball* v. *Dresser*, (1904) 98 Me., 519, 57 A., 787.

Ira C. Kates was a merchant. He kept a store in Biddeford, Maine, and another at Dover, New Hampshire. Biddeford was the location of the defendant banking corporation.

February 6, 1932, fifteen hundred dollars being due and unpaid on Mr. Kates' promissory note to the defendant, it applied thereon his account as a general depositor, the amount being $61.37. This is the first item on which plaintiff relies. The proof shows no feature of a preference. *Bank* v. *Massey*, 192 U. S., 138, 48 Law ed., 380.

After applying the deposit, the payee (now defendant) sued the note. An attachment was made of the stock in trade, and furniture and fixtures, in the Biddeford store. The debtor so requesting, the store remained open, under a keeper, that business might continue. The proceeds of sales were retained, in lieu of merchandise sold.

On March 9, 1932, Mr. Kates made what a witness characterizes as a common-law assignment. Neither the transferring instrument, nor any statement of its provisions, is in the record. There is testimony that the assignment was inclusive of "both stores", but whether these comprised all the property of the assignor, and such property should be applied to some, or to all, of his debts, is not clear. Counsel for the defendant argue, with apparent evidential support, as a permissible deduction, that the assignment did not, and never was intended to embrace all the property of the debtor, not exempted by law. They instance that, inferentially, the debtor's

real estate was not included. What the fact may be is not now of importance.

The assignment having been made, the attachment was discharged. The sheriff accounted to the assignee for the sale of goods, the latter receiving $506.90. This the assignee turned over to the attorney for the bank, who deducted the amount of his expenses and fees; the bank credited the net sum on the note. Next, the bank advanced money to pay the interest on a mortgage which Mr. Kates had given to a savings bank.

April 23, 1932, the assignee sold the stock and fixtures in the Biddeford store for $600.00. Of the purchase price, there was a cash payment of $100.00, which traces to the defendant; the balance was by the purchaser's note on thirty days, to the defendant's order. The note was honored.

Specification limits the plaintiff (whose appointment as trustee in bankruptcy antedates to the filing of the petition on May 7, 1932), to the foregoing transactions. *Carey* v. *Penney*, 127 Me., 304, 143 A., 100.

The plaintiff offers no evidence that, at the time of any transaction, the aggregate of Mr. Kates' assets, taken at a fair valuation, was less than the aggregate of his liabilities. Nothing was said or done by Kates, so far as the record shows, to indicate to the defendant, or its attorney, that he (Kates) was insolvent. Neither, for anything in evidence, knew, or had reasonable cause to believe, that Kates was insolvent, and that a preference would be effected within the meaning of the Federal statute relating to bankruptcy. On the contrary, there is room for inference that Mr. Kates, though in pecuniary difficulty, was not then insolvent; that he conceived the plan of paying his debts from the Biddeford property, and saving the Dover store for himself. That purpose was not accomplished.

The case of the plaintiff not being established, judgment goes, on the authority of the report, for the defendant.

Judgment for defendant.

ANNA M. STUTZ *vs.* GERTRUDE M. MARTIN.

Lincoln. Opinion July 20, 1933.

REAL ACTIONS. EVIDENCE. VERDICTS. NEW TRIALS.

In a real action the plea of the general issue requires that the plaintiff prove that he has such an estate in the land sought to be recovered as he has alleged, and that he had a right of entry therein when he commenced his action.

Courts generally exercise the power to set aside a verdict as contrary to the evidence, not only with caution, but with a certainty that the weight of evidence essential to sustain the verdict is clearly against the verdict.

In the case at bar, the evidence does not show the verdict to be manifestly wrong.

On general motion for new trial by plaintiff. A real action to recover a parcel of land in Boothbay Harbor. The jury found for the defendant. General motion for new trial was thereupon filed by plaintiff. Motion overruled. Judgment on the verdict. The case fully appears in the opinion.

George A. Cowan, for plaintiff.

Weston M. Hilton, for defendant.

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

DUNN, J. This was a real action to recover a parcel of land in Boothbay Harbor. A disclaimer narrowed the controversy to an area, in the form of a triangle, between the contiguous properties of the litigants. The jury found for the defendant. The plaintiff brings the case forward on a general motion for a new trial.

The plea of the general issue required that the plaintiff prove that she had such an estate in the land sought to be recovered as she had alleged, and that she had a right of entry therein when she commenced her action. *Rawson* v. *Taylor*, 57 Me., 343.

A warranty deed from the Boston and Boothbay Land Company to Walter E. Colwell, dated August 30, 1910, and duly registered, constitutes the first link in the chain of title of the plaintiff.

After introducing the muniments of her ownership, the plaintiff called as a witness a land surveyor who had surveyed the land. The plan that he made was admissible to the jury, to explain what he testified he had done in making the survey, to illustrate other testimony, and to aid in throwing light on the location of the realty that the lawsuit involved.

In the extent and limits of description, the deeds of the plaintiff were regarded as sufficient to include the demanded lot, and to entitle her to the possession thereof, unless defendant had a better title.

To overcome the *prima facie* case in favor of the plaintiff's right to recover, defendant put in evidence to establish an elder legal title in herself. Her chain began with a deed from the Boston and Boothbay Land Company. Hence, title traced to a common source.

The company, by its warranty deed dated October 29, 1907, and seasonably recorded, conveyed certain land to Mary A. Taylor. She appears to have had, at her death, (intestate), a right of possession, as well as the legal seizin and possession thereof, coextensive with the right. The title that was hers descended to her daughter as her only heir at law. This daughter deeded a part of the land to the defendant, the instrument of conveyance bearing date June 29, 1931.

When, in 1910, the Land Company conveyed to Mr. Colwell, (plaintiff's initial predecessor), this description of the granted premises was incorporated in the deed:

> "a certain lot of land situated on Spruce Point within the town of Boothbay and County of Lincoln and numbered 2 on a plan of the lands of said Corporation made by Roy L. Marston; said lot No. 2 being on the West side of Grand View Avenue and having a frontage on said Avenue of 245 feet, and extending back therefrom bounded as follows: — Beginning at an iron pin in a rock on the shore, thence N 1° 30′ E. 108 feet to an iron pin in a rock on Grand View Avenue, thence along said Avenue N 7° 15′ West 245 feet to an iron pin in a rock at the corner of the land of Mary A. Taylor, thence along the line of the land of said Taylor S 70° W 135 feet more or less to the jog in the land of said Taylor, thence along the

East line of the land of said Taylor to high water on the shore, and thence along said shore to the Point of beginning . . . ."

The deed to Mrs. Taylor (that at the head of the defendant's title), was executed and delivered, as has before been stated, in 1907. The first call in this deed extends to "the northerly end of a ledge" on the westerly line of Grand View Avenue. The monument is not more definitely marked.

The description in the deed to Mr. Colwell, to recur thereto, contains these calls: "thence along said Avenue (Grand View) . . . to an iron pin in a rock at the corner of the land of Mary A. Taylor, thence along the line of the land of said Taylor . . . ."

The line of the Taylor land, therefore, bounds the grant to Mr. Colwell. Beyond the Taylor land the Colwell deed will not, because legally it cannot, operate by way of conveyance. The description in the Colwell deed overlaps that in the Taylor deed, perhaps; even so, the extent of the real property conveyed by the latter deed might not thereby be lessened.

The description in the deed from Mrs. Taylor's heir to the defendant is as follows:

"a certain lot or parcel of land situated in Boothbay Harbor aforesaid, — bounded and described as follows, to wit: — Beginning at a bolt on the westerly side of Grand View Ave.; thence running S 48° 17′ W three hundred sixty seven and two tenths (367.2) feet to a bolt on the shore at high water mark; thence southerly by the shore one hundred ninety seven (197) feet (measured in a straight line) to a bolt at the northwest corner of land of Stutz; thence N 22° 27′ E by land of Stutz three hundred twelve and seven tenths (312.7) feet to a bolt; thence S 81° 8′ E one hundred twenty three and two tenths (123.2) feet to a bolt at Grand View Ave.; thence northerly by said Avenue N. 2° 30′ E one hundred sixty three and nine tenths (163.9) feet to point of beginning, ..."

The parties were in agreement as to the third call in the deed. They differed respecting the course of the line from the northerly terminus to Grand View Avenue.

Defendant pointed out the course and distance in her deed, and insisted thereon. The bolt which, according to the deed, sets at the end of the line, at the avenue, was not there. On defendant's showing, this bounding line comes to a fence post on the west side of the avenue, some eight feet northward of the northerly edge of the ledge. Claim is that evidence identifies this ledge as that named in the deed from the Land Company to Mrs. Taylor.

Plaintiff insisted another line, shorter by one foot, reaching the avenue at an iron pin in a rock, "about as big as a peck measure", resting on a ledge, approximately fifty-six feet north of that ledge which defendant asserts is the monument.

The main question which the jury must necessarily have been called upon to decide was which of the two ledges was designated in the Taylor deed.

The defendant made the land surveyor her witness, and too, relied upon his map; she also presented the testimony of another witness.

The trial judge interpreted the deeds, and in all respects instructed the jury to at least the tacit approval of the parties.

In finding for the defendant, the jurors must be held to have decided that the cause of action which, when the plaintiff rested her case was sufficiently established to justify a verdict in her favor, had, by rebuttal on the defendant's part, been overcome, — not necessarily by a preponderance of evidence, an equiponderance being enough.

The plaintiff argues that the verdict is against the evidence, or the weight of the evidence. These interchangeable phrases are used to signify that the proof on one side of a cause is greater than on the other. 40 Cyc., 878.

Courts generally exercise the power to set aside a verdict as contrary to the evidence, not only with caution, but with a certainty that the weight of evidence essential to sustain the verdict is clearly against the verdict. This case does not show the verdict to be manifestly wrong.

Motion overruled.
Judgment on the verdict.

SUSIE A. CHENERY *vs.* JOHN O. RUSSELL.

WILLIAM N. CHENERY *vs.* JOHN O. RUSSELL.

EDITH M. RUSSELL *vs.* WILLIAM CHENERY.

JOHN O. RUSSELL *vs.* WILLIAM CHENERY.

JOHN O. RUSSELL *vs.* WILLIAM CHENERY.

Cumberland. Opinion July 20, 1933.

EVIDENCE. JURIES. NEW TRIALS.

It is the duty of the jury to determine issues of fact, being guided in their deliberations by instructions of law announced by the trial court, applicable to the facts which the evidence adduced in the cause tends to prove.

The verdict of a jury should be responsive to a fair preponderance of the evidence. That expression does not, however, mean the mere numerical collection of witnesses, but it means the weight, credit and value. The weight of evidence is not a question of mathematics, but depends on its effect in inducing belief. One witness may be contradicted by several, and yet his testimony outweigh all of theirs. The question is what is to be believed.

Where, on motion for a new trial, the court finds that the verdict upon a material issue of fact, is against the evidence, the logical and necessary result of such finding, as a matter of law, is that the verdict must be set aside.

It is not a sufficient ground for a new trial that the Appellate Court, from a consideration and examination of the testimony might have arrived at a different result, but the verdict must be manifestly and palpably against the evidence.

In the case at bar, there was sufficient credible evidence to justify the finding of the jury in each case.

On general motions for new trials by the Russells. Five actions tried together arising out of collision of the automobiles of the parties on the state highway leading from Portland to Gray. In the first two actions the jury found for the plaintiffs Chenery, and in the latter three actions for the defendant Chenery. Motions for

new trials were thereupon filed by the Russells. Each motion overruled. Judgment on each verdict. The cases fully appear in the opinion.

William B. Mahoney,
Theodore Gonya, for Chenerys.
Verrill, Hale, Booth & Ives, for Russells.

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

DUNN, J. These actions were tried together, in the Cumberland Superior Court. The automobile collision out of which they grow, occurred early in the afternoon of November 5, 1932, in a suburb of Portland, on the main highway to Gray. William N. Chenery owned, and was driving one of the vehicles, a Pontiac coupe, southerly, in the direction of Portland. He was accompanied by his wife. Both were injured, and the automobile damaged. In his action against John O. Russell, the owner of the other car, who himself was operating it, Mr. Chenery recovered a verdict. The award of damages, $4,231.50, was for serious personal injuries, property damage, and expense and loss by reason of injuries to Mrs. Chenery, whose own verdict, for bodily hurts, was $220.00. Neither award, it may be noted, is insisted excessive.

The other car was an Oldsmobile sedan. It was proceeding along the highway, in a northerly course. Mrs. Russell, who was riding with her husband, was slightly injured. The automobile was damaged. In the three actions brought by the Russells, verdicts were for the defendant.

All five actions are presented to this court by the Russells, on motions for new trial.

Contention is that the verdicts are so clearly wrong that they should be set aside as against the evidence; the movents insist that the version of the accident which the jury accepted, and on which the verdicts are rested, was completely overwhelmed by opposing proof.

The Chenerys based their claims to recover, and their defenses, upon the predicate that, as the cars were about to meet, Mr. Russell, who had his head turned toward his wife, negligently per-

mitted his car to pass across from approximately the medial line of the road, to his left of the middle, and there collide with the approaching Chenery car.

The Russells claimed that as the cars were meeting, the rear of the Chenery car, skidding to the left, came almost entirely across the tarvia road, the width of which was twenty-four feet, and struck the Russell car. The declarations in their writs allege negligence on the part of Mr. Chenery, in driving at what, because of the slippery condition of the highway after a shower, was an excessive rate of speed.

There was testimony that the rough treads which had originally been on the rear tires of the Chenery car were worn smooth. Mr. and Mrs. Chenery both denied that their car skidded, and witnessed that to the time of the accident, the car was on its extreme right side of the way.

The left side of the Chenery car was struck on and behind the door, causing the door to open, Mr. Chenery falling onto the road. The rear left wheel of the car was demolished. The damage to the Russell car was of the left lamp, the mudguard on that side, and the rim of the front left wheel, which, for an inch or two, was bent. Immediately after the accident, the Chenery car was crosswise of the road, heading easterly, and closely diagonal to the rear of the Russell car. It was stated on the witness stand, by Mr. and Mrs. Chenery, that the impact of the Russell car turned the Chenery car, and that after the collision Mr. Russell quickly swerved his car to its proper side of the road.

On the other hand, Mr. and Mrs. Russell testified that their car had continuously been far to its right-hand side.

Where the accident happened was the underlying issue. Each plaintiff relied upon a violation of the "rule of the road". In the foreground, then, the collision occurred either on the Chenery side, or on the Russell side of the highway.

The only eyewitnesses, aside from the Chenerys and Russells, were Mrs. Annie Aldrich and her granddaughter's husband, Gerald Harris, who was driving her car, in the same direction as, and one hundred and fifty to two hundred feet behind, the Chenery car. Their statements, as witnesses, as to where and how the accident happened, were corroborative of the contention of the Russells.

Mrs. Aldrich and the Chenerys had lived across the road from each other for fourteen years. There had been a lawsuit by Mr. Chenery against Mrs. Aldrich; they "were not on speaking terms", and "hard feelings" existed.

There was evidence sufficient to sustain the verdicts in favor of Mr. and Mrs. Chenery. True, there was, in a sense, more evidence the other way. But, after much deliberation, the conclusion of this court is that the verdicts must stand, even though the court in the first instance might have come to a different conclusion.

It is the peculiar duty of the jury to determine issues of fact, being guided in their deliberations by instructions of law announced by the trial court, applicable to the facts which the evidence adduced in the cause tends to prove. The jury has the advantage of seeing the witnesses, of hearing their testimony orally delivered, of observing their demeanor and conduct upon the stand, and considering prejudice, if any is shown.

To be sure, the verdict of a jury should be responsive to a fair preponderance of the evidence. The expression does not, however, mean the mere numerical collection of witnesses, but it means weight, credit, and value. *Wilcox* v. *Hines* (Tenn.), 45 S. W., 781, 66 A. S. R., 761. The weight of evidence is not a question of mathematics, but depends on its effect in inducing belief. One witness may be contradicted by several, and yet his testimony may outweigh all of theirs. The question is what is to be believed. *Braunschweiger* v. *Waits*, 179 Pa. St., 47, 36 A., 155.

Where, on motion for a new trial, the court finds that the verdict, upon a material issue of fact, is against the evidence, the logical and necessary result of such finding, as matter of law, is that the verdict must be set aside. This is a necessary counterbalance to protect litigants against jurors, when they have failed in their verdict to do justice, and to enforce the right of the case under the evidence.

This rule has, however, no application here. Whatever our own views may be, we hesitate, on the cold print of the record, to array them against those of the twelve men who, on the conflicting evidence, are the triers of the facts; in construing and weighing the evidence tending to support the verdict, they, presumably, acted properly, and were not improperly influenced.

It is not a sufficient ground for a new trial that the appellate court, from a consideration and examination of the testimony, might have arrived at a different result, but the verdict must be manifestly and palpably against the evidence. *Googins* v. *Gilmore*, 47 Me., 9; *Purington* v. *Maine Central Railroad Company*, 78 Me., 569, 7 A., 707; *Jameson* v. *Weld*, 93 Me., 345, 45 A., 299; *Butler* v. *Rockland, etc., Railway*, 99 Me., 149, 58 A., 775; *Roy* v. *Bellevieu*, 118 Me., 495, 108 A., 70; *Day* v. *Isaacson*, 124 Me., 407, 130 A., 212.

The motions for new trial, filed by Mr. Russell in the cases in which he was defendant, must be overruled.

With respect to the motions in the actions in which he was plaintiff, and that in which his wife was plaintiff, the conclusion of the jury that neither had sustained the burden of proof, should not be disturbed. The weight of the evidence was for the jury. *Lewiston Trust Co.* v. *Cobb*, 115 Me., 264, 98 A., 756; *Clark* v. *Dillingham*, 116 Me., 508, 102 A., 36.

Each motion overruled.
Judgment on each verdict.

STATE OF MAINE *vs.* ERNEST STROUT.

Androscoggin. Opinion July 21, 1933.

CRIMINAL LAW. INDICTMENT.

An indictment describing an offense in the language of the statute is ordinarily sufficient. It, however, depends upon the manner in which the offense is defined in the statute. If the statute does not sufficiently set out the facts which make the crime, so that a person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet, then a more definite statement of the facts than is contained in the statute becomes necessary. It is not enough that the indictment detailed the facts from which an offense may be implied, or only so many of the essential elements as might suggest all the other elements; it must specify everything necessary to criminality.

The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to be informed of the nature and cause of the accusation. The Constitution of Maine contains a similar provision.

In order to properly inform the accused of the "nature and cause of the accusation," the commission of the offense must be fully, plainly, substantially and formally set forth.

In the case at bar, a fuller statement of the facts than was made in the indictment, was necessary to bring the accusation within the precise inhibition of the statute.

On exceptions by respondent. Respondent indicted under Sec. 24, Chap. 138, R. S., for causing a building owned by him to be burned, filed a general demurrer reserving the right to plead anew. To the overruling of this demurrer by the presiding Justice, respondent excepted. Exception sustained. The case sufficiently appears in the opinion.

Frank T. Powers,
A. L. Martin, Attorneys for the State.
Berman & Berman, for respondent.

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

DUNN, J. If one wilfully burns his building, which is insured against loss by fire, or causes it to be burned, with intent to defraud the insurer, the act of burning, or privity thereto, constitutes a felony. R. S., Chap. 138, Sec. 24.

This prosecution against the owner of an insured building is not for himself having fired the structure, but for having caused it to be burned. The indictment uses the very words of the statute, but it is not more descriptive with respect to any particular criminal act.

The defendant demurred. The demurrer was overruled, and an exception taken. Leave to plead anew was specially granted. It is contended that the charge of causing the building to be burned is not an allegation of fact, but merely a conclusion of the pleader; that being thus restricted in its phrase, the indictment is not informative to a degree enabling the accused to prepare his defense.

An indictment describing an offense in the language of the stat-

ute is sufficient. This commonly repeated rule is ordinarily correct. *State* v. *Doran*, 99 Me., 329, 59 A., 440. It, however, depends upon the manner in which the offense is defined in the statute. If the statute does not sufficiently set out the facts which make the crime, so that a person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet, then a more definite statement of the facts than is contained in the statute becomes necessary. *State* v. *Lashus*, 79 Me., 541, 11 A., 604; *State* v. *Doran*, supra. It is not enough that the indictment detail the facts from which an offense may be implied, or only so many of the essential elements as might suggest all the other elements; it must specify everything necessary to criminality.

The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to be informed of the nature and cause of the accusation. The Constitution of Maine contains a similar provision. Con. of Maine, Article 1, Section 6.

In order to properly inform the accused of the "nature and cause of the accusation", the commission of the offense must be fully, plainly, substantially, and formally set forth.

The object of an indictment is, first, (a) to furnish reasonable fulness of recital of the alleged crime, that a defense may not be rested upon the hypothesis of one thing, with the hazard of surprise by evidence, on the part of the government, of an entirely different thing; (b) to enable the defendant to avail himself of his conviction or acquittal, for protection against a further prosecution for the same cause; second, to give the court sufficient information to determine whether the facts alleged would support a conviction if one should be had. *State* v. *Paul*, 69 Me., 215; *State* v. *Beattie*, 129 Me., 229, 151 A., 427; *State* v. *Navarro*, 131 Me., 345, 163 A., 103.

In the instant case, a fuller statement of facts than is made in the indictment, becomes requisite to bring accusation within the precise inhibition of the statute.

The exception to the overruling of the demurrer must be sustained.

Exception sustained.

STATE OF MAINE *vs.* GUY PARKER.

Somerset. Opinion July 21, 1933.

CRIMINAL LAW. INDICTMENT. FISH AND GAME.

When an act is forbidden within a particular territory, the complaint or indictment must allege that it is committed there.

In the case at bar, the complaint neglected to state that the forbidden act was committed within the closed territory.

Respondent tried upon a complaint under Sec. 39, Chap. 11, R. S., as amended by Sec. 2, Chap. 180, of the P. L. 1931, forbidding fishing in any section of the state wherein the Governor proclaims a close season, filed a demurrer to the complaint which was overruled. Six exceptions were taken. Exceptions sustained. Demurrer sustained. Complaint adjudged bad. The case fully appears in the opinion.

Thomas A. Anderson,
Clayton E. Eames, County Attorneys for State.
F. Harold Dubord, for respondent.

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

DUNN, J. The exceptions go to the overruling of a demurrer to a criminal complaint, the charging part of which is as follows: "that Guy Parker of Waterville in the County of Kennebec and State of Maine, on the twenty-second day of May, A.D., 1932, at the Forks Plantation, so called, in said County of Somerset and State of Maine, did fish in closed season, said above twenty-second day of May, A.D. 1932, having been proclaimed by the Governor as a closed season, said Guy Parker not then and there fishing from a boat or canoe, against the peace of the State, and contrary to the form of the Statute in such case made and provided."

The complaint was under section 39 of chapter 11, Revised

Statutes, as amended by section 2, chapter 180, of the Public Laws of 1931. Section 39, in its amended form, and an immediately preceding section, numbered 38, which also was amended by chapter 180, 1931 Laws, should be read together, that the points of the demurrer may be more readily seen and understood.

Section 38, as amended, reads: "Whenever, during periods of drought, it shall appear to the governor that hunting or fishing is likely to be a menace to the forests of the state, he may by proclamation suspend the open season for hunting or fishing for such time and in such sections of the state as he may in such proclamation designate, ..."

Section 39, as amended, provided that "during the time which shall by such proclamation be made a close season, all provisions of law covering and relating to the close season shall be in force, and a person violating a provision of the same shall be subject to the penalty therein prescribed." The catching of fish, "for which there is no close season otherwise provided by law," was forbidden under penalty of fine.

Six errors are alleged to exist in the complaint:

(1) That the term "unlawfully", which implies that an act is done, or not done, as the law allows or requires, is not used by the pleader;

(2) That the complaint does not allege that the respondent (now excepter) "did catch fish";

(3) That as acts are offenses only if committed in such "sections" as an executive order designates, the allegation of place should bring the offense within such a locality;

(4) That the complaint fails to state that the proclamation had been issued by the Governor of the State of Maine;

(5) That the complaint should show that the period of the suspension of the fishing season had not been revoked at the date of the alleged offense;

(6) That the complaint, being vague and indefinite, does not enable the respondent to meet the exact charge against him.

With regard to the first assignment of error, the word "unlawfully", not being a part of the description of the statute offense, was needless. *State* v. *Robbins*, 66 Me., 324; *State* v. *Skolfield*, 86 Me., 149, 29 A., 922.

The answer to the second objection is that the complaint was not for catching fish, but for fishing in closed season. Such an act, on reference to the general fish and game laws, is a misdemeanor.

The third exception is not without merit. The gist of the complaint is that the respondent did fish, at the Forks Plantation, on a day proclaimed by the Governor as a closed season. Without reference to other urged defects, which may or may not have force, the want of recital in the complaint, that the place alleged as that of the commission of the offense was within a designated section of the state, is evident. When an act is forbidden within a particular territory, the complaint or indictment must allege that it was committed there. *State* v. *Turnbull*, 78 Me., 392, 6 A., 1; *State* v. *Prescott*, 129 Me., 239, 151 A., 426.

The fourth reason, of failure to state the proclamation as having been issued by the Governor of the State of Maine, is not pressed.

The fifth claimed error has no worth. What may be a good defense at the trial, in effectually negativing a charge, is not necessarily required to be stated in the complaint.

Lastly, the third assignment of error having been sustained, the sixth becomes sustainable.

Exceptions sustained.
Demurrer sustained.
Complaint adjudged bad.

CONSOLIDATED RENDERING CO.

vs.

GEORGE E. STEWART AND F. A. FARWELL.

Waldo. Opinion August 8, 1933.

CHATTEL MORTGAGES. R. S. 105, SECS. 3, 4, 5, AND 6.

If a power of sale inserted in a chattel mortgage is exercised in accordance with the terms of the power and with fairness to the mortgagor, except as otherwise provided by statute, the mortgagor's right to redeem is extinguished.

In this state, by statute the maker of a mortgage of personal property must redeem before a power of sale made contemporaneously with the mortgage is exercised.

A sale under a power is a sale "by virtue of a contract between the parties" and within the purview of R. S., Chap. 105, *Sec.* 3.

The method of foreclosure of chattel mortgages prescribed in R. S., Chap. 105, *Secs.* 4, 5, *and* 6 *is not exclusive and does not bar a sale under a power.*

In the case at bar, the parties, by their contract, superadded to the bill of sale and defeasance clause of the ordinary chattel mortgage a power of sale enabling the mortgagee, on default, to sell the mortgaged property according to the terms of the power.

This agreement, although made contemporaneously with the mortgage, is a valid and binding exercise of the right of contract, which neither impairs the mortgage nor clogs the mortgagor's right to redeem.

No question being raised as to the sufficiency of the power of sale here given nor as to the manner of its exercise, it must be deemed valid and judgment rendered for the plaintiff for $30 in accordance with the stipulations accompanying the report.

On report on an agreed statement of facts. An action of assumpsit on a demand note secured by a chattel mortgage on two horses. The issue involved the legal effect of a sale of the chattels under a power of sale contained in the mortgage. Judgment for the plaintiff for $30.00. The case fully appears in the opinion.

Burleigh Martin, for plaintiff.

Buzzell and Thornton, for defendant.

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

STURGIS, J. This is an action on a demand note given the Consolidated Rendering Co. by the defendant, George E. Stewart, and secured by a chattel mortgage on two horses. The defendant, F. A. Farwell, is involved only as an accommodation signer of the note. The issue presented is as to the amount for which judgment should be entered. The case is reported on an agreed statement of facts.

The mortgage, as originally written, in addition to the usual provisions, included an agreement that, on default of any condition, it should be lawful for the mortgagee to take possession of

and sell any or all of the chattels described in the mortgage, reimburse itself for costs, charges, and expenses, retain such sums as remained due under the mortgage, and account to the mortgagor for the balance of the proceeds of the sale. Under this provision, when the note was not paid on demand, an agent of the Rendering Company took peaceable possession of the horses, sold them, applied the money received as required by the agreement, and accounted to the mortgagor.

It is agreed, in the stipulations accompanying the report, that the sale of the horses netted $150 which should be credited upon the note if the sale was legal. The alternative agreement is that, if the sale is held to be void, judgment should be for $180, which is the amount of the note.

The defendants contend that the agreement in this mortgage, under which the Rendering Company sold the horses, must be construed as a release or surrender of the mortgagor's right of redemption, which the law will not allow under the rule that a mortgagor can not change the character of his mortgage to that of an absolute conveyance, or release or surrender his right of redemption by any agreement, however explicit or forceful, made at the same time or as a part of the mortgage transaction. *Greenlaw* v. *Savings Bank*, 106 Me., 205; *Reed* v. *Reed*, 75 Me., 264, 272; *Peugh* v. *Davis*, 96 U. S., 332. This rule, while ordinarily applied to mortgages of real estate, is now held to bar any agreement made contemporaneously with a chattel mortgage which clogs the mortgagor's right of redemption. *Jones on Chattel Mortgages* (Bow. Ed.), Sec. 682; 5 R. C. L., 472; *Editor's Note*, 24 A. L. R., 822 et seq; *Landers* v. *George*, 49 Ind., 309; *Graves* v. *Negy*, 114 Kan., 373; *Hart* v. *Burton*, 30 Ky., 322; *Desseau* v. *Holmes*, 187 Mass., 486; *Clark* v. *Henry*, 2 Cow. (N. Y.), 324; *Plumiera* v. *Bricka*, 140 N. Y. S., 171; *Hughes* v. *Harlam*, 156 N. Y., 427; *McKnight* v. *Gordon*, 13 S. C. Eq., 222, 230; *Luckett* v. *Townsend*, 3 Texas, 119, 131.

We are of opinion, however, that the defendants have misconceived the true intendment and legal effect of this provision in the mortgage. As we interpret the instrument, the parties, by their contract, superadded to the bill of sale and defeasance clause of the ordinary chattel mortgage a power of sale enabling the mort-

gagee to sell the property, after default, according to the terms of the power. This is a recognized mortgage provision which is now almost universally deemed a valid and binding exercise of the right of contract, which neither impairs the mortgage nor clogs the equity of redemption. It is an additional provision coupled with the mortgage, rather than a part of it. It may be included in the mortgage deed or be created by a separate instrument. 2 *Perry on Trusts*, 602; 41 Corpus Juris, 923; 19 R. C. L., 587. It is wholly a matter of "convention and contract between the parties, and not of law or jurisdiction." *Railroad Company* v. *Cotton Mills Company*, 104 Me., 527; *Perry on Trusts*, supra. As long as the power of sale remains unexecuted, the relation of the parties remains as created by the mortgage, but, when the power is fully and lawfully exercised, the mortgage is stripped of its essential attributes and becomes a nullity. *Eaton* v. *Whiting*, 3 Pck. (Mass.), 484; *Kinsley* v. *Ames*, 2 Metc. (Mass.), 29. The due and proper exercise of the power of sale in a mortgage conveys the title to the property to the purchaser, deprives the mortgagee of all interests in it, and, unless otherwise provided by statute, bars the mortgagor's equity of redemption. If a right of redemption after a sale under a power in a mortgage is given by statute, the sale confers an inchoate title on the purchaser, subject to be defeated if redeemed and to become absolute if not redeemed. *Perry on Trusts*, Sec. 602 bb. These principles seem to be applied without material limitations to powers of sale given in chattel mortgages, and we think it may be accepted as the law here, as elsewhere, that a valid power of sale may be inserted in a chattel mortgage and, if the power is exercised in accordance with its terms and with fairness to the mortgagor, if no statute intervenes, the equity of redemption is extinguished. We are in accord with the text and supporting citations in 2 *Jones on Chattel Mortgages* (Bow Ed.), Sec. 789 et seq; 11 C. J, 704; 5 R. C. L., 102.

The redemption of mortgages, both of real and personal property, is regulated by statute in this state and special provisions are made for the redemption from sales under a power. A mortgagor of real estate, or those claiming under him, may redeem the mortgaged premises from a sale under a power contained in a mortgage, or in a separate instrument executed at or about the same

time and a part of the same transaction, by satisfying the obligation of the mortgage within one year from the date of the sale. R. S., Chap. 104, Sec. 7 (P. L. 1923, Chap. 73). The maker of a mortgage of personal property must redeem, however, before the power of sale is exercised. The chattel mortgage law is that, where the condition of the mortgage is broken, "the mortgagor or any person lawfully claiming under him may redeem the property at any time before it is sold by virtue of a contract between the parties or on execution against the mortgagor or before the right of redemption is foreclosed" as thereinafter provided. R. S., Chap. 105, Sec. 3. A sale under a power given in a chattel mortgage is a sale "by virtue of a contract between the parties" and clearly within the purview of the statute.

We can not accede to the argument on the briefs for the defendants that the statutory method of foreclosure of chattel mortgages is exclusive and bars a sale by the mortgagee under a power. Until Section 30 of Chapter 125 of the Revised Statutes of 1841 was enacted, the mortgagor of personal property had no right of redemption at law and, if he failed to perform the conditions of his mortgage, the mortgagee acquired an absolute title to the chattel. *Cutts* v. *York Manufacturing Co.*, 18 Me., 190; *Flanders* v. *Barstow*, 18 Me., 357. By the Act of 1841, a right of redemption for sixty days after breach of condition was given, "unless the property shall have been sold, in the meantime, in pursuance of the contract between the parties or on execution for the debt of the mortgagor." Under that statute, unless the mortgage itself imposed conditions to be complied with, no foreclosure proceedings were required and the title of the mortgagee became absolute if the mortgage was not redeemed within the statutory period. *Winchester* v. *Ball*, 54 Me., 558. No change in this law appears in its reënactment in the Revised Statutes of 1857. In Chapter 23 of the Public Laws of 1861, a method of foreclosure of chattel mortgages was provided, certain requisites as to notice and record were prescribed, and a forfeiture of the right of redemption was ordered if the conditions of the mortgage were not performed within sixty days after the record of the notice of foreclosure. The mortgagor's right of redemption was again expressly limited, however, to a time before the property is sold "by virtue of a contract between the parties

or on execution against the mortgagor or the right of redemption is foreclosed as hereinafter provided." The law of the foreclosure and redemption of chattel mortgages, as there written, is reënacted in the current Revised Statutes without material change. R. S., Chap. 105, Secs. 3-6.

The right to sell mortgaged chattels by virtue of a contract between the parties, and this, as already pointed out, includes a sale under a power, therefore, still exists in this state. Instead of abrogating and excluding the exercise of this right, the Legislature has expressly recognized it and made it superior to the mortgagor's right of redemption. The cases of *Titcomb* v. *McAllister*, 77 Me., 353, and *Ramsdell* v. *Tewksbury*, 73 Me., 197, cited by the defendants, do not hold to the contrary. In the former, neither the validity nor effect of a power of sale in a chattel mortgage is involved, nor is it there held that the method of foreclosure prescribed by the statute is exclusive. The latter case, in so far as it deals with foreclosure, comments, by way of dictum only, on the acquisition of title by the mortgagee. The case, as reported, indicates that no consideration was given to a power of sale superadded to the mortgage.

No question is raised as to the sufficiency of the power of sale here given, nor as to the manner of its exercise, and we must assume that both are sufficient in the eyes of the law. The defenses which have been pressed can not be sustained. According to the stipulation of the parties, judgment should be rendered for the plaintiff for $30, and that entry is made.

Judgment for the plaintiff for $30.

JOSEPHINE GAUVIN'S CASE.

Androscoggin. Opinion, August 16, 1933.

WORKMEN'S COMPENSATION ACT.

An employee sustained a right inguinal hernia as result of an accident. While operating to reduce this hernia under a local anaesthetic the doctor suggested to the injured man the advisability of removing his appendix, which had appeared through the abdominal incision. With the employee's consent the appendix was removed, the employee subsequently dying.

The commissioner in his finding stated: "It is impossible to say whether death would have resulted had the appendix not been removed."

HELD

The removal of the appendix was an incident of the hernia operation.

The deceased had the right to rely on the statement of the doctor furnished by his employer that the removal of the appendix was a proper and usual procedure under such circumstances. Even though such practice may have been unwarranted and a contributing cause of death, the accident would still be regarded as the proximate cause of death and the employer would be liable.

On appeal from the decree of a sitting Justice, affirming an award of compensation to the widow of Joseph Gauvin who died following an industrial accident. Appeal dismissed. Counsel fee and costs to be allowed appellee to be fixed by the court below. The case fully appears in the opinion.

Berman and Berman, for petitioner.

William B. Mahoney,

Theodore Gonya,

Eben F. Littlefield, for respondents.

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

THAXTER, J. This is a petition under the Workman's Compensation Act by the widow of Joseph Gauvin who seeks compensation

for the death of her husband as the result of an industrial accident. The Commissioner who heard the case awarded compensation at the rate of $10.67 for the statutory period of three hundred weeks. From the decree affirming such award the employer and insurance carrier have appealed.

The deceased on February 27, 1932, sustained a right inguinal hernia from an accident arising out of and in the course of his employment. He was referred by his employer to Dr. Gauvreau, the mill doctor, who on March 15th operated on him to reduce the hernia. This operation was performed under a local anaesthetic so that the plaintiff was conscious while it was going on. When the incision was made the appendix appeared through it. The doctor suggested to the patient that it was wise under the circumstances to remove the appendix; and, though the evidence is not altogether clear, the patient was apparently given to understand that such procedure was a usual incident of the hernia operation. Gauvin gave the doctor authority to remove the appendix, and this was done without any charge being made. On March 26th as a result of the operation Gauvin died of acute nephritis and peritonitis.

The commissioner in his findings says: "It is impossible to say whether death would have resulted had the appendix not been removed."

Counsel for the employer claim that this case is governed by *Dulac's Case*, 120 Me., 324. In that case the deceased employee received an epigastric hernia from an industrial accident. He had suffered for some time from an inguinal hernia, and decided to have both of these corrected at the same time. With the surgeon, who was to operate to correct the condition caused by the accident, he made an independent contract for a new consideration for an operation for the inguinal hernia. As a result of the surgery death ensued. It was, however, impossible to determine whether one or the other operation or the combination of both caused the death. Under these circumstances this Court held that it was a matter of conjecture whether the accident was the cause of death, and compensation was denied. These facts are different from those now before us. In that case the Court took pains to point out that there

were two distinct operations and that two separate incisions were necessary. In this case the removal of the appendix was an incident of the hernia operation.

The deceased, as he was being operated on, was informed by a doctor provided by the employer that the removal of the appendix was a proper and usual procedure under the circumstances. Whether to do so was good practice or not, the assured had the right to rely on the judgment of the physician in this respect, and even though the removal of the appendix may have been unwarranted and a contributing cause of the death, the employer is nevertheless liable. The accident, in spite of the error of the surgeon, would still be the proximate cause of the death. *Burn's Case*, 218 Mass., 8; *Roman* v. *Smith*, 42 Fed. (2d) 931; *Sarber* v. *Aetna Life Ins. Co.*, 23 Fed. (2d) 434; *Wells* v. *Gould*, 131 Me., 192.

The identical question now before us has been decided adversely to the employer in Massachusetts. *Atamian's Case*, 265 Mass., 12. With the reasoning of the Court in that case we concur.

Appeal dismissed.
Counsel fees and costs to be allowed appellee to be fixed by the Court below.

EVA P. HALEY

vs.

ELTON DAVENPORT, GEORGE F. GOODSPEED AND DONALD S. BRIGGS.

Franklin. Opinion, August 16, 1933.

EMINENT DOMAIN. CONSTITUTIONAL LAW.

An appropriation of property for a purpose which is a great benefit to the public is not for that reason a taking for a public use.

R. S. 1930, *Chap.* 25, *Sec.* 28, *which provides that persons or corporations possessing land, swamp, meadow, quarries, or mines, which by reason of adjacent lands or highways, cannot be approached, drained, or used without crossing of said lands or highways, may establish drains or ditches thereto, is unconstitutional and void.*

In the case at bar, the acts of the defendants in entering the plaintiff's land, and deepening the channel of a stream running through it constituted a taking of the plaintiff's property. Such taking was not for a public use, and hence can not be justified under the right of eminent domain.

On report on an agreed statement. Action of trespass quare clausum. The defendants admitted their entry on plaintiff's land for the purpose of lowering the bed of a sluggish stream leading from a small pond on the defendants' land across the plaintiff's property. They justified their entry under the provisions of R. S. 1930, Chap. 25, Secs. 28-35. The sole question before the Court was the constitutionality of this statute. Judgment for the plaintiff. Case remanded to Superior Court for the assessment of damages. The case fully appears in the opinion.

Frank W. & Benjamin Butler,

J. Blaine Morrison, for plaintiff.

Cyrus N. Blanchard, for defendants.

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

THAXTER, J. This case is before us on report on an agreed statement. It is an action of trespass quare clausum. The defendants admit that they entered on the plaintiff's land to lower the the bed of a sluggish stream leading from a small pond on the defendants' adjoining land across the plaintiff's property. It was the purpose of the defendants in so doing to drain the pond on their land so that they might remove from the bottom of it a valuable deposit of diatomaceous earth. They justify their acts under the provisions of Rev. Stat. 1930, Ch. 25, Secs. 28-35. The sole question for decision is the constitutionality of this statute.

Section 28 reads as follows:

> "*Drains across adjacent lands or highways, how authorized. R. S., Ch.* 22, *Sec.* 28. Persons or corporations possessing land, swamp, meadow, quarries, or mines, which by reason of adjacent lands or highways cannot be approached, drained, or used without crossing said lands or highways, may establish drains or ditches thereto, in the manner hereinafter provided."

The subsequent sections provide for the procedure to be followed and for the assessment of damages.

The traditional right of every person to possess and enjoy property has ever been jealously guarded by the law. This fundamental guarantee of liberty is expressed in our state constitution in Article I, Section 1, which declares that the "acquiring, possessing and protecting property" is an inherent and unalienable right. In section 21 of the same article it is further provided that "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." From this constitutional provision it necessarily follows that private property cannot be taken without the owner's consent for a private use under any circumstances. *Paine* v. *Savage*, 126 Me., 121, 136 A., 664; *Brown* v. *Gerald*, 100 Me., 351, 61 A., 785.

That the acts of the defendants here in entering the plaintiff's land and deepening the channel of a stream running through it

constituted a taking of the plaintiff's property can not be questioned. *Paine* v. *Savage*, supra. It can not be seriously contended that such taking was for a public use or that the public exigencies required it. *Hench* v. *Pritt*, 62 W. Va., 270, 57 S. E., 808; *Matter of Tuthill*, 163 N. Y., 133, 57 N. E., 303. Indeed the agreed statement admits "that there is no one interested in or benefited by this drainage excepting the defendants."

It has been clearly pointed out that an appropriation of property for a purpose which is a great benefit to the public is not for that reason a taking for a public use. *Brown* v. *Gerald*, supra. The Court there said, page 370: "Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain. *Kinnie* v. *Bass*, 68 Mich., 625, 36 N. W., 672. If the doctrine of public utility were adopted in its fullest extent there would practically be no limit upon the exercise of this power." Again, at page 373, it is said: "The use must be for the general public, or some portion of it, and not a use by or for particular individuals." The doctrine is expressed most forcefully by Justice Kent in *Bangor & Piscataquis R. R. Co.* v. *McComb*, 60 Me., 290, 295. "This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess, and defend property. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate. The constitution protects him and his possessions, when held on, even to the extent of churlish obstinacy."

The case of *Paine* v. *Savage*, supra, is decisive of the issue now before us. The statute, which sought to authorize timberland operators to use the unimproved lands of adjoining owners without their consent for hauling supplies or lumber, was there held unconstitutional in spite of the fact that the general benefit to the public in such use was obvious. The observations which we have here made are but a reiteration of the very clear exposition of the

law set forth in the opinion in that case. In view, however, of present conditions a reassertion of this fundamental doctrine perhaps may not be out of place.

The statute in question, Rev. Stat. 1930, Ch. 25, Secs. 28-35, is unconstitutional and void and furnishes no justification to the defendants for their entry on the plaintiff's land.

In accordance with the stipulation the entry will be

Judgment for the plaintiff.
Case remanded to Superior Court
for assessment of damages.

STATE OF MAINE *vs.* JOHN FADDOUL.

Oxford. Opinion, August 16, 1933.

CRIMINAL LAW. INDICTMENT.

The rule is well recognized that in the description in the indictment of a statutory offense, every element constituting the crime must be set forth with reasonable precision. The failure to include any necessary allegation can not be cured by implication.

In the case at bar, one necessary element of the offense sought to be charged against the respondent was that the building was "insured against loss or damage by fire." This averment was lacking in the indictment. The Court could not properly assume that the statement as to insurance on the building, meant insurance against fire.

On exceptions. Respondent found guilty under an indictment purporting to charge him with the statutory offense of wilfully causing to be burned a building insured against loss or damage by fire, with intent to defraud the insurance company, filed a motion in arrest of judgment on the ground that the indictment under which he was tried set forth no criminal offense. To the overruling

of this motion an exception was taken. Exception sustained. The case fully appears in the opinion.

Clyde R. Chapman, Attorney General for the State.

Aretas E. Stearns,

Albert Beliveau, for defendant.

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

THAXTER, J. The intention in this case was to prosecute the respondent for the crime described in Section 24 of Chap. 138, Rev. Stat. 1930. The statutory offense is set forth as follows:

> "*Persons burning their own property to defraud insurers; penalty. R. S. c.* 128, *sec.* 22. If an owner or person in any way concerned, interested or in possession of any building, goods, or other property, insured against loss or damage by fire, wilfully burns the same or causes it to be burned, with intent to defraud the insurer, he shall be punished by imprisonment for not less than one year, nor more than twenty years."

The first count of the indictment reads as follows:

> "THE GRAND JURORS FOR SAID STATE upon their oath present that John Faddoul of Rumford in the County of Oxford and State of Maine at Rumford in the County of Oxford and State of Maine, aforesaid, on the ninth day of August A.D. 1932, Wilfully did cause to be burned on the eleventh day of August, A.D. 1932, with intent to defraud the Southern Fire Insurance Company of New York, New York, New York, and the Pennsylvania Fire Insurance Company of Philadelphia, Pennsylvania, a building occupied as a shop and belonging to the said John Faddoul located on the Westerly side of Canal Street in said Rumford, the said Southern Fire Insurance Company of New York, New York, New York, and the said Pennsylvania Fire Insurance Company of Philadelphia, Pennsylvania, having at the time of said burning, insurance on said building, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The second count of the indictment in so far as the respondent's objection to it goes is in the same language.

After a verdict of guilty and before sentence the respondent filed a motion in arrest of judgment on the ground that the indictment under which he was tried set forth no criminal offense. To the overruling of this motion an exception was taken.

The rule is well recognized that in the description in the indictment of a statutory offense every element constituting the crime must be set forth with reasonable precision. *State* v. *Perley*, 86 Me., 427; *State* v. *Beattie*, 129 Me., 229; *State* v. *Navarro*, 131 Me., 345. The failure to include any necessary allegation can not be cured by implication. *Com.* v. *Shaw*, 7 Met., 52, 57.

One necessary element of the offense sought to be charged against the respondent was that the building was "insured against loss or damage by fire." This averment is lacking in the indictment. We have no right to assume that the statement as to insurance on the building means insurance against fire. An indictment in similar form to this was held defective in *Martin & Flinn* v. *State*, 20 Ala., 30.

Exception sustained.

EMILE CYR

vs.

ROBERTA F. BARKER, MARTHA M. BRIDGE, LOIS C. SWETT AND LEWIS B. SWETT, JR.

AND

LEONA CYR

vs.

ROBERTA F. BARKER, MARTHA M. BRIDGE, LOIS C. SWETT AND LEWIS B. SWETT, JR.

Sagadahoc. Opinion, August 16, 1933.

LANDLORD AND TENANT.

In an action of negligence, the burden of proof is on the plaintiff to show not only that the defendant was negligent, but that he was himself in the exercise of due care.

In the case at bar, while there was some evidence that some of the nails holding the balustrade had rusted, the Court could not thereby assume that the balustrade was necessarily unsafe for the purpose for which it was designed, nor in the absence of direct evidence as to how the accident happened that the condition of the rail was the proximate cause of Mrs. Cyr's falling. The evidence was entirely consistent with the theory that she lost her balance, pitched over the rail and carried it with her in her fall.

On report. Actions by Leona Cyr for personal injuries and by her husband for medical expenses and loss of consortium. Trial was had at the October Term, 1932, of the Superior Court for the County of Sagadahoc. After the evidence was taken out the cases were by agreement of the parties, reported to the Law Court for its determination upon so much of the evidence as was legally ad-

missible. Judgment for the defendants. The cases fully appear in the opinion.

J. Harold Dubord,
John J. Keegan, for plaintiffs.
Locke, Perkins & Williamson, for defendants.

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

THAXTER, J. These two actions are before us on report. Leona Cyr sues for personal injuries received by reason of a fall from the porch of a tenement which her husband, Emile Cyr, occupied as a tenant at will of the defendants, the owners of the property. Her husband seeks to recover for medical expenses and for loss of consortium.

The defendants at the time of the accident were the owners of an apartment situated on Summer Street in the City of Bath. There were three tenements one above the other. The plaintiffs occupied that on the second floor. Access to the two upper tenements was by an outside stairway which led to a porch on the outside of the plaintiffs' quarters and from there to another stairway to the third floor. That part of the porch not used solely as a passageway was approximately four by seven feet in area. This served as a landing from the stairs ascending from the street and also was used by the occupants of the tenement for household purposes. Around this platform was a balustrade 2.7 feet high. This was constructed with a top and bottom rail fastened to posts and strengthened by banisters nailed to each rail.

Just before the accident Mrs. Cyr came out on the porch to shake some rugs. She had finished with one which she had laid over the porch rail. While engaged in shaking the other she fell from the porch a distance of twenty feet to the concrete pavement below, and sustained very severe injuries. There is no direct evidence as to how the accident happened. She does not know. Her only remembrance of the occurrence is that she fell. The balustrade was carried away and fell with her. There is no direct evidence that prior to the accident it was insecure or in an unsafe condition. After the accident the nails which held the railing to the posts were found to be rusty and to some extent eaten away, and from

this circumstance the Court is asked to draw the inference that the injuries to the plaintiff were caused by the negligence of the defendants in failing to keep the premises in proper repair.

The view which we take of the case renders it unnecessary for us to consider several questions of law argued with ability by counsel for both sides, first whether the plaintiffs or defendants had the duty to repair the platform used in part as a common passageway and in part by the plaintiffs for household purposes, secondly whether certain defendants who are minors are in any event liable.

In our opinion the plaintiffs have failed to sustain the burden of proving that the defendants were negligent, or that Mrs. Cyr in shaking the rugs was herself in the exercise of due care. Mrs. Cyr does not say that she leaned for support on the rail and that it gave way. She did not hear it give way nor does she have the slightest idea as to what caused her to fall. The evidence is entirely consistent with the theory that she lost her balance, pitched over the railing and carried it with her in her fall. If so, the case is similar to that of *Pavlovchik* v. *Lupariello*, 101 Conn., 567, 127 A., 18, cited by counsel for the defendants, which holds that an unsafe condition of a railing, if assumed to exist, was not the proximate cause of an accident, where the railing gave way after the woman fell and not before. Mr. Cyr testified that prior to the accident the railing appeared to be all right. We can not assume because some of the nails which held it had rusted that it was necessarily unsafe for the purpose for which it was designed, nor in the absence of evidence as to how the accident happened that the condition of the rail was the proximate cause of Mrs. Cyr's falling. We can find in the evidence no justification for placing the responsibility for this regrettable accident on the defendants.

Judgment for the defendants.

4-ONE BOX MACHINE MAKERS

vs.

WIREBOUNDS PATENTS COMPANY.

Cumberland. Opinion, August 16, 1933.

PATENTS. EVIDENCE.

When an instrument is not ambiguous, it is not permissible to go outside its four corners to determine its meaning.

In the case at bar, the issue was not whether plaintiff's license was exclusive or non-exclusive, but whether under a proper construction of the license agreement there was a failure of consideration. While the character of the license might be important in determining this question, the Court holds it is not controlling. The Court holds that the Healy license was modified by the later 1916 agreement, which agreement the Court holds does not purport to give to the plaintiff such a monopoly in the making, using, and selling of the supposed invention that a cause of action arises by reason of a judgment declaring the patents in question invalid.

An action in equity for an injunction restraining defendant from terminating plaintiff's exclusive patent license, and from interfering with plaintiff's business under that license, and for an award of damages for the partial eviction of plaintiff. The matter came before the Court on defendant's demurrer to the amended bill of complaint, which demurrer was reported to the Law Court by order of the trial Court. Demurrer sustained. Case remanded to sitting Justice. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives,
Douglas, Armitage & McCann.
Blair, Curtis & Dunne, for plaintiff.
Woodman, Skelton, Thompson & Chapman, for respondent.

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

THAXTER, J. This is the second time that this case has been reported to this Court for decision on the defendant's demurrer to the plaintiff's bill in equity. In the former opinion, 131 Me., 356, 163 A., 167, it was held in construing a license agreement that the invalidity of certain basic patents did not give to the plaintiff, the licensee, a cause of action against the defendant, the licensor, based on a failure of consideration. By the mandate of this Court the original demurrer was sustained and the case remanded to the sitting Justice. Amendments to the bill were filed by the plaintiff and to the amended bill the defendant has again demurred. As in the first instance the case is before us on report.

From the license agreement of May 16, 1916, set forth in the original bill the plaintiff derives its rights. Under the terms of this the defendant licenses the plaintiff "to make and use machines, and to make, use and sell boxes, and to use methods, and to license sublicensees so to do" under certain patents. Then follows a covenant by the licensor that it will not grant a license to anyone else. In the previous opinion we held that this agreement, by reason of the restrictive covenant against licensing others, gave to the plaintiff an exclusive license, but that it did not purport to grant an exclusive right or monopoly on the failure of which a right of action would accrue. That such was the proper construction was also indicated by certain other clauses of the instrument such as the plaintiff's covenant acknowledging the patents throughout their respective terms as valid for all purposes, and a covenant by which the plaintiff agreed to prosecute infringers at its own expense and to pay any judgment which might be rendered against either the plaintiff or the defendant in any suit. Supporting such interpretation was likewise the fact that the parties were dealing with a large number of patents as an entirety, that the agreed royalties were to be paid after the rights in the basic patents should expire, and that the plaintiff did not formally preclude itself from using the patents itself. In other words, the instrument taken as a whole showed an intent to place the risk of operating under the patents on the plaintiff and not on the defendant.

The plaintiff has now filed certain amendments which it claims compel the Court to place a different construction on the license agreement. The first of these is the incorporation in the bill of the

so-called Healy license of April 11, 1911. William P. Healy, the then owner of certain patents, by license granted to the plaintiff the exclusive right to operate under said patents and any others thereafter acquired by the licensor. This grant included "the exclusive right to manufacture and use the machines" covered by the patents; "the exclusive right to operate under any and all licenses, now or hereafter acquired by the licensor for the manufacture and use of machines for the manufacture of boxes"; "the exclusive right to grant to its sub-licensees the exclusive or non-exclusive right to use such machines"; "the exclusive right for the licensee and sub-licensees to manufacture, use and sell boxes made by such machines." This license agreement became effective October 4, 1913. In 1914 the defendant company was formed and acquired the interest of Healy in this license and thus became entitled to receive the royalties therein reserved. The amended bill then goes on to allege that the license agreement of May 16, 1916, did not terminate the exclusive rights granted under the 1911 license but was merely an amendment or modification of the previous agreement.

It further states that since the making of the agreement of May 16, 1916, the defendant has by its acts and conduct recognized and confirmed the exclusive rights granted in the previous license. The acts specifically referred to are the granting of four sub-licenses in the form of Exhibit C, which provide that the sub-licensees shall pay royalties to the plaintiff so long as the plaintiff shall remain the exclusive licensee of the defendant and thereafter such payments shall be made to the defendant. There is then the statement that such royalties have always been paid to the plaintiff as such exclusive licensee. The second act, which it is claimed acknowledges the Healy license as still in force, is the granting of sub-licenses in accordance with forms A, B and C which contain representations that the plaintiff has been granted "exclusively the right" to operate under the patents and wherein the plaintiff is referred to as having the only valid exclusive license. The third circumstance, which it is claimed shows an intent to recognize the Healy license as in effect after the granting of the other, is that in litigation in 1925 in the United States District Court in Michigan the plaintiff is described by its president, who was also president

of the defendant, as an exclusive licensee; and it is pointed out that in the decision of that case the District Court found such to be the fact.

The plaintiff now claims that the 1911 license was continued in force by the subsequent agreement of 1916, and that as the Healy license was a grant of an exclusive right so was the agreement of 1916.

In attempting to construe the two agreements together, section 18 of the later license furnishes the rule by which conflicting provisions of the two may be resolved. The pertinent part of it reads as follows: "It is the intention of the parties hereto that this license shall without interruption continue the rights and privileges (as herein modified) of the Licensor and Licensee under such license of April 11, 1911, and shall be amendatory thereof, but any provision of such license of April 11, 1911, not appearing in this license, or which is inconsistent with any of the terms of this license, shall be of no further force or effect."

As this Court pointed out in the previous opinion the license agreement of 1916 was drawn with great care. Except in so far as certain portions of the 1911 license may have been incorporated by the provisions of section 18, the later draft contains the full agreement of the parties. It is not ambiguous. Under such circumstances it is not permissible to go outside the four corners of the instrument to determine its meaning. *Ames* v. *Hilton*, 70 Me., 36; *Snow* v. *Pressey*, 85 Me., 408, 27 A., 272; *Strong* v. *Carver Cotton Gin Co.*, 197 Mass., 53, 59, 83 N. E., 328.

Nor do the provisions of section 18 help the plaintiff. If the terms of the 1911 license are consistent with those of the subsequent agreement, the interpretation placed by this Court on the 1916 license must obviously stand. If such provisions are inconsistent, they are abrogated by the express terms of section 18.

These observations might well determine the issue raised by the defendant's demurrer to the amended bill. Counsel have, however, spent much time in arguing that the parties have recognized the Healy license as in full effect, and by their conduct have estopped themselves from setting up any different interpretation of the agreement than that now contended for by the plaintiff.

In the previous opinion we took pains to point out that the 1916 agreement did not purport to grant an exclusive right or a monopoly to the plaintiff, on the failure of which a right of action would accrue. The defendant gave the plaintiff permission to operate under the patents and debarred itself from granting a similar right to anyone else. The practical effect of this language was to give to the plaintiff an exclusive license. We so indicated in our opinion which appears to be in entire accord with the case of *Western Electric Co.* v. *Pacent Reproducer Corporation*, 42 Fed. (2d) 116, cited by counsel for the plaintiff. The truth of the matter is that the issue in this case is not whether the plaintiff's license is exclusive or non-exclusive, but whether under a proper construction of the license agreement there was a failure of consideration. The character of the license may be of importance in determining this question, but as we indicated before it is not controlling. There is nothing in the opinion in *Drackett Chemical Co.* v. *Chamberlain Co.*, 63 Fed. (2d) 853 (C. C. A. 6th Cir.) inconsistent with this conclusion.

It is significant that the language of the granting clause in the Healy license was modified in the 1916 agreement. In our opinion this change was made advisedly and for one of two reasons, either it was thereby intended to limit the grant which had been previously given, or possibly recognizing that the purported grant in the Healy license of an exclusive right was inconsistent with the later covenants by the licensee admitting the validity of the patents and imposing on the licensee all of the hazards of operating under them, the modification was made for the purpose of making the phrasing of the granting clause consistent with such other sections. But whatever the reason the later agreement is clear and must be held to express the intent of the parties.

The inclusion of the Healy license in the amended bill, far from raising a doubt in our minds as to the correctness of the interpretation which in the previous opinion we placed on the 1916 agreement, rather confirms the views there expressed. That the parties in sub-license agreements and in litigation referred to the plaintiff as an exclusive licensee is not inconsistent with our construction of this instrument, which, however it may be designated by name,

does not purport to give to the plaintiff such a monopoly in the making, using, and selling of the supposed invention that a cause of action arises by reason of a judgment declaring the patents in question invalid.

Demurrer sustained.
Case remanded to sitting Justice.

ALICE CONROY *vs.* FERGUS REID.

ANGELINE LEE *vs.* FERGUS REID.

ANGELINE LEE, EXECUTRIX *vs.* FERGUS REID.

York. Opinion, September 6, 1933.

DAMAGES. JURIES. NEW TRIALS.

A scar upon the forehead of a female plaintiff is a physical disfigurement which, along with the mental chagrin, mortification, and discomfort she endures and will in the future endure as a direct and natural consequence of it, is an element of damage for which she is entitled to recover.

As a general rule, in the trial of civil cases the assessment of damages is for the jury and the parties are entitled to their judgment upon that issue. When it appears, however, that the jury have disregarded the testimony or acted under some bias, prejudice, or improper influence with the result that the damages awarded are either excessive or inadequate, then it is the duty of the Court to set aside the verdict.

This Court has long held that, when the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted.

In the case at bar, it clearly appeared that the verdicts rendered by the jury resulted from unwarranted and unjust methods of computation and were totally inadequate.

On general motions for new trials by plaintiffs. Three actions on the case involving an automobile accident were tried together

at the January Term, 1933, of the Superior Court, for the County of York. In the case of Alice Conroy, the jury rendered a verdict for the plaintiff in the sum of $627.84. In the case of Angeline Lee, the jury rendered a verdict for the plaintiff in the sum of $500.00. In the case of Angeline Lee, Executrix, the jury rendered a verdict for the plaintiff in the sum of $1,200.00. General motions for new trial were thereupon filed by each plaintiff, the issue involved being whether the damages awarded by the jury were adequate. Motions sustained. New trials granted. The cases fully appear in the opinion.

Bradley, Linnell & Jones, for plaintiffs.
Willard & Willard,
William B. Mahoney,
John B. Thomes, for defendant.

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

STURGIS, J. These general motions by the plaintiffs involve only the adequacy of the damages assessed by the jury. The other grounds for new trials, which were originally assigned, have been abandoned. The defendant did not file cross motions.

On August 6, 1932, Alice Conroy and Angeline Lee and the latter's intestate, Albert Morrisette, were injured when the automobile in which they were riding as passengers collided with a Lincoln touring car driven by the defendant. In each of these actions to recover the damages resulting from the collision, the plaintiff has a verdict.

There is very little, if any, conflict in the evidence as to the injuries which Mrs. Conroy received. Her attending physician states that, when she was brought to the hospital, she had jagged lacerations of the forehead and scalp, was black and blue about the face and bruised there and on the chest, elbows, and at the region of the spine at the shoulder level. He describes the cut on her face as extending perpendicularly down across the forehead and laterally across the eyebrow, making an open wound exposing the skull, and states that, after a period of unconsciousness resulting from a condition of concussion of the brain, Mrs. Conroy suffered much pain, including severe headaches. At the end of a week, she left the

hospital although her wounds had not then fully healed. She was partially disabled for several weeks and was examined by several physicians but does not appear to have required further major medical treatment. At the trial, she bore the scar of the cut down across her forehead, and complained that her head bothered her and she had no feeling in it. Although she had been previously employed and had earned rather substantial wages, she was not working at the time she was injured and shows no loss of earnings. She was awarded $627.84 as damages.

Counsel for this plaintiff presented evidence which tended to show that, as a result of this collision, she had incurred expenses aggregating $170. Although no stipulation was made, the amount and propriety of these charges were not disputed at the trial and, in effect, are admitted to be correct on the brief. In addition to these disbursements, she is entitled to recover for the pain and suffering which resulted from her injuries. The scar upon her forehead is a physical disfigurement which, along with the mental chagrin, mortification, and discomfort she endures now and in the future as a direct and natural consequence of it, is an element of damage for which she is entitled to recover. *Coombs* v. *King*, 107 Me., 376, 78 A., 468. The record is left to read that this plaintiff is a woman a little past middle age and of normal sensibilities. If the jury allowed the claim of $170 for expenses, and no reason appears in the evidence for a smaller award, they gave this plaintiff $457.84 for her pain and suffering, an amount which obviously bears no rational relation to her injuries or their results and is manifestly inadequate. We are convinced that this verdict was either the result of an unlawful compromise or a finding of the quotient of a "chalk," as it is called, or of prejudice.

Apparently, the same course was pursued in the action brought by Angeline Lee as an individual. She sustained a fracture of the right radius close to and leading into the wrist joint, although there was no displacement and a reduction of the fracture was unnecessary. She was bruised in the region of the lower ribs in front and there was a black and blue spot in the middle of her back. She was in the hospital six days and required more or less treatment thereafter. Her family physician testifies that her injuries were

painful and caused a weakness of her right hand, arm, and forearm. He attributes an existing mental depression and nervousness to the accident and expresses the opinion that months would elapse before she would regain the normal use of her right hand and arm and be able to perform manual labor. At the time of the trial, he found subjective symptoms of pain in her shoulder and back. This plaintiff also showed an impairment of her earning capacity. She was the proprietor of a dining room in Holyoke, Massachusetts, and, in operating it, did her own cooking and kitchen serving. Although other ailments had caused Mrs. Lee to temporarily close the dining room, the evidence indicates that she had recovered from them and it was the results of this accident which prevented a reopening. There is a sound basis in the evidence for a finding that her loss of earnings from this source was and would be substantial. Her verdict was for $500. She showed payments to the hospital and her physicians, together with other incidental expenses, amounting to $115.50, which, on this record, should have been allowed. Assuming that they were, she was given $384.50 for her pain and suffering and loss of earnings, which is a grossly inadequate compensation and undoubtedly a chance computation. The situation is not changed by the fact that the verdict was for a lump sum. Unless there was an unwarranted reduction in the allowance for expenses, the balance of the award was as just stated. We can find no method of allocation or computation which will justify this verdict.

Albert Morrisette died as a result of this accident. His neck was broken and his body paralyzed, and yet he remained conscious and rational and lived seven days. His pain was intense, except as he was relieved by the administration of morphine, and more than once he asked that he be given something to end his misery. He knew he was going to die and made his will. The proof is abundant that, until he lapsed into final unconsciousness just prior to death, he was subject to intermittent periods of great mental and physical agony. He was a middle-aged bachelor, employed as a telegraph operator, and, except as he suffered from arthritis, appears to have been generally in good health. The verdict given his administratrix was $1,200, of which we must assume $463.94 was for

expenses clearly proved to have been incurred on his account. On this basis, the compensation given for his conscious pain and suffering was $736.06. This verdict was rendered at the same time and in the course of the same deliberation which brought from the jury room the verdicts which we have already considered, and we are firmly of the opinion that it resulted from similar unwarranted and unjust methods of computation. Another jury should be given the facts in this case and just compensation should be awarded.

We are fully aware that, as a general rule, in the trial of civil cases the assessment of damages is for the jury and the parties are entitled to their judgment upon that issue. When it appears, however, that the jury have disregarded the testimony or acted under some bias, prejudice, or improper influence, with the result that the damages awarded are either excessive or inadequate, then it is the duty of the Court to set aside the verdict. This Court has long held that, when the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted. *Leavitt* v. *Dow*, 105 Me., 50, 72 A., 735. See also *Whitney* v. *Milwaukee*, 65 Wis., 409, 27 N. W., 39. From the record brought forward, justice would fail if the verdicts rendered were allowed to stand. In each case the entry is

Motion sustained.
New trial granted.

STATE OF MAINE *vs.* ROY B. ROWE.

Lincoln. Opinion, September 15, 1933.

PUBLIC UTILITIES. R. S., CHAP. 66, SEC. 4. CONSTITUTIONAL LAW.

R. S., Chap. 66, Sec. 4, which provides that no person, firm or corporation shall operate a motor vehicle carrying passengers for hire over regular routes on any street or highway in any city or town in the State without obtaining from the Public Utilities Commission a certificate permitting such operation, is constitutional and valid.

On report on agreed statement, and legally admissible evidence. A complaint brought under Sec. 4 of Chap. 66, R. S., for operating a motor vehicle for carrying of passengers for hire on a public highway in the town of Wiscasset over a regular route, without obtaining from the Public Utilities Commission a certificate permitting such operation. The issue involved the constitutionality of the above statute. Judgment for the State. The case fully appears in the opinion.

Bradford C. Redonnett, for the State.

George A. Cowan, for respondent.

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

BARNES, J. This is a criminal case which originated in a municipal court and progressed to this court on the record below and an agreement of parties to report the case to the Law Court. The complaint is that the respondent, from the fourteenth day of June, 1932, to the fifth day of the next month, without having procured a certificate from the Public Utilities Commission of Maine, permitting him to operate a motor vehicle in this state for the carrying of passengers for hire, over a regular route within the state, did so operate an automobile, upon a public highway between the passenger station of the Maine Central Railroad Company in Wiscasset and Boothbay Harbor, within this state.

The statute, R. S., Chap. 66, Section 4, under which the complaint is brought, reads as follows: "No person, firm, or corporation shall operate such (motor vehicle carrying passengers for hire over regular routes) vehicle or vehicles on any street or highway in any city or town of this state, without obtaining from the public utilities commission, a certificate permitting such operation."

In the agreed statement of fact the respondent admits having done the act forbidden, within the time alleged.

It is contended in argument that the statutes authorizing the public utilities commission to certify applicants as carriers of passengers for hire, and forbidding those without certificates to conduct such business are in violation of the constitution of the State.

The constitutionality of this branch of our motor vehicle law was upheld in a recent, well-considered case, *Maine Motor Coaches* v. *P. U. Commission*, 125 Me., 63, and nothing has been brought to our attention in the case at bar to bring us to a different conclusion.

Judgment for the State.

MARY GILE *vs.* NEW HAMPSHIRE GAS AND ELECTRIC CO.

AND

HAROLD H. GILE *vs.* SAME.

York. Opinion, October 6, 1933.

NEGLIGENCE.

In an action to recover damages sustained by a plaintiff who suffered painful injuries while wringing clothes, as one of her hands was caught and jammed between the rolls of an electrically operated clothes wringer, which had been renewed and repaired by the defendant; and by the husband for expenses incurred in caring for his wife after the injury;

HELD

Defendant can be held to pay damages in either suit only if it is shown to be negligent in performing a duty which it owed to the wife; and if it is shown that in operating the machine on the day of the injury she was guilty of no negligence.

The machine was old, and so worn that renewal of parts was an evident necessity.

Defendant had made one renewal and an attempt to adjust the mechanism after the renewal.

The evidence disclosed that despite repeated experiences of jamming and stopping of the machine, she placed her finger so near to the rolls that her hand was caught between them.

She was clearly negligent, and neither plaintiff is entitled to damages.

Actions of negligence, resulting in verdicts for each plaintiff, argued on exceptions to refusal to grant motions for directed verdicts for defendants, and motions for new trials.

Negligence of plaintiff physically injured found. Exceptions sustained; new trials granted. The case fully appears in the opinion.

Willard & Willard,
Elmer J. Burnham, for plaintiffs.
Sewall & Waldron, for defendant.

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

BARNES, J. Two cases are here treated together. Both are actions for damages for alleged negligence on the part of the defendant, a corporation which furnished and installed a new part, in place of one that had been worn out, in an electrically impelled clothes wringer attached to and used with a washing machine in domestic service.

Mary Gile, plaintiff in the one case, suffered painful injury while wringing clothes, as one of her hands was caught and jammed between the rolls of the wringer.

The other plaintiff is the husband of Mrs. Gile, who sues for expense incurred in caring for his wife in the attempt to restore her to normal condition.

After the close of taking of testimony in both cases motions for directed verdict for defendant were denied and exceptions were taken. Verdicts resulted for plaintiffs and motions for new trials, on the grounds usually alleged, were filed and subsequently motions were filed for new trials, on the ground of newly discovered evidence.

In the fall of 1925, the husband purchased of a local electric power distributing company, the predecessor of defendant, a washing machine to which was attached an electrically impelled wringer. In October of 1930 he engaged defendant to provide and install a new roll.

The aperture between the rolls could be regulated by a thumb screw in the top of the frame, which bore on a spring resting on either end of the upper roll.

The mechanism further included a releasing lever, which when operated allowed the upper roll and gears to rise, affording a considerable opening between the rolls.

Within four weeks after the new lower roll was installed by defendant the wife reported to her husband that the wringer was not working, and, as he testified, "I looked and found the spring bar on the top of the rolls out of position. I picked it up with my fingers and juggled it round and set it back in position after releasing the screw, releasing that screw on top, and when I got the spring back in position and set it down and adjusted it I finished wringing the clothes."

The spring bar, when tension was off would protrude into or through the housing over the end of the upper roll and prevent roll and gears from rising.

Some month or two later the same difficulty arose, and again the husband adjusted the machine. Defendant was called to put the machine in working order, and one of its men took the wringer away and later returned and put it back on the washing machine.

At intervals, through the winter and spring Mrs. Gile had similar experiences with the wringer.

She testified she notified defendant of the situation, but that nothing was done to the machine, other than by herself or her husband.

Late in May of that year, while Mrs. Gile was wringing sheets, a finger of her right hand was caught in the wringer. She failed to control or stop the machine until her hand was pulled in, next the gears, and seriously injured.

Defendant can be held to pay damages in either suit only if it is shown to have been negligent in performing a duty which it owed to the wife; and if it is shown that in operating the machine on the day of the injury she was guilty of no negligence.

The machine was old, and so worn that renewal of parts was an evident necessity.

Defendant had made one renewal and an attempt to adjust the mechanism after the renewal.

At intervals, probably numerous, for a period of seven months the wife had turned on the electric current and attempted to operate the machine. Despite repeated experiences of the jamming, and stopping of the machine, she imprudently presented her fingers so near to the rolls that her hand was caught between them, with the sheet; she was unable to "release," the upper roll, and injury was inescapable. She does not claim that she tried the release before beginning operations.

She was clearly negligent, and neither plaintiff is entitled to damages.

Exceptions sustained, and new trials granted.

ELMER G. BRYSON

vs.

AMERICAN EAGLE FIRE INSURANCE COMPANY.

Penobscot. Opinion, October 16, 1933.

INSURANCE. WAIVER. EVIDENCE. ESTOPPEL. ARBITRATION.

R. S., CHAP. 60, SEC. 4.

Waiver is the voluntary relinquishment of a known right. It can not be predicated on ignorance of that right.

The parol evidence rule is applicable to insurance policies as well as all other written contracts.

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

The arbitration clause in the Maine Standard policy simply provides a reasonable method of estimating and ascertaining the amount of the loss and leaves the general question of liability to be determined by the Courts. Only matters which relate to the amount of damages are in issue before the Referees, those going to the cause of action being immaterial and outside their jurisdiction.

In the case at bar, it not appearing that the insurance company had knowledge of the plaintiff's breach of the conditions of the "Piled Lumber Clause" of his policy, it can not be held to have waived compliance therewith.

If it had been established, which it was not, that Osgood and McDonald were agents of the company, no express or implied agreement growing out of their acts or representations, before or at the time the contract of insurance was executed, could be allowed to vary the terms of the instrument.

The plaintiff, having no right to rely on anything outside the policy, was not misled to his loss or prejudice by conditions contained in it, which he read and understood.

The joinder of the defendant company in arbitration proceedings and submission of the loss to the Referees, as provided in the Maine Standard policy, did not constitute a waiver of a breach of the conditions of the policy.

On report. An action to recover on policies of fire insurance, issued by the defendant to the plaintiff on a saw mill and contents, and piled lumber. Plaintiff's claim for loss was submitted to Referees who found for plaintiff on the policy for loss of mill and machinery and lumber in it, the sum of $800.00, on the other policy for loss of lumber piled outside the mill, the sum of $4,400.00. This action is based on their award. The case was reported for final determination on so much of the evidence as was legally admissible. Judgment for the plaintiff for $805.60. The case fully appears in the opinion.

Thompson & Ball, for plaintiff.

Frederick R. Dyer, for defendants.

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

STURGIS, J. This is an action to recover on policies of fire insurance Nos. 5303 and 5304 issued December 2, 1931, by the American Eagle Fire Insurance Company to Elmer G. Bryson, who owned and operated a saw mill at Grindstone, Maine. The mill and contents, together with lumber piled outside, having been destroyed by fire on May 2, 1932, the plaintiff's claim for the loss was submitted to Referees and this suit is based on their award. The case is reported for final determination on so much of the evidence as is legally admissible.

Under Policy No. 5304, the Referees awarded the plaintiff $800, for the loss of his mill and the machinery and lumber in it, and the defendant admits its liability for that sum. The plaintiff is entitled to recover the amount of his claim under that policy.

Policy No. 5303, which was for $6,000 and insured the plaintiff against loss by fire of lumber piled outside the mill, contained a rider attached to and made a part of the policy and designated as the "Piled Lumber Clause," which was of the following tenor:

> "In consideration of the reduced rate at which this Policy is written, it is expressly stipulated and made a condition of the contract that clear space of one hundred (100) feet shall be maintained between the lumber hereby insured and any standing wood, brush, steam railroad, steam or water power saw mill, planing mill, or refuse burner, and four hundred

(400) feet clear space shall be maintained between said lumber and any portable steam saw mill."

The Referees fixed the plaintiff's loss under this policy as $4,400 which, with interest from the date of the award, is the amount claimed here. The Insurance Company, in its brief statement, pleads a breach of the terms of the "Piled Lumber Clause" through the failure of the plaintiff to maintain a clear space of one hundred feet between the lumber insured and standing wood or brush. The plaintiff, although he read his policy and understood its conditions, admits that his lumber was then piled within one hundred feet of the standing wood and brush of adjacent woods and remained there until it was burned, but contends that the conditions of the "Piled Lumber Clause" were waived and that the Company is estopped from setting up a breach of the contract.

Policy No. 5303 was issued through the office of one Leroy W. Ames of Bangor, who was the duly appointed and licensed agent of the defendant Company. Application for the insurance was made by Edwin J. Osgood and Earl McDonald, both acting for the plaintiff and, according to the weight of the evidence, as his agents. Undoubtedly, these men both saw the lumber and had a general knowledge of its location, but it does not appear that they communicated the facts they had learned to the Agent or any other representative of the Company, or that it obtained knowledge thereof from any other source. We find no ground upon which the Insurer can be charged with knowledge of the plaintiff's breach of the conditions of the "Piled Lumber Clause" of his policy and, by reason thereof, be held to have waived compliance therewith. Waiver is the voluntary relinquishment of a known right. It can not be predicated on ignorance of that right. *Oakes* v. *Insurance Company,* 122 Me., 361, 120 A., 53; *Carleton* v. *Insurance Company,* 109 Me., 79, 82 A., 649; *Hanscom* v. *Insurance Company,* 90 Me., 333, 38 A., 324. In this connection, it may be properly noted that Osgood and McDonald viewed the piled lumber and conferred with the agent of the Company before the policy of insurance was executed, but had nothing whatever to do with the transaction thereafter. If it could be established that these men were agents of the Company, no express or implied agreement

growing out of their acts or representations, before or at the time the written contract was executed, could be allowed to vary the terms of the instrument. The parol evidence rule is applicable to insurance policies as well as all other written contracts. *Coombs* v. *Charter Oak Company*, 65 Me., 382.

The contention of counsel for the plaintiff that the defendant Insurance Company is estopped to defend upon the ground that the "Piled Lumber Clause" of Policy No. 5303 was violated is equally untenable. "The doctrine of estoppel rests upon an act that has misled one who, relying on it, has been put in a position where he will sustain a loss or injury. *Box Machine Makers* v. *Wirebounds Company*, 131 Me. 70, 78, 159 A., 496. The conditions of the Clause, written in express and unambiguous language, was that "a clear space of one hundred (100) feet shall be maintained between the lumber hereby insured and any standing wood, brush . . ." This provision remained unmodified and in full force when the fire occurred. The plaintiff admits, as already noted, that he read and understood the conditions imposed upon him, but fails to show that he was thereby misled to his loss or prejudice. Having, on this record, no right to rely on anything outside his Policy, his claim of estoppel has no support in law or fact.

The plaintiff's final contention that the defendant, by joining in the arbitration proceedings and the submission of the loss to Referees, waived its defense of a breach of the conditions of the policy can not be sustained. The Maine Standard policy was used as required by law. R. S., Chap. 60, Sec. 4. The arbitration clause in that policy simply provides a reasonable method of estimating and ascertaining the amount of the loss and leaves the general question of liability to be determined by the Courts. Only matters which relate to the amount of damages are in issue before the Referees, those going to the cause of action being immaterial and outside their jurisdiction. No waiver could arise from a failure on the part of the Company to raise the question of its liability before the Referees. *Dunton* v. *Insurance Company*, 104 Me., 372, 71 A., 1037; *Furniture Company* v. *Prussian National Insurance Company*, 112 Me., 557, with extended opinion in 91 Atlantic Reporter, 785.

The plaintiff claims interest from December 23, 1932, the date of his award under Policy No. 5304, to February 6, 1933. This he is entitled to recover and judgment should be entered accordingly.

Judgment for the plaintiff for $805.60.

U. S. REALTY & INVESTMENT CO. *vs.* F. A. RUMERY CO.

Androscoggin. Opinion, October 23, 1933.

ACTIONS. PLEADING AND PRACTICE. R. S., CHAP. 96, SEC. 27.

Section 27, Chapter 96, R. S. 1930, provides that "The action of assumpsit shall lie in any case in which either an action of debt or an action of covenant is now maintainable. Under the plea of non assumpsit, the defenses available under the plea of general issue in either of said actions shall be available."

It is unnecessary to offer direct proof of a fact which may be conclusively inferred from all of the evidence submitted.

On exceptions by defendant. An action on the case brought by the plaintiff for breach by the defendant of a written contract wherein the defendant agreed to erect a two story store and office building on premises of plaintiff in accordance with certain drawings and specifications. The original declaration did not allege that the contract was under seal. The presiding Justice permitted amendment covering the point. To the allowance of the amendment, defendant excepted, and likewise to the admission of the contract, to the ordering of a verdict for the plaintiff, and to the refusal to direct a verdict for the defendant. Exceptions overruled. The case fully appears in the opinion.

Ralph W. Crockett, for plaintiff.

Charles F. Adams,

Israel Bernstein,

Frank P. Preti, for defendant.

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

PATTANGALL, C. J. Exceptions. Verdict directed for plaintiff. Assumpsit on written contract. Original declaration did not allege that contract was under seal. When that fact appeared, presiding Justice permitted amendment covering the point. Exceptions were taken to the allowance of the amendment, to the admission of the contract, to the ordering of verdict for plaintiff, and to refusal to direct a verdict for defendant.

Defendant contended that the amendment changed the form of action, that plaintiff had declared on a simple contract, that evidence of a contract under seal was inadmissible, that assumpsit would not lie but that covenant was the proper remedy.

Section 27, Chapter 96, R. S. 1930, enacted in 1929, prior to the bringing of this writ, seems to dispose of these objections. "The action of assumpsit shall lie in any case in which either an action of debt or an action of covenant is now maintainable. Under the plea of non assumpsit, the defenses available under the plea of general issue in either of said actions shall be available."

The amendment was properly allowed. It may not have been necessary, but it was unobjectionable. The documentary evidence objected to was properly admitted.

Exceptions to directing verdict for plaintiff and declining to direct verdict for defendant relate to the following situation. The contract included the installation of an oil burner. Plaintiff's claim for damages rested on the proposition that the burner was defective. It was admittedly installed by a person other than defendant, and no direct evidence was offered that this person was an agent or employee of defendant; but there was abundant evidence from which such an inference could be drawn. In fact, it was impossible to arrive at a different conclusion.

It was the plain duty of the Court to order a verdict for plaintiff.

Exceptions overruled.

JOHN NADEAU *vs.* CLEOPHAS DALLAIRE.

Kennebec. Opinion, October 23, 1933.

HUSBAND AND WIFE. CRIMINAL CONVERSATION.

A husband's connivance at the adulterous intercourse of his wife will bar him from maintaining an action against the participant in her improper conduct.

While the question of connivance is primarily of fact for the jury, it is not ordinarily susceptible of proof as an independent fact but is usually established as a conclusion from a line of conduct pursued by the husband in relation to his wife's intercourse with the party from whom he claims damages.

If his conduct as established by undisputed evidence or admitted in his own testimony is such that a rational mind could draw no other conclusion therefrom than that he had consented actively or passively to the conduct of which he complained on the part of his wife and defendant, the question would become one of law for the Court, which in that event would not only be justified in taking the case from the jury but it would become its duty to do so.

In the case at bar, if plaintiff's testimony was true, he was guilty of connivance. If false, his case was based on perjury. In either event, the verdict can not stand.

On general motion for new trial, and special motion for new trial by defendant. An action for criminal conversation. Trial was had at the February Term, 1933, of the Superior Court for the County of Kennebec. The jury rendered a verdict for the plaintiff in the sum of $2,708.33. A general motion for new trial was thereupon filed by the defendant, and subsequently a special motion on the ground of newly discovered evidence. Motion sustained. The case fully appears in the opinion.

Carl A. Blackington,
Goodspeed & Fitzpatrick, for plaintiff.
Joly & Marden,
Perkins & Weeks, for defendant.

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

PATTANGALL, C. J. General motion by defendant, together with special motion based on newly discovered evidence. Action for damages for criminal conversation on the part of plaintiff's wife and defendant. As the case may be disposed of on the general motion, we are not concerned with the special motion. Evidence in support of plaintiff's claim was confined to his own testimony and that of his nephew, supplemented by a recital of events and circumstances tending to show opportunity and inclination.

An analysis of plaintiff's testimony forces the conclusion that the jury erred in its findings.

"The verdict, considering the actual facts of the case as proved, was an unmistakable compliment to the rare abilities of plaintiff's counsel." *Cook* v. *Wood*, 30 Ga., 891, 76 Am. Dec., 677.

The story of plaintiff's marital troubles as told by him may be summarized as follows. A laborer, forty years of age, father of two children, he maintained a home for his family at times and when unable to do so stored his furniture and placed the children in convent schools, thus enabling his wife to seek employment as a housekeeper. Early in the winter of 1931, while working in the woods, his wife with his consent started housekeeping in Waterville and accepted defendant as a boarder, receiving from him ten dollars weekly. This arrangement, entirely agreeable to plaintiff, had been in effect a few days when he came to the home and remained some three or four weeks, when he found work elsewhere and left to be gone for about two months, returning in the spring. Meantime the children came home and occupied a bed in the room in which defendant slept. Plaintiff remained with his family a short time, when he found work at a place some three miles away where there was a camp which he occupied in company with other laborers. He planned to be at home week-ends and occasionally during the week.

Nothing occurred to disturb the apparently pleasant relations existing between plaintiff, his wife and defendant until early summer, when on returning home about nine one evening he found the door of the house locked and sat down near some bushes, remaining there for about an hour, until his wife and defendant arrived in

defendant's automobile and entered the house. A window curtain was raised sufficiently so that he was enabled to see defendant undress and retire and he later saw his wife undress in another room than that occupied by defendant and the two children, after which she repaired to the room so occupied and joined defendant in bed.

Plaintiff then knocked on the door, hastened back to look in the window again, saw his wife leave defendant's bed and go to her own room, returned to the door, knocked again and was admitted by the wife. Defendant came out into the kitchen where they were, partially if not fully dressed, and a casual conversation occurred between the three. After remaining something less than an hour, plaintiff left to return to the camp, giving as his reason for not remaining until morning that if he did so he would be obliged to leave very early on account of his work.

On Saturday night plaintiff came home again, the incident related above having occurred on Wednesday, and at that time remained until Monday morning. During the evening of Saturday, he told his wife and defendant what he had seen on Wednesday. At first they both denied and then admitted the truth of the accusation. Asked if "anything took place at that time," i.e., during the week-end, plaintiff answered, "No." Husband and wife occupied the same bed Saturday night and Sunday, and on Monday morning plaintiff returned to his work, apparently on amicable terms with his wife and defendant, and quite content to leave them together with the children.

The following Saturday plaintiff came home again. He and his wife retired, occupying the same bed. After a time she left the bed and room, and a little later he arose and, going into the bedroom where defendant and the children were, found his wife in bed with defendant. Plaintiff then went back to his own bed and says that he saw no more of defendant that night. As to whether or not he later saw his wife, the record is silent. Apparently the incident provoked no comment on the part of any of the parties involved.

Again, perhaps a month later, he was at home, again he and his wife retired together, and again he woke, found his wife gone, saw a light in the kitchen, arose and went into the lighted room, where he discovered defendant and his wife, garbed only in their

undershirts, engaged in sexual intercourse on the kitchen floor. When he appeared on the scene, his wife said, "You caught us good that time"; and he replied, "I should say I caught you." He then "took a drink of water and went back to bed," where he remained until morning, leaving the others in the kitchen. There was no talk between plaintiff and defendant until about a month later when he returned from a two weeks trip in the woods and discussed matters with defendant, who agreed "to behave himself," whereupon plaintiff returned to the woods, stayed until September, came home, broke up housekeeping and separated from his wife. Something over a year later, this suit was brought.

It may be that this remarkable story is true. The jurors accepted it and, as has often been said, they saw and heard the witnesses and are to judge of their credibility. The difficulty to be overcome in these proceedings, however, is not settled by merely applying to the case the wise and well established rule that the jury is the final arbiter in matters of fact, when acting without apparent bias or prejudice and understandingly. The more serious question arising before us is whether, even if the credulity of the Court may be strained to the point of accepting plaintiff's narrative thus endorsed by the jury, a verdict based upon it may properly be maintained.

A husband's connivance at the adulterous intercourse of his wife will bar him from maintaining an action against the participant in her improper conduct. Passive sufferance or connivance of the husband may be shown in bar of such an action, the proof of which may be made out by a train of conduct and circumstances. It is not necessary to prove an actual and specific fact of adultery even, and if a system of connivance at improper familiarity, almost amounting to proximate acts, be established, the Court will assume a corrupt intent as to the result. 2 Greenleaf on Evidence (1st Ed.) 39.

While the question of connivance is primarily of fact for the jury, it is not ordinarily susceptible of proof as an independent fact but is usually established as a conclusion from a line of conduct pursued by the husband in relation to his wife's intercourse with the party from whom he claims damages.

"Connivance may be the passive permitting of adultery or other misconduct as well as the active procuring of the commission." *Dennis* v. *Dennis*, 68 Conn., 194, 36 Atl., 36.

"If his conduct as established by undisputed evidence or admitted in his own testimony is such that a rational mind could draw no other conclusion therefrom than that he had consented actively or passively to the conduct of which he complained on the part of his wife and defendant, the question would become one of law for the Court, which in that event would not only be justified in taking the case from the jury but it would become its duty to do so." *Kohlhoss* v. *Mobley* (Md., 1905), 62 Atl., 236.

We have rehearsed the testimony of plaintiff at length in order that it may be clear that the case falls within the rules quoted. If plaintiff's testimony is accepted as the truth, he is guilty of connivance. If it is rejected as false, he is guilty of perjury. On either alternative, the verdict must be set aside.

Motion sustained.

INHABITANTS OF MADISON *vs.* INHABITANTS OF FAIRFIELD.

Somerset. Opinion, October 24, 1933.

PAUPER SETTLEMENT. DOMICILE.

To retain his home in a town, it is unnecessary that a person should at all times have some house or building, or room, to which he has a right to go.

The home which a person must have, for five successive years, without receiving supplies as a pauper, to acquire a settlement in a town, is equivalent to domicile, which depends upon residence and intention.

Brief absences, without intention to abandon home,—or, more accurately, perhaps, with the formed and determined intention of returning,—do not prevent the acquisition of a settlement.

In the case at bar, the facts were sufficient to establish that Bassett gained in his own right a settlement in Madison, and had such at the time of the supplies.

On report. Trial was had at the January term, 1933, of the Superior Court for the County of Somerset. After the evidence had been taken out, the cause was by agreement of the parties reported to the Law Court for its determination upon so much of the evidence as was legally admissible. Judgment for defendant. The case fully appears in the opinion.

Charles O. Small,

James H. Thorne, for plaintiff.

Paul L. Woodworth, for defendant.

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

DUNN, J. This case was reserved for final decision by this court on a report of the legally admissible evidence. The action is for the support of one William Elwood Bassett, and his wife and children, who derive their settlement from him as paupers. Inquiry is quite narrow in its scope. The decisive question is whether, under the statutes of this State, Bassett had his settlement in the defendant town of Fairfield, when, on the ninth day of August, 1930, he fell into distress in Madison, and received, for himself and family, the pauper supplies in suit.

William Elwood Bassett attained full age on the eighteenth day of July, 1924, having been born in wedlock on the nineteenth day of July, 1903, at Anson. His mother had a settlement, but his father then had none in Maine; the father may, however, have acquired one in Fairfield, as claimed by plaintiff, during the minority of the son. Since becoming a major, the younger Bassett had his home, and lived and supported himself — and, since his marriage in 1926, his dependents — continuously to the time of the supplies, in Madison, with the exception of three months in the summer of 1927, when he had employment in Connecticut.

In going from Madison and taking his family with him, there is ample evidence Bassett had a present definite intention of returning there. He went with his mother (who, divorced from his father, had remarried), and her husband, in their automobile, looking for work upon his own account and for his own benefit. He left simply for work and solely for work, intending to remain away only so long as he had a job. Except he had such, his purpose was "to come

back to Maine." He found employment, followed it, and continued in Connecticut until he could find no further work and his money gave out. He telegraphed to a friend in Norridgewock, Maine, for funds, and obtaining them, quitted the furnished rent he was occupying and started home, bringing his family and his few worldly possessions with him. On the way, he stopped at Norridgewock, to repay by his labor the thirty-five dollars which had been sent him to defray his travelling expenses; he continued thence to Madison, to his wife's parental house, to which, it is inferable, he had a right to return.

To retain his home in a town, it is certainly unnecessary that a person should at all times have some house or building, or room, to which he has a right to go. *South Thomaston* v. *Friendship*, 95 Me., 201, 49 Atl., 1056. The home which a person must have, for five successive years, without receiving supplies as a pauper, to acquire a settlement in a town (R. S., Chap. 33, Sec. 1, Cl. VI), is equivalent to domicile, which depends upon residence and intention. *Knox* v. *Montville*, 98 Me., 493, 495, 57 Atl., 792. Brief absences, without intention to abandon home — or, more accurately, perhaps, with the formed and determined intention of returning — do not prevent the acquisition of a settlement. *Ripley* v. *Hebron*, 60 Me., 379, 394; *Knox* v. *Montville*, supra; *Rumford* v. *Upton*, 113 Me., 543, 95 Atl., 226; *Eagle Lake* v. *Fort Kent*, 117 Me., 134, 137, 103 Atl., 10, 11.

Assuming, but not deciding — for decision would serve no ultimately essential purpose — that Bassett had a derivative settlement from his father in Fairfield, the facts are sufficient to establish (with the burden on the defendant), that he later gained in his own right a settlement in Madison, and had such at the time of the supplies. The plaintiff fails. The mandate to the Superior Court will be:

Judgment for defendant.

JOSEPH FRANCOEUR *vs.* WILMOT H. SMITH.

Kennebec. Opinion, October 24, 1933.

REFERENCE. RULES OF COURT.

In reference of cases by rule of court, decision of fact, honestly made, by the referee, in the proceedings, is final, provided there is supporting evidence.

In the case at bar, there was credible evidence that the defendant, through his employee, was guilty of negligence in the operation of the truck; that such negligence was the proximate cause of the collision; that the plaintiff was not guilty of contributory negligence.

On exceptions by defendant. An action of negligence arising out of a collision between automobile of the plaintiff and truck of the defendant. The cause was referred to a referee who found for the plaintiff and assessed damages in the sum of $95.00. To the acceptance of this report, defendant filed written objections which were overruled. Defendant seasonably excepted. Exception overruled. The case sufficiently appears in the opinion.

William H. Niehoff, for plaintiff.

Joly & Marden, for defendant.

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

DUNN, J. This common-law action of tort, for property damage arising from a collision between an automobile owned and operated by the plaintiff, and a truck owned by the defendant and being driven by his employee, was referred under a rule of court, with right to exceptions in matters of law.

The referee, after viewing the scene of the accident, hearing and considering the testimony of witnesses, and the arguments of counsel, found for the plaintiff; the award of damages was ninety-five dollars. The referee reported accordingly to the court of his appointment — the Superior Court in the County of Kennebec.

The defendant objected specifically in writing to the acceptance of the report. Objections were overruled; the report was confirmed and accepted as the basis for a judgment. Thereupon the defendant noted, and was allowed, an exception.

No mistakes of law are disclosed on an examination of the record.

Evidence before the referee tended to establish the plaintiff's contentions: (1) That the defendant (or what in law is the same thing, the employee for whose conduct he was responsible), was guilty of negligence in his operation of the truck; (2) that such negligence was the proximate cause of the collision; (3) that the plaintiff was not guilty of contributory negligence, that is, any such negligence as would make the injury the result of the united, mutual, concurring, and contemporaneous negligence of the parties.

There is evidence of counter tendency, but, with respect to the exception, the briefs of counsel discuss, and arguments at the bar are confined to, the question of contributory negligence only. As is always the case when there is any doubt as to the facts, or the inferences to be drawn from them, that question becomes one of fact. *Chaput* v. *Lussier*, 132 Me., 48, 165 Atl., 573.

In reference of cases by rule of court, decision of fact, honestly made by the referee, in the proceedings, is final, provided there is supporting evidence. Rules of Supreme Judicial and Superior Courts (rule XLII); *Hovey* v. *Bell*, 112 Me., 192, 91 Atl., 844; *Jordan* v. *Hilbert*, 131 Me., 56, 158 Atl., 853; *Hawkins* v. *Maine and New Hampshire Theaters Co.*, 132 Me., 1, 164 Atl., 628; *Staples* v. *Littlefield*, 132 Me., 91, 167 Atl., 171.

Exception overruled.

WILLIAM E. PERLIN

vs.

MAURICE E. ROSEN, AND TRUSTEES.

Cumberland. Opinion, October 24, 1933.

JURY FINDINGS. EXECUTORS AND ADMINISTRATORS.

Where questions submitted are simple issues of fact and the jury appears to have investigated those issues without prejudice or sympathy, their finding is conclusive.

In the case at bar, the Court holds that the exclusion of evidence that the plaintiff as administrator of the Zimmerman estate, had, previous to the transaction in question, had certain moneys come into his own possession, was not error; likewise that the refusal to refer the matter to an auditor was not error. The issue being purely of fact, and there being no evidence of prejudice or sympathy in the jury finding, the motion for new trial had no merit.

On exceptions and general motion for new trial by defendant. An action of assumpsit to recover the sum of $1500.00 and interest, which the plaintiff claimed he delivered to the defendant as a loan. Defendant pleaded the general issue, and filed an account in set-off. Trial was had at the March Term, 1933, of the Superior Court, for the County of Cumberland. The jury rendered a verdict for the plaintiff. To the refusal of the Court to admit certain testimony, and to certain rulings of the Court, the defendant seasonably excepted, and after the jury verdict filed a general motion for new trial.

Exceptions overruled. Motion overruled. The case fully appears in the opinion.

Harry E. Nixon,
Wilfred A. Hay, for plaintiff.
Franklin Fisher, for defendant.

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

DUNN, J. The initial issue between these parties was whether or not, on the twenty-eighth day of November, 1930, plaintiff delivered $1500 in cash to the defendant as a loan. The plea was the general issue; there was also an account in set-off. The jury found a verdict for the plaintiff, expressly determining concerning the set-off, that nothing was due the defendant. The award of damages to the plaintiff is $1611.12, an amount sufficient to include the original claim, with interest from the date of the writ.

At the trial numerous exceptions were taken and have been perfected. They go to the exclusion of evidence to show that certain moneys had, before the transaction in question, come to the possession of the plaintiff, in his capacity as one of the two administrators of the estate of Pauline Zimmerman, a person deceased, intestate; to refusals of the trial judge to give requested instructions, one being, in effect, that any possible indebtment of defendant to plaintiff was of the sum of $274.63 only; and to the judge's refusal, at the start of the case, again during its progress, and still again at the conclusion of all the evidence, to order the action to an auditor.

Upon affirmation of the verdict, defendant filed to this court a motion for a new trial. In his brief, and in oral argument, counsel relies upon the sole ground that the finding of the jury is against the evidence.

There was room in the plaintiff's evidence, standing by itself, for the jury to find his cause of action sufficiently established to justify a verdict in his favor. Such evidence was, to be sure, rebuttable. The defendant introduced evidence tending to show that the plaintiff, as administrator, was in arrears to the estate, and that of the $1500, (conceding it, for argument's sake, traced to defendant's hands, under circumstances indicative of a lending,) he, as attorney for the then administrator, applied all but $274.63 toward the discharging of his client's arrearage.

Other testimony was introduced to establish that the defendant, having, as attorney, funds of the intestate's estate, improperly used such funds for his own private benefit, and that, on the probate court in Cumberland county calling the administrator to a just accounting, defendant agreed with attorneys representing

decedent's kindred to pay, and did pay, for the use he himself had had, and as well for that by the plaintiff too, of the estate moneys, the sum of $2500. For one-half of such amount, less the $274.63 mentioned before, defendant sought to recover, under the set-off, as on an implied contract.

Neither in any exception to evidence offered and excluded, nor in any exception to refusals to instruct the jury, suffice it to say, is there merit. With respect to the refusals to send the case to an auditor, there is no suggestion of any abuse of judicial discretion. It is manifest, as was outlined in the commendably clear instructions of the judge to the jury, that, in that forum, no especial examination of accounts or investigation of vouchers was requisite.

The motion for a new trial also merits little space. The questions presented were those peculiarly and eminently the province of the jury to decide. They were simple issues of fact. The jury appears to have investigated those issues without prejudice or sympathy, solely with a view of arriving at the truth, and to have returned a verdict which settles the controversy.

Exceptions overruled.
Motion overruled.

GEORGE GAGNON *vs.* FRED E. BEANE AND TRUSTEE.

Somerset. Opinion, October 25, 1933.

CONTRACTS.

In an action to recover for personal services under a written contract wherein plaintiff undertook to clear a certain flowage area on the east bank of the Kennebec River above the Wyman Dam, for which plaintiff was to receive from the defendant sixty dollars per acre of area cleared;

HELD

The construction of such a contract was for the Court. The jury finding that the plaintiff was entitled to pay for clearing the entire forty-eight acres claimed

by him in addition to sums already paid him, was based on an erroneous construction of the contract.

On motion for new trial by defendant. An action brought to recover sums alleged to be due for services under a written contract. Trial was had at the January Term, 1933, of the Superior Court, for the County of Somerset. The jury rendered a verdict for the plaintiff in the sum of $3,225.60. A general motion for new trial was thereon filed by the defendant. Motion sustained. The case fully appears in the opinion.

James H. Thorne,
Gower & Eames, for plaintiff.
Butler & Butler,
Perkins & Weeks, for defendant.

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

PATTANGALL, C. J. On motion. Action brought to recover amount claimed to be due for services performed under the terms of a written contract, together with two items totalling $57 not directly connected with the principal issue involved and not in serious dispute. Verdict for plaintiff for $3,225.60, an amount $80 in excess of the entire amount claimed and interest thereon. Plaintiff agrees that a remittitur for this excess should be filed if the verdict is otherwise sustained.

In the fall of 1929 the defendant, Fred E. Beane, had entered into a written contract with the Central Maine Power Company whereby he undertook to clear land on both banks of the Kennebec River in the flowage area above the Wyman Dam. This contract covered a large area and it became necessary for Mr. Beane to sub-contract certain portions of the work. On November 27, 1929, plaintiff entered into a written contract with defendant Fred E. Beane, whereby he undertook to clear the flowage area on the east bank of the Kennebec River north of the Clarence Andrews farm between certain lines indicated as "contour lines 445 and 485." Between these lines the area was to be "cleared of all trees, bushes, slash and all other debris which might interfere with the construction or operation of the hydro-electric plant at said Wyman Dam

. . ."; and for this work the plaintiff was to receive from the defendant sixty dollars "per acre of area cleared . . .," in addition to which he was to receive $7 per cord for cordwood cut by him on the premises and delivered at designated points, $6 per cord for pulpwood, and $10 per thousand feet for merchantable logs of certain described kinds and sizes so cut and delivered.

The total area between the contour lines was 224 acres, of which 132 acres were wooded and 92 acres field and pasture. Plaintiff admits having received pay for clearing 176 acres. Defendant claims to have paid him for clearing 183 acres, but asserts that in doing so he overpaid plaintiff something over $300 and that this overpayment was accepted by plaintiff in full settlement of all matters between them, certain items of which were in dispute.

Aside from the question of this alleged settlement, which plaintiff denies, the sole issue submitted to the jury was as to the right of plaintiff to recover $60 per acre for the entire acreage embraced in the area bounded by the contour lines or to be limited, as defendant claimed, to the actual acreage cleared by plaintiff exclusive of the farm lands lying within the territory involved in the contract.

The construction of the contract was for the Court and the jury were presumably correctly instructed that the contract was not to pay $60 per acre for the entire area but "$60 per acre of area cleared" and that if there was any portion of the land which was already cleared, plaintiff was not entitled to pay for that portion. The evidence as to just how many acres should be excluded by the application of this theory was not entirely clear, but there was no question but that it comprised a large part, possibly the whole, of the 48 acres in dispute. Notwithstanding this, the jury found that plaintiff was entitled to pay for the entire 48 acres.

Plaintiff admits being paid for clearing 176 acres. Defendant claims to have paid him for 183 acres. There were 224 acres in the tract. The engineer, employed by plaintiff and called by him as a witness, testified that about one quarter of the 176 acres paid for was made up of old fields and pasture, that it included all the land on which cutting was done, and that the remainder consisted of tillage land, mowing fields and cleared pastures.

Defendant introduced evidence of former occupants of farms included in the area covered by the contract and of engineers in charge of the work, tending to show that there was little or no work either of cutting or clearing to be done on approximately 50 acres of the land and that no such work was done on that much of the land.

Plaintiff claimed that he did some work such as taking down fences, clearing up around stone walls and removing small bushes even on the portion of the land which had been in cultivation the year before he began his operation. Taking his evidence as a whole, however, supplemented by that of his engineer and other witnesses called by him, the record does not justify the conclusion that under a proper construction of the contract he could be entitled to pay for clearing the entire 48 acres claimed by him. The jury must have based its verdict on an erroneous construction of the contract.

The evidence in favor of defendant's contention that a settlement was arrived at between the parties and that plaintiff had been paid in full is strong and persuasive, but there was an opportunity for honest difference of opinion on this point, and the finding of the jury regarding it could not be disturbed by this Court. It is, however, not important in our present consideration.

The evidence viewed from the standpoint of plaintiff in its most favorable light does not warrant a verdict for the entire amount claimed by him, and it is impossible on this record to cure the defect by a remittitur. There is but one course to follow, namely to set aside the verdict.

Motion sustained.

KIMBALL'S CASE.

Penobscot. Opinion, November 3, 1933.

WORKMEN'S COMPENSATION ACT. WORDS AND PHRASES.

Under the Workmen's Compensation Act, where the employment requires the employee to drive on the highway, and accident causes injury to the latter when he is using the highway in pursuance of his employment, or in doing some act incidental to his employment, with the knowledge and approval of the employer, such injury is compensable.

Illegality of a plaintiff is no bar to his recovery for an injury, unless his illegality is a cause directly contributing to the injury.

The right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobedience in no way contributed to the injury.

In the case at bar, the license of the deceased to operate a motor vehicle on a public highway had been suspended a long time prior to the day of the accident. It was not shown, however, that his failure to have a license in any way contributed to the injury.

A Workmen's Compensation Case. On appeal by petitioner from decree of a single Justice affirming decree of Industrial Accident Commission denying the petitioner compensation. The Commissioner found that deceased was not in course of his employment because operating a motorcycle without a driver's license. Appeal sustained. Costs awarded. The case fully appears in the opinion.

George S. McCarty, for petitioner.

William B. Mahoney, for respondent.

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

BARNES, J. The case at bar arose under the Workmen's Compensation Act, upon petition of Florence E. Kimball, to secure compensation for the loss of her husband, John A. Kimball, who died after a highway collision on the eighth day of October, 1932.

The Commissioner dismissed the petition. Pro forma ruling of the lower court sustained the ruling of the Commissioner and the widow took her appeal. The facts seem to be as follows, at the time of the collision, and from November, 1930, thereunto, the deceased, John A. Kimball, was in the regular employ of the Ham Realty Company, a corporation, as a collector and salesman.

He lived, with his wife and one child, in Lewiston, in this state. For the last months of his life his work was mainly collecting accounts of his employer, and necessitated travelling from place to place within the state and even beyond its borders. On the morning of the accident he called at the home of the treasurer of his employer, received instructions to collect of a man in Brownville; was given some expense money and started, by motorcycle, across the state.

On a highway, between the towns of Dexter and Dover-Foxcroft he was in collision with an automobile, and received injuries from which he died on that day. It is agreed that petitioner is the dependent widow of the deceased John A. Kimball.

It is further agreed that the right of the deceased to operate a motor vehicle on the public highway, formerly his by virtue of a state license had been suspended long prior to the day of the accident.

Because the rider was not in possession of a license to operate a motor vehicle at the time of the collision on a highway, the Commissioner ruled that he was not then and there in the course of his employment.

In the Commissioner's words, "Kimball, when injured, was not in a place where his duties reasonably provided that he should be when he was at the handle-bars of that motorcycle on the road from Dexter to Dover. He was not 'in the course of his employment,' as the courts have defined and developed that phrase. * * * Three elements are necessary for an employee to be 'in the course of his employment.' It is not enough that the accident occur during the period of employment and that the employee, when hurt, is about his employer's business. A third element must be present; the employee, when hurt, must have been at a place where, to quote the language in Fournier's case, supra, 'the employee reasonably may be in the performance of his duties,' or, stated in the language

of Butler's case, supra, 'at a place where the workman may properly be found.' "

However loath courts may have been to class a hazard of the streets, common to all users thereof, as producing compensable injury if accident thereon occur to an employee, the consensus of a great majority of the State courts is that where the employment requires the employee to travel on the highway, and accident causes injury to the latter when he is using the highway in pursuance of his employment, or in doing some act incidental to his employment, with the knowledge and approval of his employer, such injury is compensable.

It is said that Massachusetts is "the only jurisdiction recently passing upon this question, to take a contra view."

As to liability for highway injury to employee soliciting orders making deliveries or collecting bills, see *Dennis* v. *White & Co.*, 15 C. A., 294, 2 K. B. Div. 1916 (Eng.) 1, cited in 80 A. L. R., P. 125, and there characterized "as one of the most important decisions under the compensation acts ever handed down."

To the same result: *Ridenour* v. *Lewis*, 121 Neb., 823, 238 N. W., 745, 1931; *Lawrence* v. *Matthews*, 1 K. B., 1, 63 A. L. R., 456 (1929); *Stevens* v. *Indiana Commission*, 346 Ill., 495, 179 N. E., 102; *Harby* v. *Marwell Bros.*, 203 App. Div., 525, 196 N. Y. Supp., 729, affirmed without opinion in (1923) 235 N. Y., 504, 139 N. E., 711; Re: *Raynes*, 66 Ind. App., 321, 118 N. E., 387, *Haddock* v. *Edgewater Steel Co.* (1919) 263 Pa., 120, 106 Atl., 196, *London & L. Co.* v. *Ind. Acc. Commission* (1917) 35 Cal. App., 681, 170 Pac., 1074; *Parrish* v. *Armour & Co.*, 200 N. C., 654, 158 S. E., 188; *Central Surety & Ins. Co.* v. *Court*, 36 S. W., (2nd Series), 907, Tenn., 1931.

That when injured the plaintiff was not licensed to operate a motor vehicle has been held not to bar him from recovery.

Illegality of a plaintiff is no bar to his recovery for an injury, unless his illegality is a cause directly contributing to the injury. *Bourne* v. *Whitman*, 209 Mass., 155, 168.

"But we are of opinion that his (plaintiff's) failure in that respect (failure to have a license) is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of the plaintiff, it is

shown to be a contributing cause to the injury sued for, in which case it is a bar to recovery. We think that the operation of a car without a license, while it is a punishable act, does not render the operator a trespasser on the highway, but that the illegal element in the act is only the failure to have a license while operating it, so that if the operation and movement contributed to the accident with which the want of a license had no connection, except as a mere condition, they would not preclude the operator as a plaintiff from recovery.

"If the illegal quality of the act had no tendency to cause the accident, the fact that the act is punishable because of the illegality, ought not to preclude one from recovery for harmful results to which, without negligence, the innocent features of the act alone contributed." *Idem*—171.

True, the case above cited is an action in tort. It is decided on the familiar principle that the right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobedience in no way contributed to the injury. He is not placed outside the pale of the law merely because he was committing a misdemeanor.

We hold the rule to be the same under the Workmen's Compensation act.

And so finding, it is ordered that costs be awarded by the Justice below, including reasonable attorneys' fees.

Appeal sustained.

ALMA RICHARD, PRO AMI, *vs.* MAINE CENTRAL RAILROAD CO.

HENRY RICHARD *vs.* MAINE CENTRAL RAILROAD CO.

ADELARD C. SYLVESTER *vs.* MAINE CENTRAL RAILROAD CO.

MARION SYLVESTER, PRO AMI, *vs.* MAINE CENTRAL RAILROAD CO.

Cumberland. Opinion, November 3, 1933.

NEGLIGENCE. MOTOR VEHICLES. RAILROADS.

The rights of a railroad and the travelling public to the use of a highway at a grade crossing are reciprocal. The only superior right of the railroad is the right of passage. As an incident to this the railroad may stop its train across a highway temporarily blocking it but, under such circumstances, the use which it makes of the way must be such as is reasonably necessary to enable it to perform its duties as a common carrier.

The leaving of an unlighted obstruction on a highway at night creates a hazard for travelers. Whether such obstruction was the proximate cause of an injury depends upon the circumstances of each individual case, and particularly on whether or not the traveler in the exercise of due care should have seen it and avoided a collision.

In the case at bar, the plaintiffs had the burden of establishing their own due care and the negligence of the defendant. Though passing through a fog which obscured vision it was not as a matter of law the duty of the passengers to get out and walk. The question was whether or not they used reasonable precautions under the conditions. This was for the jury.

Whether the obstruction of a highway by a standing train is negligence depends on whether or not the conduct of the railroad is reasonable. This question and the issue whether or not negligence, if found, was the proximate cause of this accident were for the jury.

On exceptions by plaintiffs. Separate actions by two infants to recover damages for personal injuries alleged to have been sustained through negligence of the defendant; and separate actions by the respective fathers of said infants to recover for loss of serv-

ices of the infants and expenses incurred for them as result of said injuries. Trial was had at the April Term, 1933, of the Superior Court for the County of Cumberland. At the close of plaintiffs' testimony the presiding Justice granted defendant's motion for a nonsuit. Exceptions were taken by each plaintiff. Exceptions sustained. The cases fully appear in the opinion.

Ellis L. Aldrich, for plaintiffs.

Perkins & Weeks, for defendant.

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

THAXTER, J. These cases arise out of a collision between an automobile, in which two of the plaintiffs were passengers, and a freight train standing on a highway crossing. In two of the cases the plaintiffs who are minors bring suit for personal injuries, in the other two their respective fathers seek to recover for medical expenses. At the conclusion of the plaintiff's evidence the presiding Justice directed a nonsuit, and the cases are before us on exceptions to this ruling.

On December 28th, 1932, about eight o'clock in the evening the two plaintiffs, Alma Richard and Marion Sylvester, were riding in an automobile with one Robert Morse on the Growstown Road so called in Brunswick. He was driving. Miss Richard sat next to him and Miss Sylvester beside her, all on the front seat. The night was foggy. Dr. Foss, who arrived soon after the accident, testified that it was one of the thickest nights that he ever knew. Across the highway on which the plaintiffs were proceeding was a railroad crossing of the defendant. This was not protected by gates or automatic signals of any kind, and there were no important street lights in its vicinity. There were the usual signs without illumination warning travellers of the presence of the railroad. As the automobile approached this crossing the driver reduced his speed and proceeded very slowly. The windshield in front of the passengers was covered with mist. The wiper in front of the driver was operating, but in order to see better he had lowered the window on his side of the car and was leaning out as he approached the track. A freight train had been stopped on this crossing for fifteen minutes.

There was no sound and there were no trainmen there. No one of the occupants of the automobile saw or heard anything to indicate that the road was blocked, until a collision took place with a box car of the train which was across the highway.

The facts of this case raise an issue not heretofore directly before the Court in this state. The plaintiffs had the burden of establishing first their own due care, and secondly the negligence of the defendant. The duty of passengers in automobiles has been many times discussed by this Court. In this instance the vision of the girls was obscured. They were, however, proceeding at a very moderate rate of speed, and they knew that the driver was peering out beyond the side of the car in an attempt to better discern objects ahead of him. Though passing through a fog which obscured vision, it was not as a matter of law their duty to get out and walk. The question is whether they failed to take reasonable precautions under the conditions. *Cole* v. *Wilson*, 127 Me., 316, 143 A., 178. This was for the jury.

The real issue stressed in this case is as to the defendant's negligence. The rights of a railroad and the travelling public to the use of a highway at a grade crossing are reciprocal. *Continental Improvement Co.* v. *Stead*, 95 U. S., 161, 24 L. Ed., 403. The only superior right of the railroad is the right of passage. *Mitchell* v. *Bangor & Aroostook Railroad Co.*, 123 Me., 176, 122 A., 415. As an incident to this it may well be that the railroad may stop its trains across a highway and temporarily block it; but under such conditions the use which it makes of the way must be such as is reasonably necessary to enable it to perform its duties as a common carrier. The statutes of our state recognize this principle when they provide that "no way shall be unreasonably and negligently obstructed by engines, tenders, or cars." Rev. Stat. 1930, Ch. 64, Sec. 79. The railroad itself acceded to it when it adopted Rule 103D which reads as follows: "No train or engine will obstruct any highway for a longer period than five consecutive minutes. Conductors will be particular to uncouple their trains and clear the crossings if they find it necessary to remain longer."

It is indisputable that leaving an unlighted obstruction in a highway at night creates a hazard for travellers. It makes but

little difference whether this be an excavation, *Kendall* v. *City of Des Moines*, 183 Ia., 866, 167 N. W., 684, an automobile, *Rice* v. *Foley*, 98 Conn., 372, 119 A., 353, a railroad crossing gate, *Record* v. *Pennsylvania Railroad Co.*, 76 N. J. L., 800, 72 A., 62, or a freight car, *Mann* v. *Central of Georgia Railway Co.*, 43 Ga. App., 708, 160 S. E., 131. Whether such obstruction may be the proximate cause of an injury depends on the circumstances of each individual case, and particularly on whether or not the traveller in the exercise of due care should have seen it and have avoided a collision with it. The rule governing the liability of a railroad for negligence in leaving a train across a highway is well stated in *Trask* v. *Boston & Maine Railroad*, 219 Mass., 410, 414, 106 N. E., 1022, 1024, in the following language: "In order to charge the defendant with negligence it must be found that its employees, in the exercise of reasonable care, would have known that on account of the darkness the cars upon the crossing were such an obstruction that people travelling along the highway, in an automobile, at a reasonable rate of speed, properly equipped with lights and carefully operated, would be liable to come in collision with them." This doctrine is expressed in substantially similar language in the following cases. *Gage* v. *Boston & Maine Railroad*, 77 N. H., 289, 90 A., 855; *Gulf, M. & N. R. Co.* v. *Kennard*, (Miss. 1933), 145 So., 110; *St. Louis & San Francisco Ry. Co.* v. *Guthrie*, 216 Ala., 613, 114 So., 215. There seems to be no real conflict as to the rule but difficulties arise in the application of it to a particular case. The facts in many cases cited by counsel for the defendant are distinguishable from those before us.

In the very case which lays down the above rule it is pointed out that the driver of the automobile could have seen a distance of one hundred feet ahead and could have stopped his car within forty feet. The cause of the accident was therefore the negligence of the driver of the car and not of the railroad. In the same general category fall the following cases. *Gage* v. *Boston & Maine Railroad*, supra; *Gulf M. & N. R. Co.* v. *Kennard*, supra; *Crosby* v. *Great Northern Ry. Co.* (Minn. 1932), 245 N. W., 31; *St. Louis & San Francisco Ry. Co.* v. *Guthrie*, supra; *Gallagher* v. *Montpelier & Wells River Railroad*, 100 Vt., 299, 137 A., 207; *Philadelphia &*

Reading Railroad Co. v. *Dillon*, 31 Del., 247, 44 A., 62; *Scott* v. *Delaware, L. & W. R. Co.*, 226 N. Y. S., 287; *Witherly* v. *Bangor & Aroostook Railroad Co.*, 131 Me., 4, 158 A., 362.

Still other cases are distinguishable because the evidence discloses that at the time of the collision the trainmen had had no opportunity to warn the approaching automobile. *Yardley* v. *Rutland Railroad Co.*, 103 Vt., 182, 153 A., 195.

In those cases where the facts are analogous to those before us the Courts have held that the issue of the defendant's negligence was for the jury. *Mann* v. *Central of Georgia Railway Co.*, supra; *Bober* v. *Southern Railway Co.*, 151 S. C., 459, 149 S. E., 257; *Prescott* v. *Hines*, 114 S. C., 262, 103 S. E., 543.

In *Witherly* v. *Bangor & Aroostook Railroad Co.*, supra, this Court laid down the rule, page 7, that "Negligent obstruction of a highway by a standing train is determined by whether, under all the circumstances, it is reasonable or otherwise." Whether in the case before us the occupation of the railroad crossing without a warning to travellers was reasonable depended on a number of factors, the length of time that the train remained standing and the opportunity thus given the trainmen to display warning signals or to uncouple the train, the visibility, atmospheric conditions, the purpose for which the train stopped, and doubtless others.

On the plaintiffs' evidence taken most favorably for themselves the question of the reasonableness of the defendant's conduct, and whether its negligence, if found, was the proximate cause of the accident were for the jury.

Exceptions sustained.

FREIDA A. BLOCK

vs.

SHAINA BLOCK, ETHEL GORDON AND SARAH BLOCK.

Cumberland. Opinion, November 9, 1933.

HUSBAND AND WIFE. PARENT AND CHILD. ALIENATION OF AFFECTIONS. DAMAGES.

Although a parent may not with hostile, wicked or malicious intent alienate the affections of her married son, yet she may advise that the marriage relation be broken up if, on reasonable grounds, she believes that a further continuance of it tends to injure the health or destroy the peace of mind of the child so that he would be justified in leaving.

The parent may in such a case persuade the child and may use proper and reasonable arguments to that end.

And though it turn out that the parent acted on mistaken premises or false information, or that her advice and interference may have proved unfortunate, still, if she acts in good faith for the child's good upon reasonable grounds of belief, she is not liable for damages for the separation which results.

Malice is not presumed. It must be proved.

Under special circumstances, the same rule applies in actions for alienation of affections against brothers and sisters.

But if in an action by a wife, there is evidence upon which the jury would have a right to find that a parent, or brothers and sisters who stand "in loco parentis," have actively interfered to cause a son and brother to abandon the wife, and have deprived her of his affections and the comfort and solace of his society, and have done this through hatred or malice towards the wife and not for the purpose of affording a proper protection to the husband and furthering his true welfare, the case is for the jury and, if the facts so in evidence are deemed proved, recovery must be granted.

In the case at bar, the story of the plaintiff, if believed, disclosed a malicious alienation of the affections of her husband by these defendants, actuated by a dislike and ill-will towards the plaintiff growing out of their own personal

quarrels with her, rather than from a justifiable solicitude for the son and brother in an intended furtherance of his welfare and happiness.

The jury saw and heard the plaintiff and her witnesses and there is nothing in the evidence which leads the Court to conclude that they did not have a right to believe them.

The damages awarded, while liberal, were not manifestly excessive on the case made out by the plaintiff. She had a right to the affection of her husband, such as it was, and such support and maintenance as he could give her, and for its loss she was entitled to compensation. She also had a right to damages for the humiliation which she endured as the result of her abandonment, and punitive damages were not unwarranted.

On general motion for a new trial by defendants. An action on the case for alienation of affections, brought by a wife against the husband's mother and sisters. Trial was had at the October Term, 1932, of the Superior Court, for the County of Cumberland. The jury rendered a verdict for the plaintiff in the sum of $4,500.00. A general motion for new trial was thereupon filed by the defendants. Motion overruled. The case fully appears in the opinion.

J. E. F. Connolly,

Arthur D. Welch, for plaintiff.

Frank A. Tirrell, Jr., for defendants.

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

STURGIS, J. This action on the case for the alienation of the affections of the plaintiff's husband comes before this Court on a general motion for a new trial. The defendants, who are respectively the mother and sisters of the husband, are sued jointly, and a verdict against them for $4,500 was given in the trial court. The action is brought under Section 7 of Chapter 74 of the Revised Statutes.

The plaintiff, whose maiden name was Freida Seigal and lived in Portland, Maine, was married on May 24, 1931, to Myer Block of Thomaston. They and their families are Jewish people and the marriage was brought about in accordance with their customs and the tenets of their religion. They met at the instance of matchmakers, their courtship followed only after a parental conference

and approval, and their engagement and wedding, attended by the customary formalities and ceremonies, were supervised and directed by their families. The parents of the young man were getting along in years and both were in poor health, and it was their desire that their son, who ran the farm on which they lived, should marry and bring back a wife to assist in the maintenance of the home. One of their daughters had married and moved away and the other, employed as a bookkeeper in a nearby city, was no longer willing, if able, to carry the burden of the housework. It can not be doubted, when this record is read, that Myer Block was led into this marriage by the promptings and insistence of his family and, with him, it was more a matter of duty and convenience than of desire or affection for the woman who had been chosen for him. It must be assumed also that the situation was not very different with the girl. She had no acquaintance with young Block until the matchmakers brought them together, and in the following two years which passed before they were married, she saw him but a few times and then only for short periods. He was by no means an attentive or ardent lover and it is difficult to believe that he awakened in the plaintiff any real love or affection for him. This is the situation, as portrayed by the evidence, when this couple were married, and it furnishes some explanation of their rather extraordinary subsequent experiences.

The honeymoon was spent, for the night of the wedding, at a local hotel and, for the rest of the week, in Portland at the house of the bride's mother. The plaintiff's story, as she told it to the jury, is that, finding her husband apparently normal physically, she was kissed and caressed by him in her marriage bed and, though he protested his love and solicited intercourse and she was willing, when her consent was given, it was rejected with the explanation that he had been told by his family to wait a year. While the couple stayed in Portland, the husband continued his refusal to have intercourse, and there was no change when a few days later he took his wife to Thomaston and installed her as a member of his parents' household. She lived with him in this unusual and unnatural manner, except as she came to Portland for short visits, until the following fall when, as she says, her husband, having sent her to her mother with a promise to join her in a few days and arrange for a

different home, failed to come to her, went to Massachusetts to live, and refused to allow her to again live with him. A physician whose statement can not be questioned verifies the plaintiff's claim of virginity and the husband confirms it, asserting, however, that the fault was the woman's, that she at all times repelled his advances, even to the extent of using force, and though he sought intercourse, he was unable to overcome her resistance.

Within a week after Myer Block came to his parents' home, trouble arose in the family. It is very apparent, as is often the case in certain families, that Shaina Block, the young man's mother, ruled her household and demanded and received almost implicit obedience from the members of her immediate family. Her dominion over her son, as well as her other children, was practically complete and her word was law. This situation was not changed when the son married. The mother-in-law received the young bride into her home at first in a friendly and kindly spirit, but within a few days turned against her. The plaintiff told the jury nothing she did suited her mother-in-law, who pronounced her no good, without brains, and unfit to be a wife for the son. She says she was not allowed to join the family at their meals, but was compelled to cook her own food and eat alone. She insists that her request to her husband that they be given the use of empty rooms upstairs for an apartment was denied by Mrs. Block with the statement, "No, sir; she don't deserve any home and she can go where she belongs." She told the jury that her husband left money in his clothes for her and the mother-in-law took it and, upon the wife's protest, said, "I will try to separate Myer and you." Continuing her story, this plaintiff says that her husband's mother repeatedly in her presence advised him to get rid of her, admonished him not to have intercourse with her, and advised that, if this continued for six months, a separation could be obtained. In short, this plaintiff's testimony is, and there is some corroboration, that her mother-in-law, without just cause, developed an intense hatred for her, belittled her to others and particularly her husband, treated her harshly and, dominating the husband as she had before his marriage, advised and induced him to continue withholding his love from his wife, and finally to send her away and refuse to allow her to return.

As the plaintiff portrays her married life, however, her unhappiness and the loss of her husband's society and affection are in part chargeable to other members of his family. There was a sister, Sarah Block, who, although she worked in the daytime, lived with her parents on the farm at Thomaston and was one of the family circle. Another sister, Ethel Gordon, married and living in Rockland, was a frequent visitor and at times spent weeks with her family at the Block homestead, and, without going into the details of the testimony as it affects these women, both named as defendants, it is sufficient to state that there is evidence which, if believed, shows clearly that these sisters-in-law of the plaintiff joined their mother, Shaina Block, in her disapproval of their brother's wife, at times refused to speak to her, called her a greenhorn, and unfit to associate with them, and to their brother added their advice that she was no good and he ought to get rid of her and, learning that the couple were not living as man and wife, advised him to keep away from her and separate from her. The same line of testimony indicates that they conferred with their mother on this matter, supported her in her denouncements of the plaintiff and advices to the husband, and joined with her in an effort which eventually culminated in a full and complete alienation of such affections as this husband had for his wife and her abandonment by him.

The defendants insist that they at all times were kind and considerate to the plaintiff and continually endeavored to make her happy and contented. They assert that they tried to keep the young couple together and never in any way suggested or encouraged an unconsummated marriage or a separation of the spouses. They charge the plaintiff with a violent temper, a distaste for life on a farm, a disrespect for her mother-in-law, and a constant quarreling with her husband, but do not admit that on those grounds or any other they lost their affections for her or interfered with her relations with her husband. In pleading and proof, they deny the allegations of the plaintiff's writ in toto, and contend that the plaintiff lost the society and affection of her husband solely through her own treatment of him, his distaste for and dissatisfaction with married life, and his voluntary abandonment of it.

The law applicable to this case is well settled. Although a parent may not with hostile, wicked or malicious intent alienate the affec-

tions of her married son, yet she may advise that the marriage relation be broken up if, on reasonable grounds, she believes that a further continuance of it tends to injure the health or destroy the peace of mind of the child so that he would be justified in leaving. A parent may in such case persuade the child. She may use proper and reasonable arguments and, though it turn out that the parent acted on mistaken premises or upon false information or that her advice and interference may have proved unfortunate, still, if she acts in good faith for the child's good upon reasonable grounds of belief, she is not liable to the wife. Malice is not presumed. It must be proved. *Wilson* v. *Wilson*, 115 Me., 341, 98 A., 938; *Shalit* v. *Shalit*, 126 Me., 291, 138 A., 70; *McCollister* v. *McCollister*, 126 Me., 318, 138 A., 472; *Miller* v. *Levine*, 130 Me., 153, 154 A., 174. And it may be conceded that there is abundant authority for the application, under special circumstances, of the same rule in actions against brothers and sisters. *Powell* v. *Benthall*, 136 N. C., 145, 48 S. E., 598; *Luick* v. *Arends*, 21 N. D., 614, 132 N. W., 353; *Ratcliffe* v. *Walker*, 117 Va., 569, 85 S. E., 575; *Baird* v. *Carle*, 157 Wis., 565, 147 N. W., 834. But if in an action by a wife there is evidence, upon which the jury would have a right to find that a parent, or brothers and sisters who stand "in loco parentis," have actively interfered, to cause a son and brother to abandon the wife, and have deprived her of his affections and the comfort and solace of his society, through hatred or malice toward the wife and not for the purpose of affording a proper protection to the husband and furthering his true welfare, then, even within the rule just stated, the case is for the jury and, if the facts so in evidence are deemed proved, recovery must be granted.

Although counsel for the defendants, on the brief, argues the point, the defendants themselves nowhere in their pleading or proof attempt to set up any justification for an interference on their part in this plaintiff's domestic relations. As already stated, they insist that they did not interfere. That was their testimony upon the stand, and upon it they rested their defense. Justifiable solicitude for and advice to the son and brother in the intended furtherance of his welfare and happiness is not the case they present.

The issue before this jury was clear. The story of the plaintiff, if believed, disclosed a malicious alienation of the affections of her

husband by these defendants, actuated by a dislike and ill-will towards the plaintiff, growing out of their own personal quarrels with her, which began with the defendant Shaina Block and was joined in, with concert of mind and action, by her daughters, Sarah Block and Ethel Gordon. The jury saw and heard the plaintiff and her witnesses and there is nothing in the evidence which leads us to conclude that they did not have a right to believe them. Doing so, a finding that the defendants were liable was just and proper.

The damages awarded, while liberal, are not manifestly excessive on the case made out by the plaintiff. As unworthy as this husband appears to have been, in actions unsexed or the puppet of family control, a man without a trade and without means or home of his own, still, if she desired his company, his affection such as it was, and such support and maintenance as he could give her, she had a right to it, and for its loss she is entitled to compensation. She was entitled to damages for the humiliation which she endured as a result of her abandonment. Punitive damages were not unwarranted. *Allen* v. *Rossi*, 128 Me., 201, 146 A., 692. All these elements of damage the jury undoubtedly weighed in the scales of their judgment and experience as they fixed the amount of the award. No sufficient reason appears for declaring their verdict manifestly wrong.

Motion overruled.

EDITH CHRISTIAN *vs.* WALTER POMEROY.

Androscoggin. Opinion, November 13, 1933.

NEGLIGENCE. RES JUDICATA. DAMAGES.

No party may be denied a day in court unless a judgment on the merits, in an action for the same cause between the same parties, has been rendered.

The result of a former trial, in which the plaintiff was not a party, neither acts as an estoppel against him nor otherwise acts as a bar to his action.

In the case at bar, the verdict for the plaintiff was warranted. Questions of fact involved permit discussion and difference of opinion, but findings of the jury can not be said to be unsupported by evidence.

Damages, however, were excessive, and plaintiff was ordered to file a remittitur of all in excess of $1,000.00, otherwise a new trial was ordered.

An action on the case to recover for personal injuries sustained by plaintiff, a passenger in an automobile, in collision with automobile of the defendant on the state highway, leading from Sabattus to Gardiner. Trial was had at the April Term, 1933, of the Superior Court for the County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $3,141.67. To the allowance of an amendment to plaintiff's declaration, defendant seasonably excepted and, after the jury verdict, filed a general motion for new trial. Exceptions overruled. Motion sustained unless within thirty days from filing of the mandate plaintiff files a remittitur of all of the amount recovered in excess of $1,000. The case fully appears in the opinion.

Frank T. Powers, for plaintiff.

John G. Marshall,

Fred H. Lancaster, for defendant.

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

PATTANGALL, C. J. Motion and exceptions. Action to recover damages sustained in automobile collision resulting from alleged negligence of defendant. Verdict for plaintiff. Damages assessed in the sum of $3,141.67.

It is unnecessary to relate the details of the case. The defense was not without merit and the record presents close questions of fact. Concerning them, however, it is sufficient to say that the verdict is supported by evidence which the jury had a right to believe and that its decision must be respected at least so far as liability is concerned. The issues involved are not for decision by this Court in the first instance, and on this record we can not rightfully disturb the findings of the original triers of fact.

The exceptions relate to the exclusion of evidence offered for the purpose of showing that in a former trial in which defendant in the present case was plaintiff and the owner of the car in which the present plaintiff was riding as a passenger was defendant, the then plaintiff recovered damages. It was claimed that the result of that trial absolved this defendant from the charge of negligence, and urged that while the doctrine of res judicata could not be invoked in his behalf against this plaintiff, the parties not being identical, she was estopped from pursuing this action by reason of the prior judgment.

The presiding Justice refused to entertain the defense thus set up and ordered the pleadings amended by striking out the relation of events upon which it was based, confining defendant to the mere statement that "plaintiff is estopped by a former judgment," and held inadmissible evidence offered in support of the facts stated above.

We are unable to find any authority in support of defendant's position that the result of the former trial, in which plaintiff was not a party, acted as an estoppel against her. Defendant cites no case on which to base such a theory, and we do not care to inaugurate so novel a departure from what seems to be settled law, namely, that no party may be denied a day in court unless a judgment on the merits, in an action for the same cause between the same parties, has been rendered.

The judgments in the case in which the present defendant was

plaintiff and that in the case at bar may be inconsistent, but the possibility of such a result could not prevent plaintiff from submitting her case to a jury; and having so submitted it, the result is not to be controlled by that of the former case.

In addition to the general motion, a special motion was filed attacking the damages as excessive. Defendant's position in this respect is unassailable. The injuries sustained by plaintiff were a broken collar bone, a slight cut over the eye, and bruises on her body. Admittedly no importance attached to any injury excepting the broken collar bone. She was unable to work for about six weeks and expended $50 for medical attendance. She necessarily suffered some pain and inconvenience. Assuming reasonable compensation for lost time and allowing for such pain and suffering as she may have sustained, it would seem that $1,000 would compensate her generously for all that she could legally demand.

Exceptions overruled.
Motion sustained unless within thirty days from filing of this mandate plaintiff files a remittitur of all of the amount recovered in excess of $1,000.

MARY N. REID *vs.* JANE WALTON.

JANE WALTON *vs.* FERGUS REID.

JAMES A. WALTON *vs.* FERGUS REID.

Cumberland. Opinion, November 13, 1933.

JURY FINDINGS. EVIDENCE.

Where there is credible evidence to sustain a jury finding, it will not be disturbed.

In the case at bar, the jury found Reid negligent in crossing directly in front of Mrs. Walton's car. No other finding could be justified. The question of due care on Mrs. Walton's part was arguable, but the jury did not necessarily err in finding her free from negligence.

On general motion for new trial by plaintiff Mary N. Reid, and on motion and exceptions by defendant Fergus Reid. Three cases arising out of a collision between an automobile driven by Fergus Reid and one driven by Jane Walton. Cases were tried together at the June Term, 1933, of the Superior Court for the County of Cumberland. The jury rendered a verdict for the defendant in Mary N. Reid's case and for the plaintiff Jane Walton, in the sum of $5,000.00, and for the plaintiff James A. Walton, in the sum of $3,500.00. General motions for new trials were thereupon filed by Mary N. Reid and Fergus Reid, and also exceptions by Fergus Reid to refusal to direct a verdict in his behalf. Motions overruled. The cases sufficiently appear in the opinion.

William B. Mahoney,

John B. Thomes, for Mary Reid and Fergus Reid.

Coombs & Gould,

Ralph M. Ingalls,

Verrill, Hale, Booth & Ives, for Jane Walton and James A. Walton.

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

PATTANGALL, C. J. On motions. Actions growing out of collision between automobiles, one of which was driven by Fergus Reid in which Mary N. Reid was a passenger, and the other by Jane Walton. The claim of James A. Walton was based on disbursements by him on account of injuries sustained by his wife. Verdicts were for defendant in the case against Mrs. Walton, for plaintiff in cases against Fergus Reid.

The collision occurred on the three-lane concrete state highway between Portland and Portsmouth, at the point of intersection with a road leading southerly toward York. Jane Walton was driving toward the east in the southerly lane. Reid, coming from the opposite direction, left the northerly lane on which he had been driving and made a left-hand turn, crossing the highway directly in the path of the oncoming car, for the purpose of taking the road to York. The cars were in plain view of the respective drivers thereof for at least 250 feet. As they approached each other, they were moving at a rate of speed which would have caused their meeting within two or three seconds after each had opportunity to observe the other's approach.

Under these circumstances, the jury found Reid negligent in crossing directly in front of Mrs. Walton's car. No other finding could be justified. The question of due care on Mrs. Walton's part is arguable, but we can not say the jury necessarily erred in finding her free from negligence.

The case falls within the doctrine stated in *Fernald* v. *French*, 121 Me., 4, 115 A., 420, and can be readily distinguished from *Ritchie* v. *Perry*, 129 Me., 440, 152 A., 621, and *Esponette* v. *Wiseman*, 130 Me., 297, 155 A., 650.

Motions overruled.

FLORENCE E. EISENMAN

vs.

VIVIENNE I. AUSTEN, EXECUTRIX OF THE ESTATE OF GEORGE L. ROGERS.

Cumberland. Opinion, November 20, 1933.

BILLS AND NOTES. NEGOTIABLE INSTRUMENTS ACT. VERDICTS.

Under the Negotiable Instruments Act, the presumption of liability on the part of the maker, whose signature appears on the note is complete, and the proof sufficient, until it is attacked and overthrown by convincing evidence.

Evidence to overthrow a mere presumption need not be more than slight, but it must be evidence of probative weight.

The burden of proving the signature not genuine or authorized, as well as lack of consideration for the promise to pay, is on the defense when the note, apparently regular, is introduced.

In the case at bar, the Court found no fraud or undue influence in obtaining the note; no evidence of lack of consideration; that the ruling of the presiding Justice directing a verdict for the plaintiff was justified because a verdict for the defendant although rendered by a jury would have been so lacking in substantial basis, that it could not have been allowed to stand.

On exceptions by defendant. An action on a promissory note for $1,000.00. Defendant filed a plea of the general issue and as further matter of defense, forgery, fraud and undue influence, lack of consideration and the decedent's lack of mental competency. Trial was had at the November 1932 Term, of the Superior Court for the County of Cumberland. To the direction of a verdict for the plaintiff, defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Chaplin, Burkett & Knudsen, for plaintiff.

J. W. Friedman,

Daniel Stone,

Frank P. Preti, for defendant.

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

BARNES, J. This case comes up on exception to direction of a verdict in favor of plaintiff, in an action on a negotiable promissory note, on demand, for $1,000.00, dated February 5, 1929, plaintiff payee, under her name at date of note, George L. Rogers maker.

By stipulation of counsel all steps precedent to collection of defendant as executrix were duly taken.

The defense is the general issue, with brief statement, setting up:

(1) Forgery.
(2) Fraud and undue influence in obtaining the instrument in suit.
(3) Lack of consideration.
(4) Denial of decedent's capacity to make a note.

At the outset of trial the defense of forgery was not available because defendant had not filed the affidavit required by Rule X of Rules of Courts. Early in the trial, however, plaintiff waived her advantage, and the defense of forgery had to be met.

Plaintiff produced the note; had it marked for identification by the reporter; introduced it, and rested.

Under the Negotiable Instruments Act, Chapter 164, R. S., "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

By the introduction of the note plaintiff made out a prima facie case.

The presumption of liability on the part of the maker whose signature appears on the note is complete, and the proof sufficient, until it is attacked and overthrown by convincing evidence.

Evidence to overthrow a mere presumption need be not more than slight, but it must be evidence of probative weight.

The burden of proving the signature not genuine or authorized, as well as lack of consideration for the promise to pay, is on the defense when the note, apparently regular, is introduced.

In the whole record there is no evidence of "fraud and undue influence in obtaining" the note.

And we find no evidence of lack of consideration.

There remains, therefore, to be determined, only this; is there evidence in the record, which should have been submitted to the jury, that would properly overthrow the presumption that George L. Rogers signed the note, and signed it at a time when his intellect was sufficient for him to intend to be bound by its terms?

At the date of the note Mr. Rogers was 67 or 68 years of age, living in an apartment in Portland with his daughter, the defendant, a copy-writer during the day, and teacher in a night school.

From the May previous he had been treated for arteriosclerosis, hardening of the arteries.

From May to August a nurse had attended to his wants. Dr. Blaisdell was consulted in August, and treatment was had in the Maine Eye and Ear Infirmary for about the whole of that month.

The patient improved and was treated by Dr. Blaisdell during the most of the next three months, until some day in November, when the doctor's engagement ended.

From the time Mr. Rogers was discharged from the Infirmary, until March 19, he was cared for by the plaintiff at the Portland apartment.

Mr. Rogers' distressing symptoms when he had attacks of what the witnesses call illness were nausea and dizziness, followed by vomiting. The doctor testified that such attacks would make his patient dizzy for from four to twenty-four hours, and the defendant testified her father had "peculiar mental lapses when he didn't know what he was saying or doing," as frequently as two or three times a fortnight. From testimony of the daughter and nurse we learn that during the first weeks of 1929 Mr. Rogers was dressed, walked about the apartment with his nurse's help, and was satisfied with the care given him by the plaintiff.

He had the nurse write letters for him, and in the last days of his illness the plaintiff testified that her father cautioned her to be sure and pay certain bills if anything happened to him.

On the other hand defendant testified that her father's handling of knife, fork and spoon was so uncertain that she handled these utensils during his meals, and the nurse of the summer before gave the same story.

Defendant further testified that her father signed no checks

from the summer of 1928 until he died; that she signed for him, at his request, during this whole period, and that the signature on the note in suit was a forgery.

With the testimony in this state, defendant called the plaintiff to the witness stand.

She testified to her employment from August 27, 1928, till the death of decedent, on May 3, 1929; that Mr. Rogers "was quite a care," but that from November until the latter part of March he had none of the attacks of dizziness and vomiting described by others; that he was intelligent, had visitors and talked with them, and conversed with her.

She testified that Mr. Rogers signed the note in her presence and in the presence of Mrs. Hodgkins, the latter witnessing his signature.

Against this positive testimony defendant arrayed thirty-seven checks of sixty-three from her father's check book, if all were numbered seriatim, issued from August 29, 1928, to February 11, 1929. In the main these checks were written by defendant and signed by her "George L. Rogers, VR."

Defendant's contention that during this period her father did not sign and could not sign a check would have been aided if twenty-six other checks, which must have been used, destroyed, spoiled or left in her father's check book, had been exhibited to the jury or accounted for.

The checks signed by defendant proved nothing, except that she had written them. A sufficient number of her father's checks, signed by him in previous years were introduced to prove the father's signature. To an unprejudiced eye they prove much more. The unvarying peculiarities of the father's signature appear in his name as it is written on the note in question. True, the note is signed "George L. Rogers," while the checks signed by the father and introduced in evidence are signed in abbreviation, or generally "G. L. Rogers." That the full name was signed, on a note as large as this in suit, would not prove that a man who signed his name on checks by initials would not sign the note as we find it.

The defendant testified that she knew nothing of the note until after her father's funeral. She said at the trial the signature was a forgery. But in late July, 1930, she wrote this letter to the

plaintiff in regard to paying the note she now claims to be a forgery:

"Dear Mrs. Eisenman:

An explanation is due you, I feel, in regard to my delay in the payment of the note. I have been intending to write you for sometime, but kept putting it off with the hope that I might be able to bring about a settlement.

The facts of the matter are these. After paying the funeral expenses, etc. subsequent to my father's death there was not cash enough left to meet the note. I made every effort to sell our home in Pittsfield, but was unsuccessful. Two other pieces of property upon which my father held mortgages will not come into my possession through foreclosure until next February. So you see I am tied up right now as far as raising the money through the sale of property is concerned.

I tried to borrow a thousand dollars from the Pittsfield National Bank on the security of the house in Pittsfield, but they informed me that they were not lending any money on real estate there at the present time. I have also tried other sources for a loan, but without success so far.

Next spring, when the property becomes mine to sell, I shall dispose of it, by auction if necessary. Therefore if you would grant me an extension of time, it would help matters greatly. I would, in this case, give you my own note in place of my father's.

This is my position. I am very sorry it has happened this way, but you can see how impossible it has been and is for me to make the payment at the present time. Had I been able to sell our home, the payment would have been made long ago.

Sincerely,

Vivienne"

When defendant called the plaintiff to the witness stand, the latter testified as to the consideration for the note.

Asked about an occurrence, and Mr. Rogers' conversation, on a morning before the signing of the note, plaintiff said,

"I went in one morning, and he had a bowel movement in his clothes . . . I was cleaning him up, and I gave him a bath that

morning, and he says, 'I guess you won't want to be staying with me if this happens very often.' I said, 'No, Mr. Rogers, because I am working here for less than I have ever nursed and,' I said, 'I don't think I will stay.'

And after a time . . . he seemed to be in a deep study, seemed to be thinking . . . he says, 'Would you tell me that you would stay here with me as long as I live if I gave you a thousand dollars?'

I said, 'You couldn't do that Mr. Rogers.' I said, 'What would Vivienne say?' He said, 'It is none of Vivienne's business,' he said, 'this money is mine.'

And he said, 'Would you stay if I would give you a thousand dollars?' And I said, 'Yes, I will tell you, I will stay with you as long as you live.'"

She took him to her home and cared for him in his helplessness, till he died.

Plaintiff was the last witness called by defendant, who rested when she left the stand.

The taking of evidence was ended; the plaintiff's counsel move for a directed verdict, and the Justice granted it.

Defendant's counsel appears, in his argument, to claim that he was deprived of the opportunity to produce evidence to contradict his witness, the plaintiff.

Not so. At the close of plaintiff's testimony, he notified the Court that the testimony was closed.

With the testimony before him no other course was open to the Justice but to grant plaintiff's motion.

Our Court has said, "Each case of this nature must be decided upon its own peculiar facts. Upon the facts proven before us it is our conclusion that the ruling of the presiding Justice directing a verdict for the plaintiff was justified, because a verdict for the defendant although rendered by a jury would have been so lacking in substantial basis, either of fact or of proper inferences from proven facts, that it could not have been allowed to stand." *Savings Bank* v. *Berry*, 119 Me., 410, 111 A., 53, 536.

Exception overruled.

ARTHUR B. PLUMMER, BY GUARDIAN

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Somerset. Opinion, December 1, 1933.

INSURANCE. EVIDENCE.

In an action to recover payments under the "total and permanent disability" provisions of an insurance policy, it is not necessary for the insured to show that he had been reduced to and remained in a state of absolute helplessness, but it is sufficient if the evidence established that he was unable to perform the work in any occupation he was adapted to, in the customary manner of a workman in that occupation working for compensation, and that he was unable to do all of the substantial and material acts necessary to the prosecution in the customary and usual manner, and for compensation or profit, of any kind of business for which he was adapted.

Under the policy, the term "permanent" disability is not limited to a disability which must of necessity last for the remainder of the natural life of the insured without any hope or possibility of recovery before death. A total disability, enduring and continued and not merely temporary or transient, is "permanent" within the terms of the insurance contract.

When mental condition is the issue to be decided, the evidence of necessity must include a wide field of fact and circumstance, and greater latitude in the admission of testimony must be given than would be permitted in relation to a single fact.

To enable the jury to determine the real state of mind, the action of that mind as shown by conversations, declarations, claims, and acts is the most satisfactory evidence.

Although witnesses other than experts are not allowed in this State to testify directly as to their opinion of the mental condition of another when that question is the issue to be decided, under the directions of the Court, they may be permitted to describe peculiarities, conditions and situations, conduct and changes.

In the case at bar, in order to recover under his policy, the burden was upon the plaintiff to prove that, before the annuities and premium here sued for had accrued, he became totally and permanently disabled, had furnished due proof thereof to the Company, and had not since recovered. The defendant's pleadings gave this scope to the inquiry and the full period of the plaintiff's disability was involved.

The jury were clearly warranted in finding that, as a result of mental disease, the plaintiff was totally and permanently disabled within the meaning of his policy of insurance and entitled to recover as claimed in his writ, subject to the stipulations of record as to damages.

On exceptions and general motion for new trial by defendant. An action to recover sums alleged to be due under the "total and permanent disability" clause of a policy of whole life insurance issued by the defendant on the life of the plaintiff. Trial was had at the January Term, 1933, of the Superior Court for the County of Somerset. The jury found for the plaintiff in the sum of $1,005.10. To the admission of certain testimony, defendant seasonably excepted, and after the jury verdict, filed a general motion for new trial. Motion overruled. Exceptions overruled. The case fully appears in the opinion.

Merrill & Merrill, for plaintiff.

F. Harold Dubord, for defendant.

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

STURGIS, J. The Metropolitan Life Insurance Company of New York, on January 12, 1920, insured the life of Arthur B. Plummer of Skowhegan, and included as a part of the policy a Total and Permanent Disability Provision in which it agreed that if, before default of the payment of any premium and before the insured attained the age of sixty years, the Company received due proof that, as the result of injury or disease occurring or originating after the issuance of the policy, he had become totally and permanently disabled so as to be unable at any time to perform any work or engage in any business for compensation or profit, the Company, commencing with the anniversary of the policy next following the receipt of such proof, would waive payment of each premium coming due during such disability, and in addition, com-

mencing six months from the receipt of such proof, would, during the continuance of such disability, pay him a monthly annuity of $10.00 for each $1,000.00 of the original insurance. It was further provided, however, that, notwithstanding proof of such disability may have been accepted by the Company as satisfactory, the insured should, on demand but not oftener than once a year, furnish due proof of the continuance of his disability and, failing so to do, or if he should be able to perform any work or engage in any business whatsoever for compensation or profit, no further premiums would be waived or further monthly annuity payments made.

On February 26, 1929, Mr. Plummer's married sister, Helen Derbyshire, upon her petition alleging that her brother was of unsound mind, was appointed his Guardian by the Judge of the Probate Court of Somerset County and within a few weeks, the exact date not appearing in the evidence, applied to the Insurance Company for the benefits payable to him under the Disability Provision of his policy, representing that, through mental incapacity, he had become permanently and totally disabled. The claim having been allowed, the Insurance Company returned the last premium it had received and paid monthly annuities from September 2, 1929, until and including January 2, 1932, when it stopped payments and denied liability. On June 12, 1932, when the next premium fell due, it was paid under protest, and within two months this suit was brought to recover the amount of that premium and annuity payments for the seven months next preceding. The defendant Company pleaded the general issue and, having by brief statement set up the defense that the insured was not totally and permanently disabled within the terms of his policy, by stipulation of counsel the case was submitted to the jury on that issue of fact alone, with instructions that, if the plaintiff was entitled to recover, damages in the sum of $1,005.10 should be assessed. The case comes to this Court, after verdict for the plaintiff, on the defendant's motion for a new trial and exceptions to the rulings of the presiding Justice on the admissibility of evidence.

MOTION

A careful and thorough examination of the voluminous transcript which is brought forward on this review discloses credible

and substantial evidence from which the jury were warranted in finding that in 1926 the plaintiff suffered a mental breakdown which has permanently incapacitated him from performing any work or engaging in any business for compensation or profit. He has lost practically all his business acumen and judgment, becomes easily excited and extremely nervous and then is moody and depressed. He has aged in appearance and his physical capacity is greatly reduced. Until 1928, he remained in the employ of a local automobile agency, but at that time was discharged for inattention to and inefficiency in his work. He then retired to a small farm which he owned in New Portland, near Skowhegan, and has since lived there practically in seclusion. For several years, he has been supported by his guardian, and we find no convincing evidence that he has earned any substantial amount of money during this period.

Several physicians gave their opinions on the stand as to Mr. Plummer's mental condition and its causes, effect and duration. His family physician, who had known him for years and examined him repeatedly, was of the opinion that he was mentally deranged and the condition was permanent. He attributed Mr. Plummer's breakdown to a mental shock received when his first wife died in 1926, and he had observed no improvement in his condition. The Superintendent of the Maine State Hospital for the insane, who had Mr. Plummer under observation for several weeks, at first found his symptoms suggestive of general paralysis, but came to believe that he was suffering from a "manic-depressive depression associated with an ordinary amount of arteriosclerosis and an abnormally high diastolic blood pressure." There is evidence that the Superintendent later advised the family that Mr. Plummer had an organic brain disease, then dormant but of a type which warranted precautions against allowing him to become excited for fear of violence. On the stand, having made an examination of Mr. Plummer just before the trial, the Superintendent gave as his opinion that he was then "suffering from remote effects of manic-depressive disorder" and, though he said he did not know whether the condition was permanent or not, and thought the patient had ability and some capacity to work, admitted that "it is difficult for a patient in such a condition as that to work."

It is true, as pointed out by counsel for the defendant, that the record shows that at the time of or soon after his breakdown Mr. Plummer, formerly a temperate man, began to drink more or less liquor, became enamored of a married woman, installed her as his housekeeper at his farm, and married her when she obtained a divorce. He drove his own automobile until 1932 when he turned its operation over to his wife. He worked several weeks in a garage and has performed some labor on or about his farm, such as helping plant and hoe the garden, assisting in building a dam across a small brook, rowing a boat for some hours on a nearby pond, helping string a wire fence, and taking some part of the care of his cattle and hens.

Upon the facts just stated, the Insurance Company contends that it is established that the plaintiff lost his position with the automobile agency and has since been out of employment and business solely because of his own bad habits and the general business depression of the last few years. We are not convinced that this is so. There is abundant and convincing evidence in this record that the plaintiff became mentally deranged as a result of the death of his first wife, and that his subsequent condition of incompetency and incapacity is the direct result of the shock he received at that time. It may be that his dissipation since his breakdown has prolonged and increased his disability, and it would not be strange if, having a "manic-depressive disorder," he has become more depressed by current conditions and doubts as to the future. His marriage was against the advice and protest of his friends and family, and furnishes no proof of soundness of mind or body, and little significance, if any, can be attached to his operation of his automobile. It appears that his employment at the garage was arranged by his family and physician in the hope that regular work would improve his mental and physical condition, but he was found to be inefficient and irresponsible and was soon discharged. And his work about his farm, when viewed in the light of testimony that in whatever he did he was unable to accomplish any more in a day than an ordinary man would in a few hours, was unable to finish what he began, and became easily confused in simple business matters, we think, falls short of proving that he could either oper-

ate his farm or engage in any other business with an expectation of profit, or obtain employment in any kind of work for which he was adapted or, if so employed, perform the work in a sufficiently workmanlike manner to warrant retaining him and paying him wages.

Upon the issue joined, the burden was upon the plaintiff to prove that at the time his claim of disability was filed he had become totally disabled as the result of disease, so as to be unable to perform any work or engage in any business for compensation or profit, and when the premium and Monthly Annuities here in suit accrued that he had not recovered within the meaning of the disability clause of his policy. It was not necessary for him to show that he had been reduced to and remained in a state of absolute helplessness, but it was sufficient if the evidence established that he was unable to perform the work in any occupation he was adapted to in the customary manner of a workman in that occupation working for compensation, and that he was unable to do all of the substantial and material acts necessary to the prosecution in the customary and usual manner, and for compensation or profit, of any kind of business for which he was adapted. This definition of "totally disabled" is in accord with the great weight of authority regardless of whether the policy is for accident insurance or for life insurance with a disability clause attached. In principle, if not in exact phraseology, it is approved in 14 R. C. L., 1315, and the Notes and cases cited in 24 A. L. R., 203; 37 A. L. R., 151; 41 A. L. R., 1376; 51 A. L. R., 1048; and 79 A. L. R., 857. It was applied to the disability of an insured to engage in business in *Young* v. *Insurance Company*, 80 Me., 244, 13 A., 896.

According to the terms of his policy, the plaintiff was also bound to prove he was permanently disabled and had not recovered. A reading of the contract, however, leaves no doubt that the term "permanent" disability, as there used, was not intended to limit liability to proof of a disability which must of necessity last for the remainder of his natural life without any hope or possibility of recovery before death. The Company in the last paragraph of its Disability Provision, having already agreed to pay monthly annuities and waive premiums upon receipt of proof of permanent disability, there expressly provided that, notwithstanding proof of

disability may have been accepted by the Company as satisfactory, if the insured failed to furnish due proof of the continuance of his disability or became "able to perform any work or engage in any business whatsoever for compensation or profit," the payments of annuities and waiver of premiums should end. This is a recognition of the possibility that the insured might recover from the disability insured against, and is sound warrant for the conclusion that, in the contemplation of the parties, a total disability, enduring and continued and not merely temporary or transient, was "permanent," and their contract must be construed accordingly. Proof of total disability of this degree of permanency was sufficient.

Applying the law of the case as stated to the facts in evidence, the verdict must stand. The jury were clearly warranted in finding that, as a result of mental disease, the plaintiff was totally and permanently disabled within the meaning of his policy of insurance and entitled to recover as claimed in his writ, subject only to the stipulations of counsel as to damages. On this record, the verdict in the trial court was just and proper.

EXCEPTIONS

When mental condition is the issue to be decided, the evidence, of necessity, must include a wide field of fact and circumstance, and greater latitude in the admission of testimony must be given than would be permitted in relation to a single fact. And "to enable the jury to determine the real state of mind, the action of that mind as shown by conversations, declarations, claims, and acts is the most satisfactory evidence." *Robinson* v. *Adams*, 62 Me., 369. So too, although witnesses other than experts are not allowed to testify directly as to their opinion of the mental condition of another when that question is the issue to be decided, "under the direction of the court, (they) may be permitted to describe peculiarities, conditions and situations, conduct and changes." *Fayette* v. *Chesterville*, 77 Me., 28; *Robinson* v. *Adams*, supra. With one exception, the errors alleged in the Bill of Exceptions relate to the admission of evidence bearing on the plaintiff's mental condition and are within the foregoing rules.

The plaintiff's family physician, having testified that the in-

sured was disabled during the three years prior to August 1, 1932, was asked, "What was he unable to do" during that period and replied, "He was unable to carry on ordinary work." A general objection to the question and answer was noted and an exception reserved. The defendant argues that as to the interrogatory the issue was solely whether or not the insured was totally and permanently disabled during the period covered by the accrual dates of the annuities and the premium sued for, and therefore evidence as to his prior condition is immaterial. That position is untenable. In order to recover under his policy, the burden was on the plaintiff to prove that before the annuities and the premium had accrued, he had become totally and permanently disabled, had furnished due proof thereof to the Company, and had not since recovered. These were the issues which the defendant framed in its pleadings and the plaintiff was bound to meet. The inquiry before the jury involved the full period of the plaintiff's disability. The defendant's contention made here that the physician's answer was a mere opinion and not responsive is not open on this exception. Objection to the answer on these grounds should have been by a motion to strike it out. Were the rule otherwise, the result would be the same. There is nothing in the answer which furnishes ground for a new trial.

Motion overruled.
Exceptions overruled.

JOHN E. DILLON

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Piscataquis. Opinion, December 2, 1933.

INSURANCE. EVIDENCE.

In an action to recover indemnity under a policy of accident insurance, when it appeared that the plaintiff had changed the words "one year" to "two months" in a report forwarded by him to the insurance company as an explanation of his accident:

HELD

The true document contained a statement made by the plaintiff to the operating physician that the swelling occasioning the operation had existed for one year instead of two months. This under the circumstances must be regarded as the plaintiff's own admission of the duration of this condition. So interpreting it the plaintiff did not sustain the burden of proof which the law cast upon him.

On general motion for new trial by defendant. An action brought for the recovery of weekly compensation alleged to be due under an accident policy issued by the defendant to the plaintiff on April 15, 1931. Defendant contended that plaintiff was not disabled by accident while the policy was in force. The jury rendered a verdict for the plaintiff in the sum of $573.01. A general motion for new trial was thereupon filed by the defendant. Motion sustained. The case fully appears in the opinion.

Edward P. Murray, for plaintiff.

F. Harold Dubord, for defendant.

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

THAXTER, J. This is an action to recover indemnity under an accident insurance policy. After a verdict for the plaintiff the defendant has addressed to this Court a general motion for a new trial.

The evidence would justify the finding that the plaintiff suffered a fall September 4, 1931, that about a week afterwards he called Dr. Harden, a local doctor, who found a discoloration and swelling of the scrotum which he diagnosed as a hydrocele resulting from the accident. Dr. Harden advised treatment in Boston, and there an operation was performed.

The real controversy is whether this condition was due to the accident or had been of long standing. Dr. Overholt, who took down the plaintiff's story, states unequivocally in his deposition that the plaintiff told him that he had had the swelling for a year. A letter from Dr. Overholt to Dr. Harden was introduced in evidence by the defendant. This was sent ultimately by the plaintiff to the insurance company for the purpose, as he says, of explaining the accident and the treatment which was given to him in Boston. Referring to the history of his condition as given by the plaintiff it contains the following statement: "He stated that he had a swelling in the left scrotum which had been present for two months." The evidence is convincing that the words "two months" were substituted by the plaintiff after the letter was in his possession for the words "one year." Miss Kelley, the secretary who typed the letter, produced the carbon and in this the time appears as one year. The modification appears to be in the plaintiff's handwriting and he admits that he might have made the change. Likewise introduced in evidence by the defendant was a certificate by Dr. Hicks of Boston, in which the cause of the plaintiff's condition was given as a hydrocele following a fall 54 days previously. This certificate came into the hands of plaintiff and by him was forwarded to the defendant. In this document the words "54 days" appear to have been inserted over an erasure, and the defendant claims, not without reason, that the certificate as originally written referred to the fall as having been a year previously.

On the face of the record it appears that the plaintiff altered one and possibly both of these documents. In his letter to the defendant, enclosing the letter from Dr. Overholt to Dr. Harden, the plaintiff said: "I know of no better way of explaining my accident and treatment at the Lahey Clinic and N. E. Deaconess Hospital than by enclosing to you the correspondence my family Doctor, Harden had with the Lahey Clinic during my stay at the hospital."

The true document contained a statement that the swelling had existed for one year. Under the circumstances this must be regarded as the plaintiff's own admission of the duration of this condition. So interpreting it, it seems clear that the plaintiff has not sustained the burden of proof which the law casts upon him, and the defendant's motion must accordingly be sustained.

Motion sustained.

MARGARET DODGE *vs.* JOSEPH T. BARDSLEY, ET AL.

Cumberland. Opinion, December 12, 1933.

PLEADING AND PRACTICE. EXCEPTIONS.

The purpose of a bill of exceptions is to present in clear and specific phrasing the issues of law to be considered by the Court. Each ruling objected to should be clearly and separately set forth. Exceptions are only presented in a "summary manner" in accordance with the statute when they are "stated separately, pointedly, concisely." It is not permissible to bring before the Court indiscriminately all rulings of the presiding Justice.

On exceptions by plaintiff. An action of debt heard by the sitting Justice without jury. Judgment was for the defendants. To certain ruling of the presiding Justice, plaintiff excepted. The bill of exceptions was simply to all the rulings of the presiding Justice without setting the objections forth with further particularity. Exceptions overruled. The case sufficiently appears in the opinion.

Harry E. Nixon, for plaintiff.

John P. Deering,

Jacob H. Berman, for defendants.

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

THAXTER, J. This case is an action of debt heard by the presiding Justice, who found for the defendants. It is before us on exceptions.

The pleadings, exhibits, agreed statement of facts, and the findings and rulings of the presiding Justice are made a part of the bill of exceptions. The bill then states: "To all which rulings the plaintiff hereby excepts and prays that her exceptions may be allowed, she having been aggrieved by said rulings." The specific objections of the defendants set forth with no further particularity.

Rev. Stat. 1930, Ch. 91, Sec. 24, provides that any party aggrieved by the rulings of the presiding Justice may "present written exceptions in a summary manner," which, when allowed, shall be transmitted to this court for decision.

The purpose of a bill of exceptions is to present in clear and specific phrasing the issues of law to be considered by this court. Each ruling objected to should be clearly and separately set forth. The very purpose of the bill is to withdraw from the mass of rulings those which it is claimed are erroneous, and exceptions are only presented in a "summary manner" in accordance with the statute when they are "stated separately, pointedly, concisely." *McKown* v. *Powers*, 86 Me., 291, 295, 29 A., 1079, 1081.

The method adopted by counsel here attempts to bring before this court indiscriminately all the rulings of the presiding Justice, and subverts the very purpose of the statute. The objections to this course have been repeatedly pointed out. *State* v. *Reed*, 62 Me., 129; *Allen* v. *Lawrence*, 64 Me., 175; *McKown* v. *Powers*, supra; *Dennis* v. *Waterford Packing Co.*, 113 Me., 159, 93 A., 58; *Small* v. *Wallace*, 124 Me., 365, 129 A., 444; *State* v. *Cohen*, 125 Me., 457, 134 A., 627.

Exceptions overruled.

LOUIS E. THROUMOULOS

vs.

FIRST NATIONAL BANK OF BIDDEFORD.

Cumberland. Opinion, December 12, 1933.

REFERENCE. PLEADING AND PRACTICE. EXCEPTIONS.

Where there is credible evidence to support the finding of fact of a Referee, exceptions will not lie.

Rule XXI of the Supreme Judicial and Superior Courts provides that objections to any report "shall set forth specifically the grounds of the objections, and these only shall be considered by the Court."

In the case at bar, the grounds of objections as filed were not specific but general, and could not be considered.

On exceptions by defendant. An action for money had and received heard by a Referee who found for the plaintiff. Objections in writing were filed by defendant to acceptance of Referee's report, which was approved by a sitting Justice, and exceptions taken. Exceptions overruled. The case sufficiently appears in the opinion.

Willard & Willard,

Wesley M. Mewer, for plaintiff.

Waterhouse, Titcomb & Siddall, for defendant.

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

THAXTER, J. This action for money had and received was brought in the Superior Court and referred with the right to exceptions in matters of law reserved. The Referee rendered judgment for the plaintiff, and objections in writing to the acceptance of the report were filed by the defendant. The report was approved

by the Justice of the Superior Court, and exceptions were taken by the defendant.

The first ground of alleged error is that the "plaintiff has failed to substantiate a finding in his favor by a fair preponderance of said testimony." This objection can not avail the defendant, for if there is any evidence to support the findings of fact of the Referee, exceptions will not lie. *Staples* v. *Littlefield*, 132 Me. 71, 167 A., 171.

The second, third and fourth objections are that the report is against law, that the report is against evidence, that the report is manifestly against the weight of evidence. These were properly overruled by the presiding Justice.

Rule XXI of the Supreme Judicial and Superior Courts reads as follows:

> "Objections to any report offered to the court for acceptance, shall be made in writing and filed with the clerk and shall set forth specifically the grounds of the objections, and these only shall be considered by the court."

The grounds of objection as filed are not specific but general and can not be considered. *Bucksport* v. *Buck*, 89 Me., 320, 36 A., 456; *Witzler* v. *Collins*, 70 Me., 290; *Mayberry* v. *Morse*, 43 Me., 176; *Camp Maqua Young Women's Christian Association* v. *Inhabitants of Town of Poland*, 130 Me., 485, 157 A., 859; *Lincoln* v. *Hall*, 131 Me., 310, 162 A., 267. The parties have selected their own tribunal to try this case, and under such circumstances are held to a strict compliance with the provisions of the statutes and of the rules of court governing the procedure authorized in such instances. *Staples* v. *Littlefield*, supra.

Exceptions overruled.

FLORENCE B. SMITH, ADMINISTRATRIX

vs.

JOE'S SANITARY MARKET, INC.

Cumberland. Opinion, December 23, 1933.

NEGLIGENCE. MOTOR VEHICLES.

In an emergency, to escape the charge of negligence, one must act as an ordinarily prudent man might under the same or similar circumstances.

In the case at bar, if there was a sudden emergency it was the dead man himself who created it. From the transcript of the evidence it is not perceivable how the accident could have happened if the deceased had exercised ordinary care.

The jury could not properly have rendered a verdict for the plaintiff.

On exception by plaintiff. An action on the case by the plaintiff, as administratrix, to recover damages for conscious pain and suffering of her intestate Raymond C. Smith, who was struck by automobile truck of the defendant on Main Street in Westbrook, causing him injuries from which he died after several hours of conscious pain and suffering. Trial was had at the June Term, 1933, of the Superior Court for the County of Cumberland. At the close of the evidence defendant moved for a directed verdict. To the granting of this motion, the plaintiff excepted. Exception overruled. The case fully appears in the opinion.

Harry C. Libby, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

DUNN, J. This action was brought by the plaintiff, as administratrix of the estate of her late husband, (who died intestate), to recover damages for personal injuries sustained by him, on February 18, 1933, as a result of having been struck by defendant's auto-

mobile truck. The vehicle was being operated for its owner, at the estimated speed of thirty-five miles an hour, on Main Street, in Westbrook, at midday. Plaintiff's intestate had just been arrested, at the instance of the wife, in non-support proceedings, for commitment to the county jail, and, by permission of the officer having him in charge, was crossing the highway on foot, to obtain some desired article from his own car. Going in diagonal direction, he had reached the middle of the trolley tracks in the center of the forty-one foot business street. It is not contradicted that he stopped, looked toward the truck, on-coming, "a car length or a car length and a half away"; "jumped, as if to cross the street," directly into the path of the truck, and was immediately hit. He died thirteen hours later. The truck driver testifies that, on first seeing the pedestrian stepping to the pavement from the sidewalk, he released the accelerator, to slacken the truck's speed; he also testifies that he inferred that the man, whose conduct he observed continuously, would stay between the car rails, until the truck should have passed, on its course, three feet from the nearest rail, on its own proper side of the street.

At the close of the evidence, defendant moved for a directed verdict. The motion was granted. Plaintiff excepted. Her counsel strongly urges that the evidence disclosed a case for the jury, and that the trial judge was not justified in ordering a verdict for defendant.

The court below evidently felt either that there was no ground for holding defendant responsible for actionable negligence, or, assuming the contention that plaintiff made a prima facie case, that plaintiff's decedent, whose due care the statute, (R. S., Chap. 96, Sec. 50), because of death, presumed, had been proven to have been guilty of contributory negligence.

Upon a review of the evidence, the court arrives at the conclusion that the verdict was directed rightly.

The speed of the truck might have warranted inference of negligence. Assuming this, the proof is plenary that plaintiff's intestate failed to use due vigilance and caution for his own safety. Contributory negligence established, plaintiff was not entitled to a verdict. *Levesque* v. *Dumont*, 117 Me., 262, 103 A., 737.

If, in the case at bar, there was, — as argument pressed upon

attention, — a sudden emergency, reply must be that the now dead man himself created it. *Bonefant* v. *Chapdelaine*, 131 Me., 45, 50, 158 A., 857, 859. Even in an emergency, one must act as an ordinarily prudent man might under the same or similar circumstances. *Gravel* v. *Roberge*, 125 Me., 399, 134 A., 375. It is not perceivable, in the transcript of the evidence, how the accident could have happened if he who was injured had exercised ordinary care.

The jury could not properly have rendered a verdict for the plaintiff. The exception must be overruled. *Levesque* v. *Dumont*, supra; *Kidney* v. *Aroostook Valley Railroad*, 119 Me., 597, 111 A., 334.

Exception overruled.

MILTON B. FIELD, ADMINISTRATOR *vs.* LEWIS H. WEBBER.

Cumberland. Opinion, December 23, 1933.

R. S., CHAP. 101, SECS. 9 AND 10. NEGLIGENCE. MOTOR VEHICLES.

The Death-Liability Act affords and measures a remedy for certain designated persons, where none existed at common law. The test of the right to maintain the action is the right of the injured person to have maintained an action had death not ensued.

At common law, in actions of tort for negligence, the plaintiff has to prove, by a fair preponderance of all the evidence, not only that defendant was negligent, and harm without other agency resulting, but also to negative contributory negligence. Absence of proof of any of these elements precludes a recovery. Under the Death-Liability statute if contributory negligence is relied upon as a defense, it must be pleaded and proved by the defendant; otherwise that statute did not undertake to change the substantive law of negligence. If a plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff may not prevail.

Contributory negligence is usually for the jury. Yet, when the evidence is conclusive that conduct was not in harmony with what an ordinarily prudent man would do, and a valid verdict, in any rational view, could not be returned for the plaintiff, the judge should order the verdict the evidence demands.

Disobedience of a 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. Negligence and causal connection are ordinarily questions of fact. It is not in every situation an act of negligence for a driver to turn to the left. He must, however, if meeting another automobile, seasonably drive to the right of the middle of the traveled road so that each shall have one-half part thereof, and he must yield for a vehicle in his rear to pass, on suitable and audible signal.

When the operator of a motor vehicle intends to cross a street, he must use reasonable care to ascertain whether cars are attempting to pass from behind.

Attempting to pass vehicles at a street intersection is not permissible.

In the case at bar, had the plaintiff's intestate exercised ordinary care, the emergency insisted upon by the plaintiff could not have arisen.

The testimony discloses that the plaintiff's intestate's negligence was proved to have been a moving or contributory cause of his death. The evidence on this phase, did not, in fact, disclose a jury question; it presented a question of law.

On exceptions and general motion for new trial by defendant. An action on the case to recover damages for the benefit of the widow and posthumous child of the plaintiff administrator's intestate. The action arose out of a motor vehicle accident in which plaintiff's intestate was fatally injured, dying without conscious suffering. Trial was had at the March Term, 1933, of the Superior Court for the County of Cumberland. The jury rendered a verdict for the plaintiff in the sum of $5,000.00. To the denial of defendant's motion for a directed verdict exception was taken, and after the jury verdict a general motion for new trial was filed by the defendant. Exception sustained. Motion sustained. Verdict set aside. New trial granted. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Robinson & Richardson, for defendant.

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

DUNN, J. This action is prosecuted for the benefit of the widow and posthumous child of the plaintiff administrator's intestate, who died without regaining consciousness, from injuries incurred in a collision between the motorcycle he owned and was riding and an automobile truck belonging to and operated by the defendant. The action is based on the Death-Liability Act, (R. S., Chap. 101,

Secs. 9 and 10), which affords and measures a remedy for certain designated persons, where none existed at common law. The test of the right to maintain the action is the right of the injured person to have maintained an action had death not ensued. *Danforth* v. *Emmons*, 124 Me., 156, 126 A., 821. Defendant pleaded the general issue, and specially, by brief statement, contributory negligence. R. S., Chap. 96, Sec. 50. When the evidence was ended, and the case for the defendant, and that for the plaintiff, had been rested, counsel for the defendant moved the directing of a verdict in favor of his client, on the ground that on the evidence a verdict for the plaintiff could not be permitted to stand. The motion was overruled; the point was saved. Thereupon the case was submitted to the jury. The verdict was for the plaintiff, in the sum of five thousand dollars. The case is here upon exception by defendant to the refusal to direct a verdict, and also on general motion for a new trial, the single assignment of the latter, advanced by defendant's counsel in their brief, and orally at the bar, being that the verdict is against the weight of the evidence. The motion and the exception present essentially the same question.

On April 28, 1932, the plaintiff's intestate, Bradbury A. Rand, was traveling on his motorcycle, southerly along Washington Street, a public way in Portland, the particular stretch of the road not being in a business or residential district. The time was six o'clock in the morning; it was daylight, and the weather was fair.

Washington Street, for present purposes, runs nearly north and south, is forty-four feet wide, and paved; there are double car tracks in the center; the clear for travel on either side is fifteen feet. The roadway is slightly upgrade. The motorcycle approached the truck from behind, and overtook it. The truck, which is described as a Dodge, two years old, having an open express body and an inclosed cab, had been used in delivering milk, and was homeward bound; the right wheels, on plaintiff's version, were between the rails of the easterly track, the vehicle moving forward to the operator's left of the medial line of the street. The rate of speed, on the estimate of witnesses called by the plaintiff, was twenty-five miles an hour. The same witnesses say that the motorcycle was traveling at thirty or thirty-five miles. No other vehicles were in the vicinity.

One witness called by plaintiff testified that twenty feet from the northerly line of the Eastern Promenade, a street ninety-five feet in width as it enters Washington Street from the eastward on a double turn, the motorcycle speeded to pass the truck. Another witness states that the attempted passing was fifty feet from the intersection; still another, that when the motorcycle endeavored to go ahead, both vehicles were within the space common to the intersection of the ways.

Evidence for the plaintiff tends to show that when the motorcycle "was just about half way by," the truck was "sheered" suddenly and without warning or signal of any kind, to the left, diagonally toward the other street, and "run into the motorcycle." Other testimony is that the truck "cut off the course of the motorcycle" without notice, making that vehicle collide with the truck, inevitably. Whichever the fact, the collision occurred. The impact careened the motorcycle, but the rider held on and guided it, albeit uncertainly, to the middle of the intersection; he then fell off, and was dragged to the far curb, where the motorcycle stopped.

Evidence for the defendant aims at proving that his truck, proceeding in the westerly, rather than the easterly car tracks, (and hence to the driver's right-hand side of the middle of the street), continued in undeviating line, until the accident. "Pretty close to the intersection," said the defendant himself on the witness stand, and though there had been plenty of room for the motorcycle to pass, yet it was driven, without its rider giving such audible warning by horn or other warning device as the statute required, (R. S., Chap. 29, Sec. 70), till it struck the left front fender of the truck a glancing blow, diverting the direction of the motorcycle, with consequent fatality. On the impact, the defendant's testimony continues, he drove the truck to the left curb, "to avoid the man" on the motorcycle, of whose presence he had not before then known.

This, briefly stated, is substantially the contention of the parties.

The gist of the action is negligence. Negligence has been defined as the want of ordinary care, that is, the omission to do something which a prudent and reasonable man, led by those considerations which ordinarily regulate human affairs, would do, or doing something which such a man would not do. 20 R. C. L., 26.

Plaintiff asserts and insists that the evidence for his side, in-

clusive of that of the violation by the defendant of the statutory regulation of a left turn, with immediately resultant injury, establishes actionable negligence. The statute, in expressing the legislative view concerning what drivers on the street should ordinarily do, requires that: ". . . the driver of a vehicle intending . . . to turn to the left (at any intersection of public ways) 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." R. S., Chap. 29, Sec. 74.

A penalty is provided for violation of the provisions of the statute. This, it might be noted parenthetically, is likewise true of all other traffic statutes of later reference herein.

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. *Neal* v. *Rendall*, 98 Me., 69, 56 A., 209. Driving to the left of the middle of the road which a clear vision discloses unobstructed, is not necessarily evidence of negligence. *O'Malia* v. *Thomas*, 123 Me., 286, 122 A., 773. Nor, in every situation, is it an act of negligence for a driver to turn to the left. *Skene* v. *Graham*, 114 Me., 95A., 950.

The defendant had, in general, and under reasonable restrictions as to the exercise of care by him, a right to travel anywhere upon the way, no one else lawfully desiring to use it. *O'Malia* v. *Thomas*, supra. This does not mean that a motorist is justified in enforcing his right if he has reason to believe that in doing so he will incur danger of collision. The right is not an absolute privilege but something relative. It does not confer a license to violate other traffic laws, nor abrogate the legal requirement for care, not alone for the safety of its possessor, but, as well, for that of other travelers. An operator of a vehicle, though he has such right, must, for instance, if meeting another, seasonably drive to the right of the middle of the traveled part of the road, so that each shall have one-half of such part, and that they may pass without inter-

ference. R. S., Chap. 29, Sec. 2; *Neal* v. *Rendall*, supra; *Bragdon* v. *Kellogg*, 118 Me., 42, 105 A., 433. And he must yield for a vehicle in his rear to pass, on suitable and audible signal being given. R. S., Chap. 29, Sec. 72; *Levesque* v. *Pelletier*, 131 Me., 266, 274, 161 A., 198, 202.

When the operator of a motor vehicle intends to cross a street, he must use reasonable care to ascertain whether cars are attempting to pass from behind. *Verrill* v. *Harrington*, 131 Me., 390, 163 A., 266.

Upon the propositions of (1) negligence of the defendant, and (2) proximate relation of that negligence to the death of the intestate, there was, on the theory of the case apparently accepted by the jury, evidential basis substantiating the declaration in the writ. The jury might properly find that death resulted, in continuous and natural sequence, from the failure of the defendant to discharge the duty owed by him to plaintiff's intestate.

Although the defendant was negligent, and his negligence a producing cause, he is not liable if plaintiff's intestate's own want of consistent care was in any degree contributable to the unfortunate misadventure. The intestate was bound to exercise reasonable care to avoid colliding with the truck. Overtaking and passing a motor vehicle at any time calls for caution. *Levesque* v. *Pelletier*, supra.

In order to constitute contributory negligence, act or inadvertence of plaintiff, amounting to a breach of the duty which the law imposes upon persons to protect themselves from harm, must so unite with actionable negligence of defendant as to make the damage complained of, the direct result of such mutual and coöperating negligence. 45 C. J., 942. "It (contributory negligence) debars from recovery, even from an admittedly negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm." 21 Harvard Law Review, 233, 258. The defense is grounded on the common-law rule that the law will not apportion the consequences of concurrent negligence. *Hines* v. *McCullers* (Miss.), 83 So., 734.

At common law, in actions of tort for negligence, the plaintiff has to prove, by a fair preponderance of all the evidence, not only that defendant was negligent, and harm without other agency resulting, but also to negative contributory negligence. Absence of

proof of any of these elements precludes a recovery. With respect to cases like the present, a statute provides:

"In actions to recover damages for negligently causing the death of a person . . . the person for whose death . . . the action is brought shall be presumed to have been in the exercise of due care . . . , and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant." R. S., Chap. 96, Sec. 50.

This statute did not undertake to change the substantive law of negligence. *Cullinan* v. *Tetrault*, 123 Me., 302, 305, 122 A., 770, 772. Cases must still be decided upon all the evidence. *Levesque* v. *Dumont*, 117 Me., 262, 103 A., 737. The law allows a recovery against one who negligently causes the death of another, that other having been, at the time, in the exercise of ordinary care. The statute enacts a presumption of care; next, it casts upon the defendant the burden of overcoming such presumption, and proving want of care on the part of the deceased person. *Danforth* v. *Emmons*, supra. This shifting of the burden of proof works no change in the underlying principles of law. If a plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff may not prevail. *Jones* v. *Manufacturing Company*, 92 Me., 565, 569, 43 A., 512, 513.

There is, then, for review, on this branch of the case, these questions: Did defendant prove, by believable evidence overcoming the statutory presumption of due care, that plaintiff's intestate failed to exercise such care as an ordinarily careful and prudent cyclist would have exercised under similar or substantially the same circumstances, — and that such failure contributed to and entered into the fatality? Contributory negligence is usually for the jury. Yet, when the evidence is conclusive that conduct was not in harmony with what an ordinarily prudent man would do, and a valid verdict, in any rational view, could not be returned for the plaintiff, the judge should order the verdict the evidence demands. *Day, Admx.* v. *Boston and Maine Railroad*, 97 Me., 528, 55 A., 420; *Kidney, Admr.* v. *Aroostook Valley Railroad*, 119 Me., 597, 111 A., 334.

The general verdict in this case indicates that the jury found the defendant's proof fell short of outweighing presumed due care, and establishing the contrary.

In determining whether the plaintiff's intestate was guilty of contributory negligence, these provisions of statute law have bearing:

"The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at . . . any intersection of ways." R. S., Chap. 29, Sec. 71.

"The driver of an overtaking motor vehicle not within a business or residence district . . . shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction." R. S., Chap. 29, Sec. 70.

Prima facie, as before stated, violation of a traffic statute is evidence of negligence. *Neal* v. *Rendall*, supra; *Bragdon* v. *Kellogg*, supra; *Dansky* v. *Kotimaki*, 125 Me., 72, 130 A., 871; *Bolduc* v. *Garcelon*, 127 Me., 482, 144 A., 395. Such a violation is not necessarily evidence of contributory negligence. Evidence that plaintiff was lacking in the care and diligence that an ordinary person would use, is not evidence that defendant was actionably negligent.

The presumption of the deceased person's due care is, as counsel urges, inclusive of the due observance by him of traffic statutes. Irrespective of the presumption, illegality is not to be presumed. *Lyons* v. *Jordan*, 117 Me., 117, 102 A., 976.

When the accident happened, plaintiff's three witnesses were walking northerly on the sidewalk, on the westerly side of the street, in a sense to meet the vehicles. Two of them were going along together, hurrying to their work; they were fifty to one hundred feet from the vehicles. Both these men, as witnesses, gave evidence that the collision occurred before the motorcycle and the truck were at the intersection. The third man, who appears to have been three times as far away as the others, seems, on cross-examination, to say that the collision was within the intersection. The testimony of this witness, despite the efforts of counsel on the opposing sides, and of the presiding Justice, that he be definite, is confused and confusing, except as to his having seen the accident. The defendant himself, and defendant's son (who too was riding in the truck cab, the left window of which was down), testify that while the locus was close to the intersection, the vehicles had not yet come to the meeting of the streets. This, in summary, is all the evidence in this connection.

The inhibition of the statute is that a motor vehicle must not attempt to pass another, proceeding in the same direction, at any intersection of streets. Traffic statutes are given a reasonable construction. "At" is a word of somewhat indefinite meaning, whose significance is generally controlled by the context and accompanying surroundings. Used in reference to place, it often means "in" or "within," but its primary sense encases the idea of "nearness" or "proximity." 4 Cyc., 365. "At" is less specific than "in" or "on." *Lovin* v. *Hicks* (Minn.), 133 N. W., 575. "At" emphasizes locality. "One who drives out of a single file of cars in motion just before entering a street intersection, and proceeds abreast of it, violates a traffic ordinance forbidding attempts to pass vehicles, 'at a street intersection'." Headnote, *Crosby* v. *Canino*, 78 A. L. R., 1202; 89 Colo., 434, Pac., (2d) 792.

Laying aside the question of where the collision was, as debatable, and involving a matter for the jury, this further inquiry claims attention: Did the cyclist reasonably give warning with his horn or other warning device, before attempting to pass the truck, of his desire and intention to go by it, and, if so, did failure to warn constitute contributory negligence? The burden, it is to be borne in mind, is on the defendant. One of plaintiff's witnesses testified positively that no signal was given. All the other witnesses, — two for the plaintiff and two for the defense, — simply say they heard no sound of horn. The significance to be attached to testimony concerning whether or not the signal which the statute exacts was given, depends upon attendant circumstances.

The street on which the vehicles were proceeding was, to the left of the truck, twelve feet in width. Notwithstanding, the motorcycle "crawled by slowly," "four or five feet from the truck," without, — as all the testimonial evidence tends to show, — sounding an audible warning.

It may be that the cyclist was relying that the truck driver, before turning his vehicle to the left, would proceed to the center of the intersection, as required by statute. A driver of a vehicle may rely somewhat that drivers of other vehicles will be obedient to law, but not implicitly. *Larrabee* v. *Sewall*, 66 Me., 376, 381; *Smith* v. *Elliott*, 122 Me., 126, 119 A., 203.

There is testimony that the noise made by the exhaust of the motorcycle was heard by the men on the sidewalk, who witnessed for plaintiff, — even by the most distant one of them, who was deaf. The defendant, while on the witness stand, said that he heard only the noise of his own truck. The noise of the motorcycle might well have suggested a motor vehicle, laboring, — as witnesses testify the motorcycle did,—to make the hill, which was negotiated appreciably before starting to go by the truck; but there is no room in the evidence for inference that any such noise was tantamount to the intersectional warning the statute prescribes.

Plaintiff stresses that his intestate was confronted by an emergency. Any emergency was not attributable solely to negligence on defendant's part; had plaintiff's intestate exercised ordinary care, the emergency now insisted would not have arisen. *Esponette* v. *Wiseman*, 130 Me., 297, 303, 155 A., 650, 654.

To him who reviews the sad accident, on the neutrality of the printed transcript, seeking only the verity of that record, there seems, in justice, no escape from the conclusion that plaintiff's intestate's negligence was proved to have been a moving or contributory cause of his death. The evidence, on this phase, did not, in fact, disclose a jury question; it presented a question of law. *Levesque* v. *Dumont*, supra. The exception has merit. Of the verdict, it suffices to say that it can be given no weight whatever.

Exception sustained.
Motion sustained.
Verdict set aside.
New trial granted.

STATE OF MAINE

vs.

MURIEL RAND AND PHILIP HENRY.

Penobscot. Opinion, January 4, 1934.

CRIMINAL LAW. ARSON. "AGGRAVATED OFFENSE." P. L. 1931, CHAP. 241.

No one can commit the crime of arson without evincing such a degree of depravity and utter disregard of the safety of limb, life and the secured rights of society as to constitute an "aggravated offense" within the meaning of the statute.

The charge of arson necessarily carries with it an averment of aggravation. One charged with the crime of arson is sufficiently informed that the offense with which he is charged is of an aggravated nature without specific allegation to that effect.

The Superior Court before the enactment of P. L. 1931, *Chap.* 241, *had original jurisdiction of the crime of arson, and then it was not necessary to allege aggravation in its commission.*

Arson, being an aggravated offense, comes within the exception and of it the Municipal Court by said Act was not given "exclusive original jurisdiction." By the enactment of this law, the Superior Court is not deprived of its jurisdiction as to the crime of arson.

A child under the age of fifteen years may be indicted in the Superior Court for the crime of arson or the Municipal Court on proper process of complaint and warrant may bind the child over to await the action of the grand jury of the Superior Court.

On report. Defendants were indicted at the April Term, 1933, of the Superior Court for the County of Penobscot, for the crime of arson. At the trial a verdict of not guilty was directed for the defendant Rand. The defendant Henry filed a plea in abatement to the indictment, alleging that at the time of the commission of the alleged offense, he was a child under the age of fifteen years, and subject to the jurisdiction of the Municipal Court only. A gen-

eral demurrer was filed by the State, and by agreement of counsel, the case was reported to the Law Court for its determination.

Case remanded for trial of respondent Henry. The case fully appears in the opinion.

James D. Maxwell, County Attorney for the State.

Clinton C. Stevens, for respondent.

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

HUDSON, J. This case comes to the Law Court on report. At the April Term, 1933, of the Superior Court in Penobscot County the Grand Jury indicted Muriel Rand and Philip Henry for the crime of arson. At the same term, upon conclusion of the State's evidence, the presiding Justice ordered a verdict of not guilty as to Rand.

The other respondent, Henry, filed a plea in abatement to the indictment, alleging as reasons for abatement the following:

1. "That at the time of the bringing and presentment of the same by the Grand Jurors for the said County of Penobscot he was, and is now, a child under the age of fifteen years."

2. "That the offense and offenses alleged against him in said indictment were not and are not alleged in said indictment to be aggravated, and that he is not a child of a vicious or unruly disposition, has never been such and is not alleged in said indictment to have been such at any time or to be such now."

3. "That judges of municipal courts within their respective jurisdictions have exclusive original jurisdiction over all offenses committed by children under the age of fifteen years which are not and are not alleged to be aggravated or unless committed by children of a vicious or unruly disposition and alleged to be such."

4. "That the alleged offense set out in said indictment was therein alleged to have been committed within the territorial jurisdiction of the Bangor Municipal Court, wherein this proceeding should have been commenced and not in this honorable court."

To the plea in abatement the State filed a general demurrer.

By stipulation in the report, agreement was made "that if the

indictment is not good as against him" (meaning Henry), "it is to be quashed as to him; if good as against him, then he is to be placed on his trial."

By the above pleadings an issue of law is raised on admitted facts. The defense is that the indictment is invalid because of lack of jurisdiction in the Superior Court, by reason of provisions of Chapter 241, P. L. 1931, entitled, "An Act to Extend the Jurisdiction of Municipal Courts in Certain Cases." The State's contention is that this Act is inapplicable and, moreover, is unconstitutional.

The issue, then, requires interpretation of this public law, to be followed, if necessary, by decision on its constitutionality.

Its Section 1, with relation to jurisdiction, provides: "Except as hereinafter provided, judges of municipal courts within their respective jurisdictions shall have exclusive original jurisdiction over all offenses committed by children under the age of fifteen years." Is this offense, then, within the "exclusive original jurisdiction" of the Municipal Court, or does it come within the exception stated in the Act? This exception appears in the second paragraph of Section 4 of the Act, and is "Unless the offense is aggravated or the child is of a vicious or unruly disposition no court shall sentence or commit the child to jail, reformatory, or prison, or hold such child for the grand jury."

Is the crime set forth in this indictment, viz., arson, an aggravated offense? If so, it comes within the exception. Arson was defined at common law as the "malicious and wilful burning the house or outhouse of another man. 4Bl. Com., 220, 221." 264 Mass., 378, 380, 162 N. E., 733, 734.

"Arson, as understood at the common law, was a most aggravated felony, and of greater enormity than any other unlawful burning, because it manifested in the perpetrator, a greater recklessness and contempt of human life, than the burning of any other building, and in which no human being was presumed to be." *State* v. *McGowan*, 20 Conn., 245, 247; 2 R. C. L., 496, Sec.1.

Arson in this State has been made a statutory crime, and is set forth with varying situations in Sections 1, 2 and 3 of Chapter 130, R. S. 1930. No punishment designated in any of said sections

is less than one year in State's Prison. Sentence may be, depending on which section the indictment is found, anything from one year in State's Prison to life, for Section 1 provides that "Should the life of any person be lost in consequence of any such burning, such offender shall be deemed guilty of murder and punished accordingly."

The severity of the sentence is significant in considering the enormity of the offense as one aggravated or not. Formerly, the crime of arson in this State was punishable by death. R. S .1871, Chap. 119, Sec. 1.

The minimum sentence for arson is one year in the State's Prison. Hence it is a felony by statute and being a felony it is an infamous crime. *State* v. *Vashon*, 123 Me., 412, 123A ., 511.

To aggravate is "to make heavy or heavier; to add to; to increase; also, to load; burden; to make worse or more severe; to render less tolerable or less excusable; to make more offensive; to enhance; to intensify." Webster's New International Dictionary.

Quoting the above definition, counsel for the respondent argues that "it is fair inference to draw from all this that there is a usual norm in the case of each kind of crime as defined by law" and claims that "the same crime may be perpetrated in an aggravated form by other and added circumstances of more than ordinary depravity." Thus, his position is that there is aggravated arson and arson not of an aggravated nature. It may be true that in some cases of arson there is greater turpitude than in others; still, it does not follow, if arson is committed, that in any case it is not an aggravated offense, even if less aggravated than in another. We think that the mere commission of the crime of arson itself is the commission of an aggravated offense.

Some murders are more aggravated crimes than others but would one contend that any murder was not an aggravated crime?

No one can commit the crime of arson without evincing such a degree of depravity and utter disregard of the safety of limb, life and the secured rights of society as to constitute an "aggravated offense" within the meaning of this statute.

We hold, therefore, that arson is in itself an aggravated crime. The learned counsel for the respondent, who is acting in this case only by reason of appointment by the Court, states in his brief

that: "If the Court so holds," (that arson is an aggravated crime) "we have nothing further to say."

The defense also claimed that allegation of aggravation in the indictment was necessary to give the Superior Court jurisdiction.

The charge of arson necessarily carries with it an averment of aggravation. One charged with the crime of arson is sufficiently informed that the offense with which he is charged is of an aggravated nature without specific allegation to that effect.

Furthermore, the Superior Court before the enactment of P. L. 241 had original jurisdiction of the crime of arson, and then it was not necessary to allege aggravation in its commission.

The later passage of this statute, which as construed excepts arson from its embrace, leaves the Superior Court's jurisdiction as to arson as it was previously and in no way changed; and so now there can be no need of such an averment.

Arson, being then an aggravated offense, comes within the exception and of it the Municipal Court by said Act was not given "exclusive original jurisdiction." By the enactment of this law, the Superior Court is not deprived of its jurisdiction as to the crime of arson.

A child under the age of fifteen years may be indicted in the Superior Court for the crime of arson or the Municipal Court on proper process of complaint and warrant may bind the child over to await the action of the grand jury of the Superior Court.

Our interpretation of the Act, as above set forth, makes unnecessary decision upon the question of its constitutionality. "Questions of Constitutional law should not be passed upon unless strictly necessary to a decision of the cause under consideration." *Payne* v. *Graham*, 118 Me., 251, 255, 107A., 709, 710.

We hold the indictment good, as against the attack of the defense, and in pursuance of the stipulation in the report the entry must be,

Case remanded for trial of respondent Henry.

H. TREMBLAY

vs.

L. HARRY SOUCY AND MARYLAND CASUALTY COMPANY.

Androscoggin. Opinion, January 6, 1934.

SURETYSHIP AND GUARANTY. CONTRACTS.

In the absence of a statute to that effect, it is universally held that mere agreement to "furnish" material does not guarantee title.

Liability can not be founded except upon the reasonable import of all the terms of a bond, otherwise a surety would be held not on the contract as actually made, but on that which the court might determine that he intended to enter into.

An agreement to furnish a thing to be used in a certain work is not an agreement as to how it shall be obtained.

An agreement by a construction company to furnish and deliver all the materials and to do and perform all the work and labor necessary to complete its undertaking, is not the equivalent of a promise to pay subcontractors. Such a promise is necessary before the contracting company's surety company can be held.

In the case at bar, the defendant Soucy contracted to furnish the building material and the surety company that he would perform his covenants, but the surety company did not contract that Soucy would pay materialmen, the agreement to "furnish" building material, not being subject to the construction and interpretation, of providing and paying for such material.

On report on an agreed statement of facts. An action in debt to recover of the defendants under the obligation of a bond, certain sums of money paid by the plaintiff to creditors of the defendant Soucy. Judgment for the defendants. The case fully appears in the opinion.

James H. Carroll, for plaintiff.

Skelton & Mahon, for defendants.

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

BARNES, J. Action of debt. On report. The Town of Sanford, desiring the construction of an addition to a high school building, executed a contract with plaintiff, whereby the latter agreed and undertook to furnish the labor and materials for and construct the addition, and gave bond to secure said Town against any loss or damage arising out of liens or claims for labor or materials.

Plaintiff did not construct the addition, but secured defendant Soucy, as subcontractor; the work was done, the subcontractor paid in full, and it then appeared that three materialmen had not been fully paid by defendant for materials furnished by them and used by defendant in construction. One filed a lien claim, which plaintiff paid; the others refrained from filing lien claims, at the request of plaintiff, and he afterwards paid them. For the sum of these bills, $1,426.46, plaintiff brought suit.

In the lower court, by agreement of parties, the case was reported to this court upon an agreed statement of facts, for final determination and disposition upon the merits in accordance with law.

Defendant Soucy operated under a written contract with plaintiff, binding himself to furnish all labor and material and to do and perform all the work required, and to finish the work as provided in the general contract between contractor and owner.

The "general contract" between the Town and plaintiff is not before us, and we may assume nothing as to its contents.

Subsequent to the execution of the building contract a bond, duly executed by defendant Soucy as principal and defendant Maryland Casualty Company as surety, in consideration of a premium then agreed upon and afterwards paid to it by said Soucy, was furnished to plaintiff, conditioned that Soucy would well and truly perform and carry out the covenants, terms and conditions of said agreement.

Plaintiff's contention is that the surety company is liable to him for what he paid materialmen, by virtue of the bond given.

We find, however, no such obligation under the bond.

Soucy contracted to furnish the building material, and the surety company that he would perform his covenants; but the

surety company did not contract that Soucy would pay material-men, unless it be held that an agreement to "furnish" building material means to provide and pay for such material.

It may be good business, at a price, for sureties to guarantee title to material.

But in the absence of statute to that effect, and Maine has none such, it is universally held that mere agreement to "furnish" material does not guarantee title.

"Contracts of suretyship should be interpreted like other classes of contracts, according to the sense and meaning of the terms which the parties have used, and those terms should be taken, understood and given effect in their plain, ordinary and popular sense, fairly and justly to all the parties to the contracts." *United States Fidelity & Guaranty Co.* v. *Centropolis Bank of Kansas City Mo. et al*, 17 Fed., 2nd Series, 913, 53 A. L. R., 295.

"The natural, obvious meaning of the provisions of a contract should be preferred to any curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover. . . . Where the parties to an agreement have expressly contracted in writing that an insurance company shall or shall not be liable for a certain class of risks or accidents, and have made no exception of any of them, the conclusive legal presumption is that they intended to make none, and it is not the province of the courts to do so. In suits on written contracts, courts may lawfully give effect to the intentions of the parties, expressed in the writings only." *Hawkeye Commercial Men's Association* v. *Christy*, 294 Fed., 208, 40 A. L. R., 46, 52.

"The surety had a right to define and limit its liability even although it resulted in the failure of the obligee to get the security that he intended to obtain and thought that he had procured. Liability can not be founded except upon the reasonable import of all the terms of a bond, otherwise a surety would be held not on the contract as actually made, but on that which the court might determine that he intended to enter into. It is not sufficient that he 'sustain no injury by a change in the contract, or that it may even be for his benefit.'" *Miller* v. *Stewart*, 9 Wheat., 680, 703; *United States* v. *Boecker*, 21 Wall, 652, 657.

"The decisions, in cases where bonds have been given by a corpo-

ration organized for the express purpose of giving security, under which the rule so often declared as to the strictness with which bonds should be construed has been somewhat relaxed, do not aid the plaintiff.

"Such decisions are inapplicable where liability is beyond the scope of the undertaking." *Burdett* v. *Walsh et al*, 235 Mass., 153, 126 N. E., 374, 375.

"Now in this case each contract, with the bond securing its performance, is in one paper signed by the three parties, Galm, as contractor, this defendant as surety, and the city of Columbia as the party letting the work. In that paper Galm agrees to furnish the material for the work, but he does not agree to pay for it.

"The words of his obligation, as therein expressed, are that he 'shall furnish all tools, material, and labor necessary or required to perform the work.'

"An agreement to furnish a thing to be used in a certain work is not an agreement as to how it shall be obtained.

"The contractor may have it on hand, or he may make it, or he may acquire it as he will, if he furnishes it, he complies with his obligation as expressed in his contract. If he purchase such material, from another, he thereby is obliged to that other by that contract of purchase to pay him, but such contract is a distinct matter unconnected with his contract to perform the work." *Fellows* v. *Kreutz* (Mo.), 176 S. W., 1080, 1081.

"In the contract itself the construction company agrees 'to furnish and deliver all the materials and to do and perform all the work and labor' necessary to complete its undertaking. But this is not the equivalent of a promise to pay subcontractors. And such a promise is necessary before the casualty company can be held." *Mason* v. *Portland Const. Co. et al* (N. H., 1932), 160 Atl., 477.

"It is argued for appellants that, as the contract required Opdahl to *furnish* all the materials, this was equivalent to an agreement on Opdahl's part to pay for the same, and that the bond having been given to secure the faithful performance of the contract the surety company can be held liable for the amount due for materials furnished to Opdahl by appellants.

"The word 'furnish' in the contract would in a settlement between the United States and Opdahl, of course, be given its full

significance, but we can not hold that as against the Surety Company, the word 'furnish' shall be given the broad meaning contended for by counsel for appellants. No case has been cited by counsel for the appellants parallel in all its facts to the case at bar. When all is said the case is simply this: That Opdahl by his contract agreed to give a bond obligating himself to pay the claims of materialmen, but he failed to give any such bond. The surety company signed the bond which was executed, and no other. The bond itself did not provide for the payment of materialmen, nor did the contract contain any such provision." *Babcock & Wilcox et al* v. *American Surety Co. of New York*, 236 Fed., 340.

Under a contract that the contractor shall "provide" all material, and a bond that he shall "duly perform said contract," held:—"Unless the sureties agreed to be bound for debts due persons for furnishing material, there is no legal reason why they should be held liable in this action." *Greenfield Lumber & Ice Co.* v. *Parker et al*, 159 Ind., 571, 65 N. E., 747.

"We consider the true rule to be that there must not only be an intent to secure some benefit to the third party, but there must be a promise, legally enforceable. The contract and bond in this case fail to meet these requirements."*Electric Appliance Company* v. *U. S. Fidelity & Guaranty Company*, 110 Wis., 434, 85 N. W., 648, 53 L. R. A., 609.

To the same effect see, *Sterling* v. *Wolf*, 163 Ill., 467, 45 N. E., 218; *Green Bay Lumber Co.* v. *School District*, 121 Iowa, 663, 97 N. W., 72; *Village of Argyle* v. *Plunkett et al*, 226 N. Y., 306, 124 N. E., 1; *Scott-Graff Lumber Co.* v. *Independent School District No.* 1, 112 Minn., 474, 128 N. W., 672; *Warner et al* v. *Halyburton et al* (N. C.), 121 S. E., 756; *City of Ocala* v. *Continental Casualty Co.* (Fla.), 127 So., 326; *Puget Sound Brick, Tile & Terra Cotta Co.* v. *School District No.* 73, 12 Wash., 118, 40 Pac., 608, and in note to Ann. Cas., 1916 A., 759.

Such being the law, and since, as is the agreed statement, "The defendant, Soucy, contracted for and had delivered and incorporated into said building the labor and materials necessary for and did and completed the work required of him by his contract in accordance with the plans and specifications," to the satisfaction of the architects, we find,

For the defendants.

NETTIE A. GREEN *vs.* FRANK W. ALLEN ET ALS.

Penobscot. Opinion, January 10, 1934.

WILLS.

The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rules. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implications and necessary inferences. Language may be changed or moulded to give effect to intent; and intent will not be allowed to fail for want of apt phrase or conventional formula.

In the case at bar, the bequest read as follows: "All my wearing apparel, jewelry, articles of adornment and personal effects, I give and bequeath to my wife, Nettie Shaw, my sister, Mrs. Mary S. Kimball, my niece Mrs. Fred B. Bradeen and Frank W. Allen, to be distributed by them in accordance with their wishes and desires. Inasmuch as Frank W. Allen is familiar with my wishes to a considerable extent, his suggestions may be helpful in the distribution."

A trust being created thereby, other than a charitable trust, too indefinite on its face to be carried out, the legatees acquired the bare legal title to the property, the beneficial interest to which passed to the residuary legatees by way of a resulting trust.

On appeal by plaintiff from a decree of a sitting Justice dismissing her Bill in Equity involving the construction of a paragraph in the will of Charles D. Shaw, her late husband. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Fellows & Fellows, for plaintiff.

Butler & Butler, for defendants.

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

PATTANGALL, C. J. Bill in Equity involving the construction of a single paragraph in a will in which defendant Allen is named executor. On appeal.

The paragraph in question reads:

> "All my wearing apparel, jewelry, articles of adornment and personal effects, I give and bequeath to my wife, Nettie Shaw, my sister, Mrs. Mary S. Kimball, my niece Mrs. Fred B. Bradeen and Frank W. Allen, to be distributed by them in accordance with their wishes and desires. Inasmuch as Frank W. Allen is familiar with my wishes to a considerable extent, his suggestions may be helpful in the distribution."

Plaintiff claimed that the persons named became owners, as tenants in common, of the personal property described and prayed that it be divided equally on the basis of value between them; and if division in kind proved impracticable, to be sold and the proceeds divided.

The Court below dismissed the bill, finding that the testator intended to create other than a charitable trust but that the trust was too indefinite on its face to be carried into effect; that the legatees named took the legal title to the property but not the beneficial interest therein; and that the residuary legatees, by way of a resulting trust, acquired the beneficial interest. As authority for his finding, the learned Justice relied on *Fitzsimmons* v. *Harmon*, 108 Me., 456, 81 A., 667; *Haskell* v. *Staples*, 116 Me., 103, 100 A., 148; *Buzzell et als* v. *Fogg*, 120 Me., 158, 113 A., 50; *Nichols* v. *Allen*, 130 Mass., 211.

Attention was called by him to another item in the will which he regarded as of evidential value on the question of the testator's intent. This item read:

> "Inasmuch as my wife, Nettie A. Shaw and myself, and before our marriage, made and executed an ante-nuptial agreement under date of November 12, 1926, said ante-nuptial agreement is now confirmed by me, and because of it I make no bequest to my said wife in this Will."

The record discloses that testator left an estate appraised at $325,000, no part of which, because of the ante-nuptial agreement referred to in his will, went to his widow; that the property which appeared to be included in the paragraph in dispute was estimated to be of the value of $1,861.50 exclusive of the testator's clothing which was, by agreement of all of the interested parties, presented to a charitable institution. Included in the list were two diamond rings, one valued at $525 and one at $540. The remaining articles, valued at about $800, were divided among the four people named in a manner satisfactory to all, without much, if any, regard to value.

The items awarded to testator's widow were estimated to be worth $327.25; those to his sister $192.75; to his niece $156.76; to his friend and executor, Mr. Allen, $139.75. When the rings were reached, an irreconcilable disagreement at once appeared. The widow insisted upon receiving one of them. The sister and niece urged that they should remain in testator's family, one of them having been originally a gift from testator to a former wife. The executor temporarily retained possession of the rings but declined to take part in deciding to whom they should be allocated. The three women attempted to settle the matter by vote, the sister and niece uniting in favor of giving one of them to the daughter of Mrs. Kimball, the other to the son of Mrs. Bradeen. Mrs. Shaw refused to agree to the arrangement and thus a dispute arose which finally culminated in this litigation. Meantime, the executor delivered the rings as directed by majority vote of the others, deeming this sufficient authority for so doing.

The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rules. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implications and necessary inferences. Language may be changed or moulded to give effect to intent, *Hopkins* v. *Keazer*, 89 Me., 345, 36 A., 615, and intent will not be allowed to fail for want of apt phrase or conventional formula, *Fuller* v. *Fuller*, 84 Me., 475, 24 A., 946.

We can not agree with plaintiff that it was the intent of the testator in the instant case that the property in dispute should be divided into four parts of equal value among those named in the

bequest. The money value of the bequest was relatively trivial. The apparent intent of this portion of the will was to leave to those who were nearest to the testator certain tokens of his regard, the mere sight of which would revive kindly memories of old companionship. The value of these mementos was not to be measured in money. It sounded in sentiment, not in dollars. On such a basis, the testator believed that the distribution of his personal effects would be approached.

Nor do we subscribe to the doctrine that the legatees took title to the property as tenants in common. The language of the will contradicts that theory. The phrase "to be distributed by them" is not synonymous with "to be distributed among them" or "divided among them." The use of either of the latter phrases would imply the exclusion, as participants in the gift, of all excepting those named. The words actually used are inclusive of the persons particularly designated and also of an unascertainable number of others. The bequest is not restricted to those whom plaintiff regards as cotenants. Not being so restricted, the legatees took as trustees merely the naked legal title. A trust, then, having been created, too indefinite on its face to be carried out, the beneficial interest in the property by way of a resulting trust passes to the residuary legatees in accordance with the rule laid down in *Buzzell* v. *Fogg*, supra, and cases cited therein.

Appeal dismissed.
Decree below affirmed.

THOMAS A. COOPER

BANK COMMISSIONER OF THE STATE OF MAINE

vs.

FIDELITY TRUST COMPANY.

IN RE: PETITION OF EMERY O. BEANE, RECEIVER

OF

FINANCIAL INSTITUTIONS, INC.

Cumberland. Opinion, January 11, 1934.

BANKS AND BANKING. CONSERVATORS. RECEIVERS. SET-OFF. EQUITY.

When in proceedings under Chap. 93, Public Laws 1933, known as the "Emergency Banking Act," the Court elects to liquidate a trust company through a conservator and does not appoint a receiver or trustee, except as the statute otherwise expressly provides, the conservator is governed by the general rules applicable to receivers of trust and banking companies.

Such a conservator is a ministerial officer of the Supreme Judicial Court and is subject at all times and in all matters to the direction and control of the Court, which is the source of his authority and to which he is bound to render strict obedience.

The conservator's power and right to enforce the statutory liability of the stockholders, expressly conferred by the "Emergency Banking Act" and defined by reference in the general law applicable to receivers appearing as R. S., Chap. 57, Sec. 93, is subject to the same limitations.

Under R. S., Chap. 57, Sec. 93, the stockholders in a trust and banking company in this State are "individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such corporation, to a sum equal to the amount of the par value of the shares owned by each in addition to the amount invested in said shares."

The liability which the stockholders of the corporation assume when they become shareholders, accrues when the Court having jurisdiction of the proceeding properly decrees that a resort to the statutory liability of the shareholders is necessary, and fixes the amount thereof.

The statutory liability of the stockholders is no part of the corporate assets.

It can be enforced only for the benefit of the creditors by the receiver of the corporation or a conservator having the powers of a receiver.

The moneys which come into the possession of the receiver or conservator as the proceeds from the collection of the liability of stockholders are available for and must be applied ratably to all contracts, debts and engagements of such corporation and, while not in a legal sense assets of the corporation, added to and along with such assets make up a fund for the benefit of all creditors having valid claims against the corporation.

This is one common fund held by a single trustee for one and the same purpose or use, regardless of the source from which it is derived or the distinctions which originally attached to its several parts.

The relation of a depositor to a trust or banking company is ordinarily that of a creditor.

A court in equity will take cognizance of cross claims between litigants though wanting in mutuality, and set off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice.

The insolvency of the party against whom the set-off is claimed is well recognized as a sufficient ground for equitable interference.

When a person entitled to share in the distribution of a trust fund is also indebted to the fund, and is insolvent, his indebtedness in equity may be set off against his distributive share.

Under this rule, a stockholder's statutory liability may be set off against his distributive share in the assets of a bank.

The right of set-off extends to the distributable share of the assets of the bank to which a stockholder is entitled as a depositor, and not to his entire deposit.

A receiver of a corporation holds the property coming into his hands by the same right and title as the corporation and is subject to all equities, including the right of set-off, which existed at the time of his appointment and could have been successfully invoked against the corporation.

In the case at bar, inasmuch as Financial Institutions, Inc. had already on May 25, 1933, been decreed insolvent, the Conservator of the Fidelity Trust Company could not disregard the decree of the Supreme Judicial Court made June 9, 1933, wherein he was directed to retain the dividends then declared which were payable to any stockholder whose liability he had reason to believe might be difficult to collect.

Financial Institutions, Inc. was a creditor of the Fidelity Trust Company in respect to its deposits. As a stockholder, however, it was indebted to the creditors of the Fidelity Trust Company.

While there was not the mutuality of demand as to the quality of the right and identity of the parties essential to a right of set-off at law, the right of equitable set-off had attached to the distributive share of Financial Institutions, Inc., in the assets of the Fidelity Trust Company, and the Receiver held the property of the corporation subject to that equity.

The issue raised in these proceedings, being equitable, the cause was properly retained and determined in the pending suit.

The fact that the Conservator had already brought a suit at law to enforce the payment of the statutory liability of Financial Institutions, Inc. as a stockholder does not bar this proceeding. The Conservator can not be compelled to elect to proceed at law where his remedy is less full and complete.

The order directing the Conservator of the Fidelity Trust Company to retain the dividend declared upon the deposit of Financial Institutions, Inc. was fully warranted.

On report on an agreed statement of facts. A Bill in Equity in which Emery O. Beane, Receiver of Financial Institutions, Inc., petitioned to obtain payment of certain dividends payable by the Conservator of the Fidelity Trust Company, but held by him in accordance with the provisions of the decree for distribution. Petition denied. The case fully appears in the opinion.

Beane & Beane, for petitioner.

Frank H. Haskell,

John F. Dana, for defendant.

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

STURGIS, J. On Petition in Equity filed by the Bank Commissioner of Maine in accordance with Chap. 93 of the Public Laws of 1933, and known as the "Emergency Banking Act," the Supreme Judicial Court on March 18, 1933, appointed a conservator for the Fidelity Trust Company, a state trust and banking corporation located at Portland, and thereafter the conservator accepted and qualified for said trust, entered upon the discharge of his duties, and in due course his appointment was confirmed and made permanent.

On April 4, 1933, liquidation of the Fidelity Trust Company having been begun, the conservator petitioned the Court for authority to enforce the individual liability of the bank's stockholders

(R. S., Chap. 57, Sec. 93), and, after due notice and hearing, it was ORDERED, ADJUDGED AND DECREED:

"That the assets of the defendant corporation are not sufficient to pay its indebtedness, and that there is due to the creditors of said Fidelity Trust Company the sum of at least one million dollars ($1,000,000) in excess of the amount that can be realized from its remaining assets, and that an assessment of 100% upon the whole capital stock of said Fidelity Trust Company amounting to one million dollars ($1,000,000) upon all the stockholders thereof be, and the same hereby is, made and declared, and that the said Robert Braun, Conservator, be and hereby is authorized and directed to collect from each owner of record of the stock of said Fidelity Trust Company on the eighteenth day of March, 1933, the date when said conservator was appointed in this case, a sum equal to the par value of his or her stock, to be used in payment of the claims of said creditors, . . ."

The conservator thereupon began proceedings to enforce the payment of the assessment.

When the conservator was appointed, Financial Institutions, Inc., a corporation having its principal place of business at Augusta, was the owner of 5,308 shares of the capital stock of the Fidelity Trust Company of a total par value of $530,800, and was also a depositor, having a credit in the form of a demand or checking account which amounted to $38,747.66. It is now insolvent and in receivership, the petitioner in this proceeding having on May 25, 1933, been duly appointed its receiver upon a bill in equity filed in the Supreme Judicial Court for the County of Kennebec.

On June 9, 1933, by decree duly entered as of that date, the conservator of the Fidelity Trust Company was directed to pay to all of its demand depositors and others entitled to share on a parity therewith, a dividend amounting to twenty (20) per cent of their deposits or claims, subject, however, to the following conditions:

"In case of all stockholders in the said Trust Company who have demand deposits or claims against it, the conservator may in his discretion retain until further order of Court

twenty (20) per cent of any demand deposit or claim against said Trust Company held by such stockholder, and in the event that the said conservator has reason to believe that it may be difficult to collect the liability from such stockholder, he shall retain such twenty (20) per cent."

The receiver of Financial Institutions, Inc. here seeks to recover the twenty per cent dividend of $7,749.53 which was so declared upon its deposit in the Fidelity Trust Company but is retained by the conservator of that bank pursuant to the provisions of the decree ordering the distribution and under a claim of the right to set off the liability of Financial Institutions, Inc. as a stockholder.

When this cause came on for hearing, the sitting Justice, being of the opinion that important questions of law were involved, with the consent of all the parties and intervenors, reported it to the Law Court for final determination. The Report is accompanied by an agreed statement which, saving the issue here directly involved, admits the existence of all facts which have been recited and the validity of all proceedings before the Court.

Conservators appointed under the "Emergency Banking Act" are given all "The rights, powers and privileges of receivers of banks and trust companies, including the right and power to enforce stockholders' liability." Sec. 4, Chap. 93, P. L. 1933. These general powers are enlarged but not limited by the special powers there conferred, which relate to borrowing money, pledging assets, distributing dividends, and receiving deposits, and are not here involved. When, therefore, in such a proceeding, the Court elects to liquidate a trust company through a conservator and does not appoint a receiver or trustee as permitted by Sec. 11 of the Act, the conservator, except as the statute otherwise expressly provides, is governed by the general rules applicable to receivers of trust and banking companies, and in that branch of the law we must find guidance for the determination of the question which has arisen here.

By statute, a receiver of a trust and banking company in this state is authorized "to take possession of its property and effects subject to such rules and orders as are from time to time prescribed by the supreme judicial court or superior court or any justice thereof in vacation." R. S., Chap. 57, Secs. 85, 52. As this

statute has been construed, such a receiver is an officer of the Court, subject to its rules and orders and even his possession is the possession by the Court. He takes no title to the property or assets of the trust company and receives his authority to act solely from the Court. "Without that authority given originally or by subsequent ratification, no act of (his) is valid." *Glidden* v. *Rines*, 124 Me., 286, 292, 128 A., 4, 6. In exercising the "rights, powers and privileges of receivers of banks and trust companies," the conservator is subject to and must abide by these rules. He is a ministerial officer of the Supreme Judicial Court which, contrary to the general statute, is given exclusive jurisdiction over conservators of trust companies, and he is subject at all times and in all matters to the direction and control of the Court, which is the source of his authority and to which he is bound to render strict obedience. The conservator's power and right to enforce the liability of the stockholders of the trust company, expressly conferred by the "Emergency Banking Act" and defined by reference in the general law applicable to receivers, appearing as R. S., Chap. 57, Sec. 93, is subject to the same limitations. In that statute it is expressly stated that the individual liability of the stockholders in a trust and banking company, when made to appear, can only be enforced "under proper orders of the court."

The conservator could not disregard the decree of June 9, 1933, wherein he was directed to retain the dividends then declared which were payable to any stockholder whose liability he had reason to believe might be difficult to collect. Financial Institutions, Inc., had already on May 25, 1933, been decreed insolvent and the petitioner had been appointed its receiver. The conservator obviously then had sound reason to believe that the liability of this stockholder would be difficult to collect and, until otherwise ordered by the Court, it was his duty to retain the dividend declared upon its deposit. Unless the Court exceeded its authority in this matter in the first instance, or because of the equities of the case should now modify the order, the action of the conservator must be confirmed.

The stockholders in a trust and banking company in this state are "individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such corporation, to a sum equal to the amount of the par value of the

shares owned by each in addition to the amount invested in said shares." R. S., Chap. 57, Sec. 93. The liability which the stockholders of the corporation assume when they become shareholders, accrues when the Court having jurisdiction of the proceeding properly decrees that a resort to the statutory liability of the shareholders is necessary, and fixes the amount thereof. *Johnson* v. *Libby*, 111 Me., 204, 210, 88 A., 647. The liability is no part of the corporate assets. *Flynn* v. *Banking & Trust Company*, 104 Me., 141, 147, 69 A., 771. It is created for the benefit of the creditors of the corporation and was formerly enforcible only by the creditors. *Pulsifer* v. *Greene*, 96 Me., 438, 445, 52 A., 921. Now since the amendment appearing in P. L. 1905, Chap. 19, and retained in the current statute, has come into effect, it can only be enforced for the benefit of the creditors by the receiver of the corporation or a conservator having the powers of a receiver. R. S., Chap. 57, Sec. 93; P. L. 1933, Chap. 93, Sec. 4.

The moneys which come into the possession of a receiver or conservator as the proceeds from the collection of the liability of stockholders are available for and must be applied ratably to "all contracts, debts and engagements of such corporation," and, while not in a legal sense assets of the corporation, added to and along with such assets, make up a fund for the benefit of all the creditors having valid claims against the corporation. It is a trust fund held by a single trustee for one and the same purpose or use, regardless of the source from which it is derived or the distinctions which originally attached to its several parts. It may be, strictly speaking, held in different capacities, but when collected it is one common fund.

In *King et al* v. *Armstrong, Receiver*, 50 Ohio State, 222, 233 et seq., 34 N. E., 163, 164, in discussing the national banking law, which was the law of the case, and noting that under Revised Statutes of the United States, Sec. 5234, act of June 30, 1876, the receiver of a national bank is charged with the enforcement of the individual liability of the stockholders, that Court said:

> "The receiver is authorized to collect from each stockholder, the necessary amount up to the full extent of his liability, to meet the demands of the creditors, and appears to be charged with that duty. The amount due from the stock-

holders becomes assets to be administered by him, as the other assets of the bank in his hands; and all of the assets, including the individual liability of the stockholders, constitute a trust fund for the benefit of all creditors having valid claims against the bank. It therefore becomes the duty of the receiver, under the direction of the comptroller, to so administer the fund as to secure to each beneficiary his just proportion of it. In his trust capacity, he is the representative of all the creditors, and of all the stockholders, both in the collection of the assets, and their proper distribution; and the fund collected from the stockholders goes into that arising from the other assets, and is distributed in the same way to the creditors, without separation or distinction on account of the source from which it is derived. It altogether constitutes one common fund, for the equal benefit of all the creditors, according to their respective rights."

This trust fund theory was affirmed in *Andrews* v. *State ex rel.*, 124 Ohio State, 348, 178 N. E., 581, and is the rule of the text in *Michie on Banks and Banking*, Vol. 7, Sec. 115d. While originally written concerning national banks and the laws under which they may be liquidated, the theory, we think, may be as soundly applied to a state bank which, as in the case at bar, is governed, as to the liability of its stockholders to its creditors, by essentially similar statutes.

The relation of a depositor to a trust or banking company is ordinarily that of a creditor. *Lawrence* v. *Trust Company*, 123 Me., 273, 122 A., 765; *Sales Company* v. *Trust Company*, 127 Me., 65, 141 A., 102. This is the status of Financial Institutions, Inc., in respect to its deposit in the Fidelity Trust Company. The amount of the deposit is a debt of the bank. Financial Institutions, Inc., as a stockholder is indebted, however, not to the Fidelity Trust Company, but to its creditors. Viewed from a legal aspect, the mutuality of demand as to the quality of the right and the identity of the parties, essential to a right of set-off at law, is lacking. R. S., Chap. 96, Sec. 77; *Lawrence* v. *Trust Company*, supra. Here we find strict mutuality only as to the fund which the conservator represents and of which Financial Institutions, Inc., is both a debtor and a creditor.

The doctrine of the necessity of a mutuality of demands in set-off is not binding, however, in equity. Although as a usual rule equity will not allow a set-off of debts accruing in dissimilar capacities, it is well settled that a court of equity will take cognizance of cross claims between litigants, though wanting in mutuality, and set off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice. *Rodick* v. *Pineo*, 120 Me., 160, 113 A., 45; *Crummett* v. *Littlefield*, 98 Me., 317, 56 A., 1053; *Merrill* v. *Cape Ann Granite Co.*, 161 Mass., 212, 217, 36 N. E., 797; *Rolling Mill Co.* v. *Ore & Steel Co.*, 152 U. S., 596, 615. The insolvency of the party against whom the set-off is claimed is well recognized as a sufficient ground for equitable interference. *Crummett* v. *Littlefield*, supra; *Rolling Mill Co.* v. *Ore & Steel Co.*, supra; *King et al* v. *Armstrong, Receiver*, supra; 24 R. C. L., 806.

In *King et al* v. *Armstrong, Receiver*, at page 235, the double liability of a stockholder of a bank was allowed to be set off against a liquidation dividend payable to him, and the Court said:

> "Equity will enforce the set-off or compensation of cross demands, so far as they equal each other, when necessary to prevent one of the parties from losing his demand on account of the insolvency of the other. Upon the same principle, when a person entitled to share in the distribution of a trust fund is also indebted to the fund, and is insolvent, his indebtedness may, in equity, be set off against his distributive share."

In *McClelland* v. *Merchants' and Miners' Nat. Bank*, 77 Colo., 302, 236 P., 774, the rule of equitable set-off stated in *King et al* v. *Armstrong, Receiver*, was applied verbatim to the set-off of a stockholder's liability against the dividend due him on the insolvency of the bank.

In *Finkelstein* v. *Bank of United States*, 255 N. Y. S., 8, a case involving the liquidation of a state bank, on the authority of *King et al* v. *Armstrong, Receiver*, the superintendent of banks, acting as liquidating agent, was allowed to set off a stockholder's statutory liability against his liquidation dividend. The opinion concludes as follows:

"Justice and expediency require that the superintendent, who holds both the general assets of the bank and the sums collected upon the assessment as trustee for the benefit of creditors of the bank, be permitted to set off the amount of applicant's statutory liability as stockholder against his distributive share in the assets of the bank."

Among the numerous other cases allowing a set-off between a stockholder's statutory liability and his distributive share in the assets of the bank are *Reichert* v. *Farmers' and Workingmen's Savings Bank*, 257 Mich., 500, 242 N. W., 239; *Harper* v. *Carroll*, 56 Minn., 487, 69 N. W., 610, 1069; *Schimke* v. *Smith*, 51 S. D., 591, 215 N. W., 878. *In re Carolina Bank and Trust Company*, 197 N. C., 613, 150 S. E., 118; *Broderick* v. *Adamson*, 262 N. Y. S., 204. Such of these cases as are at law and do not depend upon the doctrine of equitable set-off are cited only as to their results. They illustrate the trend of decision regardless of the reasoning on which they are based. It may be properly added that these and all other authorities seem to concur in the view that it is the distributable share of the assets of the bank to which a stockholder is entitled as a depositor and not his entire deposit, which may be set off against his individual liability. Under this rule, the stockholder shares equally with other creditors of the bank and no preference is created.

A receiver of a corporation holds the property coming into his hands by the same right and title as the corporation, and is subject to all equities, including the right of set-off, which existed at the time of his appointment and could have been successfully invoked against the corporation. *Folsom* v. *Smith*, 113 Me., 83, 92 A., 1003; *Am. Bank* v. *Wall*, 56 Me., 167; 23 *R. C. L.*, 56 *et seq*; 53 C. J., 103, and cases cited. When the petitioner was appointed receiver of Financial Institutions, Inc., that corporation was not only indebted to the Fidelity Trust Company to the amount of its then accrued liability as a stockholder, but was insolvent, and the right of equitable set-off here invoked had attached to its distributive share of the bank's assets. Its receiver came into possession and holds the property of the corporation subject to this equity. If the maxim "Qui prior est tempore potior est jure" has force in this case, it militates against the petitioner, not for him.

The procedure adopted in this case is approved. The issue raised here being equitable, the cause is properly retained and determined in the pending suit in which the conservator has been appointed. *Porter* v. *Kingman*, 126 Mass., 141; *Columbian Book Company* v. *De Golyer*, 115 Mass., 67; *Whitehouse, Eq. Pr.*, Vol. 1, Sec. 490. If a different rule of practice prevailed, the conservator, by answering the petition, waived all objections to its form and the mode of proceeding. *Newman* v. *Moody*, 19 Fed., 858; *Whitehouse, Eq. Pr.*, supra, Sec. 209; and the parties, by submitting the case to the Law Court on an agreed statement of facts, waive all technical questions of procedure and pleading. *Hurd* v. *Chase*, 100 Me., 561, 62 A., 660; *Pillsbury* v. *Brown*, 82 Me., 450, 19 A., 858. Furthermore, it is only in equity that full and complete justice can be done. In the suit at law, which the Agreed Statement shows the Conservator has brought to enforce the payment of the statutory liability of Financial Institutions, Inc., the remedy of equitable set-off is not available. The Conservator can not be compelled to elect to proceed at law where his remedy is less full and complete, *Fleming* v. *Courtenay*, 95 Me., 135, 49 A., 614; nor where he is not plaintiff both in equity and at law. *Whitehouse, Eq. Pr.*, Vol. 1, Sec. 334.

For the reasons stated and upon the authorities cited, the sitting Justice was fully warranted in ordering the Conservator of the Fidelity Trust Company to retain the dividend declared upon the deposit of Financial Institutions, Inc. The amount of that dividend, as also of any further dividends which may be duly declared, should be credited *pro tanto* upon the statutory liability of that corporation as a stockholder. If the dividends do not exhaust the assessment, the balance remaining due thereon is a proper claim against the assets of the corporation in the hands of its receiver. If, by chance, the dividends in the aggregate amount to more than the assessment, which here seems impossible, the excess is payable to the Receiver of Financial Institutions, Inc., as the Court may direct. The entry is

Petition denied.

EVERTON G. FRENYEA

vs.

MAINE STEEL PRODUCTS CO.

Cumberland Opinion, January 11, 1934.

MASTER AND SERVANT. MOTOR VEHICLES. NEGLIGENCE.

A master may loan or let his servant to another in such a way that he becomes the servant of the other for the time being.

Although the employee in such a case remains the general servant of his regular master, for anything he does in the transaction for which he is loaned or let, his special employer has all the usual liabilities of a master.

The master may agree with another that he will perform the work of the other through his own servant, who is retained in his service and under his direction and control. If so, the original master remains solely liable.

The test is whether the servant remains under the general direction and control of the original employer, or has become subject to that of the person for whom the work is being done.

A servant of one employer does not become the servant of another for whom the work in which he is employed is performed merely because the latter points out the work to be done and superintends its performance.

So long as the servant is engaged in the work entrusted to him by a general employer, and is attempting to accomplish it, there is no inference, from the mere fact that the original master has permitted a division of control over the servant, that he has surrendered or resigned his command so as to relieve himself from liability for the servant's acts.

In the case at bar, the jury were warranted in finding that the driver of the Ford truck, at the time the collision occurred, was acting as the defendant's agent or servant and within the scope of his employment. They were likewise warranted in finding that the negligence of the driver of the Ford truck was the sole proximate cause of the plaintiff's personal and property losses.

On exceptions and general motion for new trial by defendant. An action in tort to recover damages for personal injury and prop-

erty damage, resulting from a collision between an automobile truck owned and operated by the plaintiff, and an automobile truck owned by the State of Vermont and operated by one Pickering, alleged to be an agent or servant of the defendant. Trial was had at the June Term, 1933, of the Superior Court, for the County of Cumberland. The jury rendered a verdict for the plaintiff in the sum of $840.00. To the admission of certain testimony, and to the refusal of the presiding Justice to direct a verdict for the defendant, the defendant seasonably excepted, and after the jury verdict filed a general motion for new trial. Motion and exceptions overruled.

The case fully appears in the opinion.

Cook, Hutchinson, Pierce & Connell, for plaintiff.

Charles E. Grace, William B. Mahoney, for defendant.

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

STURGIS, J. This action on the case for negligence comes to this Court, after verdict for the plaintiff, on the defendant's motion for a new trial and exceptions. There is no essential dispute as to the facts, nor complaint as to the damages awarded by the jury.

MOTION:

On the morning of March 22, 1932, the heavily loaded Federal truck which the plaintiff, Everton G. Frenyea, was driving over the public highway through Hartland, Vermont, was struck by a Model A Ford light pick-up truck owned by the Highway Department of that State and operated by one Fred A. Pickering, who was employed as a road mechanic by the defendant, the Maine Steel Products Co., a manufacturer of road equipment at South Portland, Maine. The collision occurred about nine o'clock in the forenoon on a clear day on a concrete road about eighteen feet wide, which was covered with four or five inches of light snow or hail through which a single set of ruts had been worn by passing cars. At the point of collision, these ruts were at the extreme right-hand side of the road as the plaintiff drove towards White River Junc-

tion. The Ford truck came around a curve and along a level stretch for several hundred feet, traveling on its left-hand side of the road in the same ruts and directly in the path of the oncoming Federal truck. The plaintiff slowed down to three miles an hour. The driver of the Ford truck came straight ahead at fifteen to twenty-five miles an hour until he was close up to the other truck before attempting to turn out onto the right-hand side of the road. His front wheels made the turn, but the rear wheels slewed or skidded sideways and the trucks came together. The plaintiff received minor personal injuries and his truck was badly damaged.

The defendant is not entitled to a new trial on the issue of negligence. The jury were warranted in finding that the sole proximate cause of the collision from which the plaintiff suffered damages was the failure of the driver of the Ford truck to exercise due care in turning from the wrong side of the highway, on which he was traveling, over to the right of the center of it so as to pass without interference the vehicle in which the plaintiff was approaching from the opposite direction. The verdict can not be disturbed on this ground.

The Maine Steel Products Co., admitting it was the general employer of the road mechanic involved in this collision, but denying that he was negligent as found by the jury, contends, however, that he had been previously loaned or let to the State of Vermont and when the collision occurred was driving the Ford truck at and under the directions of the highway officers of that State, and for the time being was its servant. This seems to be the real defense relied on in this action.

The evidence discloses that the Maine Steel Products Co., having sold twenty-three snow plows to the State of Vermont, on February 13, 1932, through its President, George C. Soule, arranged to equip fifteen plows with deflectors, so-called, which had been recently invented and were designed to overcome certain operating defects. It was agreed with the Commissioner of Highways that the deflectors should be furnished and attached without charge. The road mechanic, Fred A. Pickering, was brought from the factory at South Portland, Maine, and left in Vermont with directions to attach the deflectors. His wages and expenses were paid by the

Maine Steel Products Co. Although he was taken about the State by Rupert A. Phelps, Superintendent of Construction of the Highway Department, showed the plows which needed deflectors, and directed by him from time to time as to when and where the attachments should be made, he was in no way otherwise supervised or directed in his actual work.

It seems that the deflectors were shipped, in the first instance, to the State Garage at Montpelier, Vermont, and had to be transported from there to the places where the plows were located, but apparently this distribution of the deflectors was for and at the expense of the Maine Steel Products Co. under its agreement to furnish and attach them free of charge. After the deflectors had been shipped from place to place by rail for a few weeks, apparently on its own initiative and merely as a courtesy, the Highway Department loaned the mechanic a Ford truck for that purpose and he used it thereafter in his work. So far as the record discloses, he was given no special instructions as to the operation or use of the truck, but the inference is that when and where he was directed by the Superintendent of Construction to put on new equipment he was impliedly authorized to use the truck to haul it. The mechanic had been directed to attach a deflector to a snow plow at Hartland and was on his way there with it in the Ford truck when this collision occurred.

It is a universally recognized rule that a master may loan or let his servant to another in such a way that he becomes the servant of the other for the time being. Although the employee in such a case remains the general servant of his regular master, for anything he does in the transaction for which he is loaned or let, his special employer has all the usual liabilities of a master. *Pease* v. *Gardner*, 113 Me., 264, 93A., 550, 552; *Torsey's Case*, 130 Me., 65, 153A., 807. On the other hand, the master may agree with another that he will perform the work of the other through his own servant, who is retained in his service and under his direction and control. If so, the original master remains solely liable for the act of the servant. *Wilbur* v. *Construction Company*, 109 Me., 521, 85A., 48; *Gagnon's Case*, 128 Me., 155, 146A., 82. In determining where the liability rests in this class of cases, the test which has long

and repeatedly been applied is whether, in the particular service which the servant is performing at the time of his tort, he was liable to the general direction and control of his original employer or had become subject to that of the person for whom the work was being done. "It is not so much the actual exercise of control which is regarded, as the right to exercise control." *Pease* v. *Gardner*, supra; *30 C. J. 1275 and cases cited.*

A servant of one employer, however, does not become the servant of another, for whom the work in which he is engaged is performed, merely because the latter points out the work to be done, and superintends its performance. As was said in *Quinby Company* v. *Estey*, 221 Mass., 57, 108 N. E., 908, "When a servant or agent in the general employ of one person is sent to work for another, he does not become the servant of the one to whom he is sent merely because the latter directs what work is to be done, or in what way it is to be done. The original master remains liable and the employee remains his agent, unless the authority to direct and control the servant in all the details of the transaction is surrendered to some other person, so that the business in which the servant is engaged is no longer the business of his general employer, but is in all respects the business of the person to whom he is sent. If the servant remains subject to the general orders of the man who hires and pays him he is still his servant, although specific directions may be given him by another person from time to time as to the details of the work and the manner of doing it." This rule is approved and applied in *Gagnon's Case*, supra; *Wilbur* v. *Construction Company*, supra; *Connolly* v. *People's Gas Light Company*, 260 Ill., 162, 102 N. E., 1057; *Driscoll* v. *Towle*, 181 Mass., 416, 63 N. E., 922; *Scherer* v. *Bryant*, 273 Mo., 596, 201 S. W., 900; *McNamara* v. *Leipzig*, 227 N. Y., 291, 125 N. E., 244; *Charles* v. *Barrett*, 233 N. Y., 127, 135 N. E., 199; *Standard Oil Co.* v. *Anderson*, 212 U. S., 215.

In the case at bar, although the road mechanic was rendering a service to the State of Vermont in attaching deflectors to its snow plows, in doing this he was working for the Maine Steel Products Co., which had agreed to furnish and attach them free of charge. When he collided with the plaintiff's truck, he was hauling a de-

flector to Hartland and going with it to put it on. At most, the officers of the Highway Department of Vermont had been permitted to specify what work was to be done and direct when and where it should be performed. There is no inference that the Maine Steel Products Co., by permitting this division of control over its mechanic, had surrendered or resigned "command" so as to relieve itself from liability for his acts while he was engaged in the very work it had entrusted to him and was attempting to accomplish it. *Charles* v. *Barrett*, supra.

Nor can the plaintiff be denied a recovery because the defendant's servant used a means of transporting its deflectors which it had not intended or contemplated. When the collision occurred, the road mechanic was using the truck not for his own purpose or those of the State of Vermont, but to perform a part of the service which he had been directed to render. This could properly be found to be within the scope of his employment. If so, his master is liable. *Champion* v. *Shaw*, 258 Mass., 154 N. E., 181; *39 C. J. Sec. 1478 and notes.*

It is the opinion of the Court that the jury committed no error in reaching the conclusion that Fred A. Pickering, who caused the plaintiff's injuries and property damage as here alleged, was acting as the defendant's servant or agent at the time. Its verdict in accordance with that finding can not be set aside.

EXCEPTIONS:

The defendant takes nothing by its exception to the refusal of the trial judge to grant its motion for a directed verdict. The questions there involved have been fully covered under the general motion for a new trial.

We are not of opinion that a new trial should be granted in this case because the plaintiff was allowed against objection to introduce evidence showing that, after this collision, the Maine Steel Products Co., paid its road mechanic compensation for disability under the Workmen's Compensation Act of the State of Maine. R. S., Chap. 55. Although this evidence should have been excluded as having no legitimate bearing upon the issue before the Court, it does not appear that the excepting party was aggrieved by it. It appears "that the case upon its merits has been rightly decided and

that the result should not be disturbed because of abstract errors of law, if they exist, which could not and do not interfere with the truth." *Gordon* v. *Conley*, 107 Me., 286, 78A., 365, 368. The exception directed to the admission of this evidence is not sustained.

Motion and exceptions overruled.

BLAINE S. VILES

vs.

S. D. WARREN COMPANY

Kennebec. Opinion, January 12, 1934.

BANKS AND BANKING. BILLS AND NOTES.

The general rule governing the question of reasonable time for presentation of checks for payment is well established. If the bank on which the check is drawn and the payee are in the same place, the check should be presented during banking hours of the first secular day following its receipt; if in different places, it should be deposited in the mail in like time. Special circumstances may excuse delay in either case, but in their absence the rule is absolute.

Delay in presentation for payment of checks and other negotiable instruments is excused by (1) *inevitable accident or overwhelming calamity;* (2) *prevalence of a malignant disease which suspends the ordinary operations of business;* (3) *the presence of political circumstances amounting to a virtual interruption and an obstruction of the ordinary negotiations of trade;* (4) *the breaking out of war between the country of the maker and that of the holder;* (5) *the occupation of the country where the parties live, or where the note is payable, by a public enemy, which suspends commercial intercourse;* (6) *public and positive interdictions and prohibitions of the State which obstruct or suspend commerce and intercourse;* (7) *the utter impracticability of finding the maker or ascertaining his place of residence.*

In addition to these general circumstances, there are various special circumstances which may excuse delay. Inevitable or unavoidable accident not attributable to the fault of the holder that makes performance impracticable or impossible, "by which is intended that class of accidents, casualties or circum-

stances which render it morally or physically impossible to make such presentment."

By the great weight of authority, the holder of a check is held to a high degree of care in protecting the maker from loss by reason of the closing of the bank against which the check is drawn. The rule appears to be based on sound grounds from every standpoint—legal, equitable and moral. The maker, when he deposits money to meet a check which he has mailed to his creditor, has a right to expect the recipient of the check to act promptly in presenting it for payment. There is little that the debtor can do to protect himself after the check leaves his hands. He must rely on his creditor to observe the rule which the law merchant made familiar to business men generations before the Negotiable Instruments Law was enacted. He has every right to expect that the law will be complied with and that he will not be subjected to danger of loss because of avoidable delay in presenting his check for payment.

In the case at bar, in so far as defendant suffered by plaintiff's failure to present the check within the time prescribed by law, plaintiff must stand the loss.

Report on agreed statement of facts. Action of assumpsit. The issue involved the question of due diligence in presentation of a check for payment.

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

Locke, Perkins & Williamson, for plaintiff.

Bradley, Linnell, Jones, Nulty & Brown, for defendant.

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

PATTANGALL, C. J. On report. Agreed statement of facts. Assumpsit on the common counts. Plea, general issue and brief statement of payment by check of the amount claimed. Plaintiff admits receiving check, which it is agreed was not paid by reason of the insolvency of the bank on which it was drawn. Defendant's position is that had the check been presented for payment within a reasonable time, plaintiff would have received his money, and that failure to so receive it was due to plaintiff's negligence. The details of the transaction, as fully and clearly stated in the record, may be summarized as follows.

It appears that the defendant was indebted to plaintiff; that their places of business were some sixty miles apart; that defendant mailed a check to plaintiff, payable to plaintiff's order, for the full amount of the debt, with a voucher attached bearing the endorsement "Account poplar contract, $2,000"; and that it was received at plaintiff's office on the following day. The next morning the check was taken from the envelope by plaintiff's bookkeeper, who prepared a deposit slip to accompany it when banked and set the documents aside for plaintiff's attention. Plaintiff was not at his office on the day the check arrived nor on the following day until after banking hours, when he first learned of its arrival. He then endorsed it and the next morning it was deposited in the local bank and forwarded in the regular course of business, arriving at the bank on which it was drawn one day too late to be cashed on account of the closing of that bank. Defendant had, at all times, a sufficient deposit to meet the check. The sole issue is whether or not failure to deposit the check on the day after its arrival at plaintiff's place of business constituted negligence and relieved defendant from loss. The facts being undisputed, this becomes a question of law. *Comer* v. *Dufour*, 51 Am. St. Rep., 89.

Sec. 186, Chap. 164, R. S. 1930, provides: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay," an enactment declaratory of the common law.

Sec. 193 of the same chapter provides that "In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

The general rule governing the question of reasonable time for presentation of checks for payment is well established. If the bank on which the check is drawn and the payee are in the same place, the check should be presented during banking hours of the first secular day following its receipt; if in different places, it should be deposited in the mail in like time. Special circumstances may excuse delay in either case, but in their absence the rule is absolute.

Veazie Bank v. *Winn*, 40 Me., 60; 5 R. C. L., 509-10, and cases cited.

Plaintiff admits the rule but contends that under the circumstances existing in this case, the delay of one day beyond the time fixed by it was not unreasonable. The points relied on are (1) that plaintiff did not personally receive the check until the day after it came to his office and had no reason to anticipate it at that particular time; (2) that the check being accompanied by a voucher, the acceptance of it automatically receipted in full the account for which it was given so that it required his personal attention and could not properly have been looked after by his bookkeeper; (3) that his absence from his office was occasioned by his being engaged in important public business in connection with the state Senate of which he was a member.

These reasons for delay beyond the time fixed as reasonable under normal conditions are urged as sufficient to take the case out of the general rule. We cannot agree with that conclusion.

Sec. 185, Chap. 164, R. S., 1930, defines a check as " a bill of exchange drawn on a bank, payable on demand" and adds that "except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

We have already quoted the section immediately following this definition, which fixes the time for presentation of a check for payment as within "a reasonable time." Some light as to what suffices as an excuse for not presenting within the time prescribed by the general rule may be derived from Sec. 81, Chap. 164, R. S., 1930, which refers to the presentment for payment of negotiable paper generally and excuses for delay in presentment. "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence." The language of this section is somewhat stronger than that used in Section 186 but is not inconsistent with it.

The authorities are agreed that certain circumstances of a general nature excuse delay. These are listed by Story, Parsons, Randolph and Daniels and quoted in many legal opinions substan-

tially as follows: (1) Inevitable accident or overwhelming calamity; (2) prevalence of a malignant disease which suspends the ordinary operations of business; (3) the presence of political circumstances amounting to a virtual interruption and an obstruction of the ordinary negotiations of trade; (4) the breaking out of war between the country of the maker and that of the holder; (5) the occupation of the country where the parties live, or where the note is payable, by a public enemy, which suspends commercial intercourse; (6) public and positive interdictions and prohibitions of the state which obstruct or suspend commerce and intercourse; (7) the utter impracticability of finding the maker or ascertaining his place of residence." *Young* v. *Exchange Bank of Kentucky*, 153 S. W., at 449.

In addition to these general circumstances, there are various special circumstances which may excuse delay. Inevitable or unavoidable accident not attributable to the fault of the holder that makes performance impracticable or impossible, "by which is intended that class of accidents, casualties or circumstances which render it morally or physically impossible to make such presentment." *Windham Bank* v. *Norton*, 22 Conn., 213.

Judge Story, in speaking of this ground of excuse, says, "It has been truly observed, by a learned author (referring to Mr. Chitty), that there is no positive authority in our law which establishes any such inevitable accident to be a sufficient excuse for the want of a due presentment. But it seems justly and naturally to flow from the general principle which regulates all matters of presentment and notice in cases of negotiable paper. The object in all such cases is to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution and effort. . . Due presentment must be interpreted to mean presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within regular time." Story on Bills, Sec. 258.

The application of these rules to a particular set of circumstances is not free from difficulty. In examining cases in which the

point is discussed, we have not confined our search to those relating to checks alone but have found it helpful to extend it to those concerning other forms of negotiable paper governed by similiar rules.

In *Barker* v. *Parker*, 6 Pick., 80, the court saw no excuse in the fact that on the day when presentment should have been made there was a heavy rainstorm and the plaintiff lived twenty miles distant, saying that "if it had appeared that a violent tempest had so broken up or destroyed the roads or obstructed them, it might have been considered a providential interception on account of which plaintiff would not have been charged with negligence."

Somewhat similar circumstances failed to excuse in *McDonald* v. *Mosher*, 23 Ill. App., 206. Here, the jury found against the drawer of the check. The court reversed its finding saying: "It does not appear it was physically impossible for appellee to have traveled the distance of two miles to the village on that day. While the law does not require it should be made manifest that it was absolutely impossible so to do, yet it does require it should be shown that it was reasonably impossible to do so . . . . It is unreasonable to say from the evidence that appellee, if he had known that the bank would fail and had believed he would lose the $54 unless he presented the check on that day, would have stayed at home. But, even if this could reasonably be said, yet it would not be a valid excuse for not going. One may be willing to sacrifice a sum of money, large or small, rather than take a cold, disagreeable and difficult walk or ride, and yet this fact affords no just cause for the conclusion that it was reasonably a physical impossibility for him to make such a trip."

In *Wilson, Executrix* v. *Senier*, 14 Wis., 411, the Court said, "There can be little doubt that cases may arise where the illness of the holder will excuse, but to do so it would undoubtedly be required that the case come strictly within the rule laid down by Mr. Chitty, that the illness must be shown to have been so sudden and so severe as to have prevented the holder from employing another person to make the presentment, as well as to have precluded the possibility of his doing so himself."

"Illness, in order to constitute a sufficient excuse, must be that

of the holder or his agent and of such a character as to prevent due presentment by the exercise of due diligence. And where an endorser was called from home in consequence of the dangerous illness of his wife and left his house in care of a lad without authority to open letters, it was held that he had lost recourse against his prior endorsers by the consequent delay in giving notice. He should have left someone in charge with authority to open letters." 2 Daniel on Negotiable Instruments (6th Ed.), Sec. 1127, and cases cited.

In *Northwestern Coal Co.* v. *Bowman et al* (Iowa), 28 N. W., 496, the excuse offered and considered insufficient was that plaintiff's manager, who received the check, was also superintendent of its mine and that the demands of his employment were such that he could not without detriment to the business leave the mine and go to the nearest bank, distant some six or seven miles, oftener than once or twice a week. It was his usual practice to hold checks received by him until he could, without serious inconvenience and possible loss, leave the mine for the time required to attend to his banking and in the case under consideration he followed that practice, retaining the draft seven days. On these facts the plaintiff recovered in the circuit court but the judgment was reversed on appeal.

The foregoing cases are fairly illustrative of the position generally taken in jurisdictions where the question has arisen, and might be extended almost indefinitely. The uniformity of opinion is disturbed by only a few isolated decisions.

Plaintiff calls attention in his brief to *Peterson* v. *School Dist.* (Minn.), 203 N. W., 46. In that case a school teacher received, in exchange for school orders issued to her for wages, two checks drawn by the district treasurer on a bank located several miles from the place where she taught and boarded. She held them for three days while she continued to teach before she attempted to present them to the bank for payment. The case was tried to a jury which found for plaintiff. The verdict was affirmed on appeal, the court holding that it involved a jury question and that the decision found justification on the ground that "It was plaintiff's duty to teach every week day except Saturday and legal holidays. The school's closing hour was 3:30 p. m. and the bank's

4 p. m. She could not make presentment of her checks before Saturday, April 15th, unless she employed some one to go to the bank for her or closed her school for a day and went herself. It can hardly be assumed that the defendant expected or intended that she should suspend teaching in order to cash the checks, or that she would employ a messenger to present them for her. . . Moreover, it would be unreasonable to charge a young woman teaching a country school with the knowledge of usages which might properly be ascribed to men actively engaged in business."

In *Berry* v. *Harris* (Ark.), 54 S. W. (2nd), 289, the court held that plaintiff was not negligent in delaying three days to deposit a check, under the following circumstances. "The payee was a farmer, not engaged in a commercial business. He resided eight miles from his trading town, in which the bank was located upon which his check was drawn, and only three days intervened before the check was presented for payment."

In *Peterson* v. *School District*, supra, the facts not being in dispute, the conclusion of the court, that the question whether the check was or not presented within a reasonable time was for the jury, is out of accord with well established law; and the observation that plaintiff would not be expected to be familiar with legal principles governing commercial transactions does not seem to us a good reason for accepting her excuse for the delay. Even if regarded as sufficient in that case, it has no application to the case at bar.

Berry v. *Harris*, supra, so markedly disagrees with any decision with which we are familiar that we cannot give it weight in reaching our conclusion.

By the great weight of authority, the holder of a check is held to a high degree of care in protecting the maker from loss by reason of the closing of the bank against which the check is drawn. The rule appears to be based on sound grounds from every standpoint —legal, equitable and moral. The maker, when he deposits money to meet a check which he has mailed to his creditor, has a right to expect the recipient of the check to act promptly in presenting it for payment. There is little that the debtor can do to protect himself after the check leaves his hands. He must rely on his creditor

to observe the rule which the law merchant made familiar to business men generations before the Negotiable Instruments Law was enacted. He has every right to expect that the law will be complied with and that he will not be subjected to danger of loss because of avoidable delay in presenting his check for payment.

In the instant case, plaintiff, in the exercise of the degree of care which the law demands, should either have visited his office during some period of the day when his legislative duties permitted or have arranged with his bookkeeper to act in his stead. His office was in the state capital and accessible to the State House by telephone. If plaintiff's agent was negligent in not communicating with his principal and if that negligence caused the loss, plaintiff is responsible.

In so far as defendant suffers by plaintiff's failure to present the check within the time prescribed by law, plaintiff must stand the loss.

Judgment for defendant.

INHABITANTS OF FRIENDSHIP

vs.

INHABITANTS OF BRISTOL

Knox. Opinion, January 12, 1934.

PAUPER SETTLEMENT. R. S. 1930, CHAPTER 33, SEC. 1, VI, SEC. 30 P. L. 1931, CHAPTER 124.

A person non compos, of age and emancipated, can acquire a pauper settlement in his own right.

Such a person intentionally kept living for five successive years in a town by his guardian, without receiving pauper supplies directly or indirectly, has his home in that town within the meaning of the pauper statute and gains a settlement.

Section 30 *of Chapter* 33 *of the Revised Statutes, which provides that a recovery by a town incurring expense in relieving persons found destitute and having no settlement therein against a town chargeable with the pauper's support estops such town "from disputing the settlement of the pauper with the town recovering in any future action brought for the support of the same pauper," has reference only to the same settlement.*

Under R. S. Chapter 33, *Section* 3, *as amended by Chapter* 124, *P. L.* 1931, *which was in force when this action accrued, a pauper settlement acquired under existing laws remains until it is defeated by the acquisition of a new one or until it is lost as therein provided.*

Under this law, when a pauper settlement is defeated or lost, it is finally ended and can not be revived.

A subsequent settlement in the same town, as in a different one, is a new settlement and entirely distinct from the old. It is not the same in fact or any legal consequence.

The estoppel of R. S., Chapter 33, *Section* 30, *does not apply to a new and independent settlement acquired subsequent to that upon which the recovery has been had.*

In the case at bar, when the plaintiff town furnished the relief to the pauper, he had lived five consecutive years outside of Bristol after August 1, 1926, without receiving pauper supplies from any source within the State. By the provisions of Chapter 124, P. L. 1931, he had lost his former settlement in Bristol.

The pauper had also defeated his settlement in Bristol by the acquisition of a new settlement in Friendship.

On report on an agreed statement. An action for pauper supplies furnished by plaintiff town, and for which plaintiff seeks to recover from defendant town by virtue of R. S., Chapter 33, Section 30. Judgment for the defendant. The case fully appears in the opinion.

Rodney I. Thompson, for plaintiff.

Emerson Hilton, *Weston M. Hilton*, for defendant.

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

STURGIS, J. Action on the case for pauper supplies furnished a person found destitute in the town of Friendship. The case is

reported on an agreed statement of facts of which the pleadings are made a part.

The case states that the pauper formerly lived and had a legal settlement in the town of Bristol, but sometime prior to January 1, 1916, came to Friendship and has since "resided" there. He was of age and emancipated when he arrived in that town and during the following years neither directly nor indirectly received any supplies as a pauper until March 9, 1932, when he applied to the overseers of the poor of Friendship and received relief. Due notice alleging that the legal settlement of the pauper was in Bristol was promptly given the overseers of that town, but they denied the settlement and this suit followed.

The facts thus far recited are agreed upon and, on their face, give the pauper a settlement in Friendship. "A person of age having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein." R. S. Chap. 33, Sec. 1, Par. VI. The agreement is that the pauper "resided" in Friendship and that "no pauper supplies had been furnished (him) from the time of his return to Friendship in 1915 until the furnishing of the supplies mentioned in this writ." This is equivalent to an admission that he had his "home" there for "five successive years without receiving supplies as a pauper, directly or indirectly." In the pauper law, "residence" and "home" are used as synonymous terms. *Warren* v. *Thomaston*, 43 Me., 406, 418; *Yarmouth* v. *Gardiner*, 58 Me., 208.

Nor is the force of the admission that the pauper resided in Friendship lost by the fact that the pauper was under guardianship from September 2, 1919, to July 7, 1931. It does not appear upon what grounds a guardian was appointed and, although it may be inferred that he was found to be incompetent to manage his estate, it does not necessarily follow that he was non compos mentis. He may have been rendered incompetent by physical infirmity or have been only a spendthrift exposing himself or his family to want and suffering and his town to expense. A guardian may be appointed on these grounds as well as mental incapacity. R. S., Chap. 80, Sec. 4. But if we assume that he was non compos and under guardianship for that reason, this would not prevent his

acquiring a settlement. A person non compos, of age and emancipated, can acquire a pauper settlement in his own right. *Augusta* v. *Turner*, 24 Me., 112; *New Vineyard* v. *Harpswell*, 33 Me., 193; *Gardiner* v. *Farmingdale*, 45 Me., 537; *Waterville* v. *Benton*, 85 Me., 134, 26 A., 1089. Such a person intentionally kept living for five successive years in a town by his guardian without receiving pauper supplies, directly or indirectly, has his home in that town within the meaning of the pauper statute. *Auburn* v. *Hebron*, 48 Me., 332; *Waterville* v. *Benton*, supra. We find no modification of these rules in any decision of this Court.

The fact that the pauper was described in the guardianship proceedings as "of said Bristol" does not bar proof of where he has in fact lived, nor overcome the admission that he has "resided" in Friendship. *Bangor* v. *Wiscasset*, 71 Me., 535; *McNichol* v. *Eaton*, 77 Me., 246, 251. Nor can weight be attached to the payment of taxes by the pauper. Although he actually resided in Friendship, his land there was assessed to him as a nonresident and he or his guardian paid the taxes. The assessment only represented the opinion of the assessors upon the question of the residence or nonresidence of the pauper and is not evidence of the fact itself. *Rockland* v. *Union*, 100 Me., 67, 60A., 705, *Rockland* v. *Farnsworth*, 93 Me., 178, 44A., 681. So far as the reported case shows, the payment of taxes may have been made in ignorance of the form of the assessment. If so, the payment has no significance. If the contrary is true, it is not agreed upon and can not here be assumed or inferred.

In the same category of inconsequence is the description of the pauper as "of Bristol" in a deed given him by Addie Haupt. This recital, standing alone, represents only the opinion of the grantor upon the question of the pauper's residence. We find no ground for treating this as proof of his residence in fact, especially as against towns which were not parties to the instrument. No more effect can be given to the restriction in this deed that the land conveyed can not be sold "without the consent of the town of Bristol." The agreed statement of facts does not show that any responsible officer of Bristol knew of this restriction when made, or that the town is in any way bound by it. Speculation and conjecture as to

the purpose and effect of this provision can not give it probative value.

However, in Sections 29, 30 of R. S., Chapter 33, which directs the overseers of the poor to relieve persons found in their towns and having no settlement therein and authorizes the town incurring such expense to recover the same of the town chargeable with the pauper's support, it is provided that "a recovery in such an action against a town estops it from disputing the settlement of the pauper with the town recovering, in any future action brought for the support of the same pauper." Invoking the aid of this statute, the plaintiff town points out that the case states that at the January Term 1915 of the Supreme Judicial Court for Knox County the town of Friendship recovered judgment against the town of Bristol for supplies furnished this same pauper, and the argument is that the defendant town in this action is barred from disputing the pauper's settlement there, even though in fact, since that recovery, he has acquired a new settlement in the plaintiff town or has lost the settlement which was the basis of the former recovery and judgment.

We are not of opinion that the contention advanced by the learned counsel for the plaintiff town can prevail. The pauper statute is one body of law and all its provisions must be read together. The legislative intent is to be drawn from a consideration of the whole act, and effect must be given, if possible, to every part of it. These are settled rules of statutory construction. *Comstock's Case*, 129 Me., 467, 471, 152A., 618; *State* v. *Frederickson*, 101 Me., 37, 41, 63A., 535; *Merrill* v. *Crossman*, 68 Me., 414.

The statutory estoppel relied upon has existed for more than a century. Chap. 122, P. L., 1821 et seq. But along with it in the first enactment, as in all subsequent revisions, there has been the provision that, although a pauper settlement, legally acquired, remains until a new one is gained, it is defeated by the acquisition of a new settlement, and, by the law in force when this action accrued, that it may be lost as there provided without the acquisition of a new one. R. S. Chap. 33, Sec. 3, as amended by Chap. 124, P. L. 1931, reads:

"Settlements acquired under existing laws, remain until new ones are acquired or until lost under the provisions of this section. Former settlements are defeated by the acquisition of new ones. Whenever a person having a pauper settlement in a town, has lived, or shall live, for five consecutive years in any unincorporated place or places in the state, or five consecutive years outside of the town in which he has a settlement after August one, nineteen hundred twenty-six, without receiving pauper supplies from any source within the state, he and those who derive their settlement from him lose their settlement in such town, and whenever a person having a pauper settlement in any town in the state shall after April twenty-nine,, eighteen hundred ninety-three, live for five consecutive years beyond the limits of the state without receiving pauper supplies from any source within the state, he and those who derive their settlement from him shall lose their settlement in such town."

Under this provision, when a pauper settlement is defeated or lost, it is finally ended and can not be revived. A subsequent settlement in the same town, as in a different one, is a new settlement and is entirely separate and distinct from the old. They can not be deemed the same in fact or in any legal consequence. *Monson* v. *Fairfield*, 55 Me., 117.

We find no reason for assuming that the Legislature, in enacting and continuing in force the statutory estoppel of what is now Section 30, Chapter 33, R. S., either ignored or intended to set aside or modify the general provisions of the statute relating to the acquisition or defeat or loss of pauper settlements. The intention appears only to have been to bar repeated and continuous litigation respecting the same settlement. As was said in an early opinion of this Court, "It was not intended to permit a town, which had commenced an action and been defeated in it, to continue to litigate the same settlement with the same town as often as it pleased, while it failed to obtain a judgment in its favor."*Oxford* v. *Paris*, 33, Me., 180. This, we think, is the full scope and effect of the estoppel. It does not apply to a new and independent settlement acquired subsequent to that upon which the recovery has been had. To

hold otherwise would permit the town having a recovery in a pauper suit to avoid, as in the case at bar, its own responsibility and charge the other town with the support of a pauper for which it is in no way responsible. The presumption is that the Legislature did not intend so unjust a result. *French* v. *Cowan*, 79 Me., 426, 433, 10A., 335; *Landers* v. *Smith*, 78 Me., 213, 3A., 463.

On the facts shown in the agreed statement, when the plaintiff town furnished relief to the pauper in the case at bar, he had lived five consecutive years outside of Bristol after August 1, 1926, without receiving pauper supplies from any source within the state, and had lost his former settlement there. He had also defeated that settlement by acquiring a new one in Friendship. These facts are a defense to this action.

Judgment for the defendant.

STATE *vs.* HENRY DORATHY.

Somerset. Opinion, January, 13, 1934.

CRIMINAL LAW. EVIDENCE.

The nature and extent of cross-examinations of a child of tender years is left to the discretion of the Court.

The credibility to which the child is entitled is for the jury.

The weight of authority now is that one's personal appearance may be observed by the jury, in connection with other evidence, or standing alone, for the purpose of determining his or her age.

When the age of a person becomes an issue and the person is present before the triers of fact, they should be at liberty to use their senses and to draw an inference as to the person's age from his physical appearance.

In the case at bar, the appearance of the respondent, his every outward characteristic, were properly to be weighed by the jury to determine whether the man alleged to be seventy-four years of age was in truth and in fact more than twenty-one.

Respondent, tried on an indictment charging him with taking indecent liberties with a female person under the age of sixteen years, was found guilty. After trial and adverse verdict, respondent filed a motion for new trial. This was denied and appeal and exceptions were taken. Exceptions overruled. Motion denied. The case fully appears in the opinion.

Clayton E. Eames, County Attorney for the State.

F. Harold Dubord, for respondent.

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

BARNES, J. The respondent was tried and convicted, on an indictment under Sec. 6 of Chapter 135, R. S., for taking indecent liberties with a female person under the age of sixteen years.

During the trial, the prosecutrix, in cross-examination, was asked whether, at about the time when respondent is charged with having committed the offense set out in the indictment, she did something naughty with a boy of the village; and whether she had told her mother anything about him. On objection the court excluded these questions, and exception was noted.

The record then shows the following:

Q. "Do you know a boy by the name of Raymond Collins?"

A. "No, Sir."

Mr. Eames: "I object."

Mr. Dubord: "You say you don't know a boy by the name of Raymond Collins?"

The Court: "I shall have to exclude that as the case now stands."

To this ruling the second exception was noted.

A nurse having supervision of the children in the local schools was introduced as a witness for the respondent and asked whether the prosecutrix said anything to her to the effect that boys had infected her with gonorrhea.

She was not allowed to answer the question, and the third exception was noted.

The nurse was then asked whether she was "familiar with an investigation in connection with" prosecutrix and a boy of the town.

This question was excluded and the fourth exception noted.

The nurse was asked if she had any talk with the prosecutrix concerning whether or not she acquired venereal disease from or gave it to a local boy, and whether she had any talk with the prosecutrix concerning her actions, with a young man named, at or about the same time she accused respondent of committing the crime.

The exclusion of these questions gave rise to the fifth exception. Another exception, taken at the trial, was waived.

The prosecutrix was a girl, eight years old at the time of the trial.

She was examined by the presiding Justice, in the presence of counsel for both sides, and later presented as a witness.

The questions that resulted in the first and second exceptions were asked as affecting the credibility of the witness. The nature and extent of cross-examinations of a child of tender years is left to the discretion of the court.

The credibility to which the child is entitled is for the jury.

Should contradiction or apparent misunderstanding arise, or discrepancies appear, by reason of testimony of others, respondent's counsel might well ask the privilege of making searching examination of a child of eight.

At the stage to which the trial had advanced when these questions were asked, the respondent was not hurt by their rejection.

The court excluded them, "as the case now stands," and properly.

The State rested after the production of the prosecutrix, and the respondent introduced testimony that on the last day of September, 1932, respondent showed no symptoms of gonorrhea; and that after the middle of that month the prosecutrix was suffering from that disease.

After verdict of guilty, motion for a new trial was presented to the court, alleging as grounds therefor that the verdict was against the law, evidence and the weight of evidence, and that the State did not prove that the respondent was twenty-one years of age or more when the crime was committed.

This motion was denied, and appeal taken.

The appeal was argued on the issue of evidence of the respondent's age.

Not failing to note that no witness was asked the age of the respondent, and that the best practice would be to put into the written record direct evidence thereof, it remains for this court to say that we find evidence that justified the decision of the jury.

That evidence is in the record of the court proceedings, and we cannot say, after the jury has passed upon the weight of the evidence, that the evidence was so slight the respondent should be discharged.

In arguing his motion for a new trial respondent stresses the claim that there was no evidence that he was twenty-one years or more of age when the offense was committed, and if admissible evidence thereon be found urges the court to rule that all the admissible evidence on the issue of respondent's age at that time be held insufficient to prove beyond reasonable doubt this material issue.

The right of a jury in a criminal case to determine a person's age by inspection or observation has been decided in many of our states, with some diversity as to conclusions.

Some few hold that the jury may not determine one's age by inspection or observation where attention has not been called to the fact that such person was on inspection for that purpose.

A small class hold that one's appearance can never be taken into consideration by the jury, the reason advanced being that such evidence cannot be preserved for review.

We find, however, a very respectable collection of authorities which hold that one's personal appearance may be observed by the jury, in connection with other evidence or standing alone, for the purpose of determining his or her age.

The gravity of the hazard the respondent at the bar faces is fully appreciated by the court, and it is borne in mind that he "shall not be compelled to furnish or give evidence against himself."

He was presented for a felony. So he was required to be present in the court room, before the jury which was to try the State's case against him was empanelled, and in the presence of Court and jury throughout the trial. We take judicial notice that when the trial was at its beginning respondent was informed, by statement

of the court, through its clerk, that certain persons were about to be qualified to try the case; that if he were to object to any persons called, he must do so before they were sworn.

And the inference is unavoidable that every alert and intelligent juror sworn then must have seen respondent, whom probably to know aright as to age was but to see.

We take judicial notice that after the jurors were sworn, the respondent, if physically able to rise and stand, did so while to him and to the jury was read the indictment, which charges that at the time of commission of the alleged felony respondent was seventy-four years old.

It is in the record, sufficiently for purposes of review, that the jurors saw the respondent, on the day of trial.

Later, in the record we find that while the little girl was being examined, she was asked, "Do you know that man who sits down there in that chair (indicating respondent)?"

She answered, "Yes, Sir."

Then followed:

Q. "What is his name?"

A. "Henry Dorathy."

So that again each juror had his attention directed to the respondent. It may be argued that no juror can be allowed to review in the conference room the concept formed if he saw with his eyes a man of more than twenty-one years, or an infant in his minority.

The answer which banishes such a claim is that men and women, of intelligence sufficient to serve as jurors, have been drawing conclusions as to age, as a matter of every day experience, from the appearance of people with whom they come in contact; and they are not required to consider that they have no evidence of the age of a respondent in a prosecution for a felony because there is no verbal or written testimony of age.

Such conclusion is as inescapable as would be the conclusion that a party in court had lost an arm, if he stood forth to the view shorn of such member.

There is force to the claim that respondent was not compelled to produce evidence against himself.

He must, however, present himself before court and jury, to se-

cure acquittal. This he may do voluntarily, but whether voluntarily as a witness, or by force of his compelled attendance, as here, he inevitably reveals that he is a person, a male perhaps. He reveals his race, color, and, we hold, somewhat as to his age.

The preponderance toward this view of the authorities consulted has influence with us.

In a civil action, where contract was disaffirmed, Iowa code reading, "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting," and where the defendant was a witness, held, "certainly his appearance was a proper matter for the jury to consider in determining whether Armstrong, in acting for the bank, had good reason for supposing him of age." *First National Bank of Titonka* v. *Casey*, 158 Iowa 349, 138 N. W., 897.

Where the statute makes it a crime for anyone knowingly to suffer any girl under twenty-one years of age on his premises for prostitution, the court allowed the jury to determine the question whether respondent knew the girl was under the age of twenty-one years, from her personal appearance, or from view only. On exceptions the judgment of the lower court was affirmed. *Hermann* v. *State*, 73 Wis. 248, 41 N. W., 171.

Soo Hoo Hong, a would-be immigrant, claimed to be under twenty-one years of age.

On appeal, in habeas corpus proceedings the court says: "The board of inquiry, in considering the testimony, had the right to take into consideration the appearance of the applicant, and being satisfied by his appearance that he was well over twenty-one years old, they denied him admission." Held: "the order is affirmed." United States, ex Rel., *Soo Hoo Hong* v. *Tod, Commissioner of Immigration.*, 290 Fed., 689.

In prosecution for marrying a white woman, where respondent was a descendant of a negro of the whole blood, not beyond the third generation, the state may introduce a witness "to testify that a man is a negro or a white man as the case may be, if he knows the type and is not testifying to a mere conclusion," and "It is also

competent to prove a man's race by his admissions, either verbally or by his acts." *Weaver et al* v. *State*, 22 Ala. App., 469, 116 So. 893.

This point was adjudicated in case of a California respondent on trial for homicide, as follows: "The contention is urged with much force that the court erred in ordering the defendant to stand up during the trial for identification by one of the witnesses. The witness had stated that he went into the station-house, and there found this young man, (meaning the defendant). It is claimed that this act was violative of the constitutional provision that 'no person shall be compelled in any criminal case to be a witness against himself.' The defendant was in Court, and it was proper for the jury, in identifying the person whom the witness had seen, to know whom the witness meant by the expression 'This young man.' He was not compelled to exhibit any part of his person which the jurors had not seen as he walked in and out every day. It was not compelling the defendant to become a witness against himself in any respect, within the meaning of the constitutional provision above quoted." *People* v. *Goldenson*, 76 Cal., 328, 19 Pac. 161.

In the case at bar it may be the jurors knew that the birth of a person of respondent's appearance antedated the registration of vital statistics, and that in the course of nature none who could have knowledge of his birth are probably within reach of process of our courts. If so the appearance of the respondent, his every outward characteristic, would properly be weighed by the jury to determine whether the man alleged to be seventy-four years of age was in truth and in fact more than twenty-one. As stated in the opinion of one of our sister appellate courts, on a like occasion, "Counsel for appellant will not resent the kindly suggestion that his talents might be better employed than in urging a point of so little merit."

In *Garvin* v. *State*, 52 Miss., 207, an indictment rested on the ground that the defendant was a colored man. Of his color there was no "proof"; but the court said: "No error is perceived in the charges. By one of them the jury were instructed that, inasmuch as the indictment described the defendant as being a colored person, he must be shown to be such by proof but that actual profert of

him before them was sufficient if they were satisfied, from their inspection, that he was colored. It is urged that this was erroneous, because it is said that the jury can know nothing except from the testimony of witnesses. This is not true as to physical facts which may be brought to their attention by ocular demonstration. It would not be necessary to prove, by other testimony than profert of the party, that he was a 'person', or a 'man', if so described in the indictment. Under certain circumstances jurors may use their eyes, as well as their ears."

To the same effect, see *Warlick* v. *White*, 76 N. C., 175.

In discussing these cases the Maine court said in *Clark* v. *Bradstreet*, 80 Me., 454, Atl. 56, "No one will doubt the propriety or reason upon which these decisions are based when the question is one of race or color, for it is well understood that there are marked distinctions, physical and external, between the different races of mankind, which may enable men of ordinary intelligence and observation to judge whether they are of one race or another."

In a Missouri case, where respondent could not be held to answer for a criminal act unless over sixteen years of age, and where the court submitted to the jury the question of respondent's age at the time of commission of the offense: held that the jury "evidently found the fact to be true, but it is earnestly insisted that the evidence was wholly insufficient to warrant conviction, as there was no evidence that defendant, at the time of the alleged commission of the offense, was over sixteen.

It is true there is no direct testimony in the record on this point. There is evidence, however, that the defendant was an attorney at law in Poplar Bluff, with an office in that city, and was a candidate for city attorney of Poplar Bluff at the time the prosecuting witness went there for the purpose of making a demand for these rents. As this was a trial for a felony, and the defendant was shown to have been present in person at the commencement of the trial, every presumption will be indulged that he was in fact present. . . . After all these facts are considered, it seems to us to reverse this judgment because some witness was not called to formally testify to defendant's age would be a reproach to the administration of justice. If witnesses had been called, they could in all probability

have merely testified to the same appearance which the jury witnessed. Jealous as we are of the rights of a defendant, we feel absolutely assured that no possible prejudice resulted to him by the failure to make this formal proof that he was over sixteen years of age." *State* v. *Gebhardt*, 219 Mo., 708, 119 S. W., 350; *State* v. *Davis*, 237 Mo., 237, 140 S. W., 902.

On the trial of the keeper of a billiard room, for admitting a minor, in violation of law, the court held: "There is nothing in the bill of exceptions from which it can be inferred that the defendant was aggrieved by the ruling of the court in permitting the jury to judge whether one of the alleged minors was under age from his appearance on the stand. There are cases where such an inspection would be satisfactory evidence of the fact. It certainly was not incompetent for the jury to take his appearance into consideration in passing on the question of his age; and, as it does not appear that this may not have afforded plenary evidence of that fact, the defendant fails to show that he was convicted on insufficient evidence, or that he has been prejudiced by the ruling of the court."*Commonwealth* v. *Emmons*, 98 Mass., 6.

In a prosecution where the age of a girl was of importance, and wherein it was contended that the whole evidence was too slight and inconclusive to warrant a conviction, the court held: (citations on these, and on another point, omitted) "As to the age of the girl. Through inadvertence perhaps, or for some other reason she was not asked how old she was. Her testimony on this point would have been competent. It was also competent for the jury to consider her appearance in determining her age. It may have been quite obvious that she was under sixteen. . . . . The defendant further contends that the whole evidence was too slight and inconclusive to warrant a conviction, and that for this reason the case ought to have been withdrawn from the jury. Where an essential element in an offense is unsupported by evidence, no doubt this course should be adopted. But where competent evidence has been introduced in support of all the material allegations of an indictment, the weight and sufficiency of such evidence are ordinarily for the jury, in the first instance. They may also be further considered by the court on a motion for a new trial, but ordinarily cannot be considered anew on a bill of ex-

ceptions. In the present case, we are unable to say that the evidence was insufficient in law, or so slight that it was the duty of the court to direct a verdict of not guilty." *Commonwealth* v. *Hollis*, 170 Mass., 433, 49 N. E., 632.

And in this commonwealth, where several children were allowed to testify as to their respective ages; the Court held that to determine their ages the jury may take into consideration "the appearance of the children." *Commonwealth* v. *Phillips*, 162 Mass., 504, 39 N. E., 109, 110.

A boy represented to be twelve and one-half years of age and the son of Fong On, a man of Chinese descent but a nativeborn citizen of the United States, begotten in China, and if by Fong On, begotten within fourteen years of the date of the hearing on admission, was refused admission, because found to be older than a son of Fong On could be, if begotten in China.

The Circuit Court of Appeals, Second Circuit, dismissed the writ of habeas corpus, despite the fact that the applicant, Fong On and an identifying witness testified to the boy's age as claimed. The Court says, inter alia, that the applicant "is five feet six and a quarter inches tall, and the full length photograph of him included in the record certainly gives him the appearance of being many years older than the age claimed. A certificate signed by a surgeon of the public health service states that he has examined the applicant and believes him to be at least sixteen years of age.

When the age of a person becomes an issue and the person is present before the triers of the fact, it can hardly be doubted that they are at liberty to use their senses and to draw an inference as to the person's age from his physical appearance." United States ex rel., *Fong On* v. *Day*, 54 Fed., (2d) 990.

On a bill against heirs of the grantee in a deed to set it aside on the ground of the mental incompetence of the grantor to execute it, the court says, "The complainant was in court during the hearing. The defendant's counsel criticizes complainants very harshly for bringing complainant into court. We think the criticisms are entirely uncalled for and unjust. It was perfectly proper and in furtherance of justice to bring the complainant before the court, and afford the judge an opportunity of seeing him, and, if he de-

sired, of questioning him. It was the theory of complainant's counsel that he was incapable of holding a connected conversation. His nephew Ben Hinkley testified that he was incapable, as he sat in court, of holding connected conversation.

If defendant's counsel desired to dispute this testimony, they had an opportunity to apply a decisive test by calling the old gentleman as a witness. They did not do so, and we think their brief shows that the reason was that they were satisfied that at that time he was incapable of testifying."*Benson* v. *Raymond*, 142 Mich., 357, 105 N. W., 870, 108 N. W., 660.

In report of a criminal prosecution in the same state, where the charge was sexual intercourse with an infant under sixteen years of age, where the girl, called as a witness by the State, testified to being older at the commission of the offense than she had testified at the "examination," the court held that the jury were entitled to consider the statements of witnesses as to the girl's age, "and as well her appearance."*People* v. *Elco*, 131 Mich., 519, 91 N. W.,755.

The jury may infer the minority of a witness examined before them without the introduction of any direct evidence. (Pa. 1852) 2 Grants Cases 43.

In a contested election case, "The appearance of the voter may be testified to as indicative of age." *Black* v. *Pate*, 130 Ala., 514, 30 So., 434.

In a trial for rape, wherein the prosecutrix was a witness, the court said: "The jury had the right, in forming an opinion with reference to her capacity or want of capacity to consent to sexual intercourse, to take into consideration facts discovered by their own observation of the girl herself, her apparent physical development, etc." *Jones* v. *State*, 106 Ga., 365, 34 S. E., 174.

There is no exception to the charge of the trial court.

In his brief counsel for respondent expresses his commendation of the charge. In his charge the Court apprised the jury again of the allegation that respondent was, "more than twenty-one years of age, to wit of the age of seventy-four years."

We are not to interfere with the verdict.

Exceptions overruled.
Motion denied.

INHABITANTS OF VIENNA *vs.* NORMAN WEYMOUTH.

Franklin. Opinion, January 16, 1934.

PAUPERS. HUSBAND AND WIFE.

By the provision of R. S. 1930, *Chapter* 33, *Section* 39, *a town which has incurred expense for the support of a pauper, whether he has a settlement in that town or not, may recover it of him, his executors or administrators, in an action of assumpsit.*

It is not every expense incurred that is recoverable under this statute. A purely officious payment of expense which a town is under no legal obligation to make is not so recoverable.

A town furnishing necessary relief to a married woman totally deserted by her husband, it having been applied for and received as pauper supplies, may obtain reimbursement from the husband.

At common law, a husband is bound to provide support for his wife, and is liable to pay for it, if it is furnished by other person, on his refusal or neglect to do so, when he ought.

In the case at bar, before falling into distress, the defendant's wife by process based on Section 9 of Chapter 74, R. S. 1930, had obtained an order that her husband should pay her for her support and maintenance $8.00 per week, which "decree was in full force at the time the supplies were furnished as described in plaintiff's writ and the defendant was paying as ordered." The defendant was not in default on this order.

This order legally determined the defendant's duty to support his wife and the defendant, having fully performed that duty, could not be made to reimburse the town of the pauper settlement, Vienna, by reason of the provisions of said statute.

Neither could the plaintiffs recover at common law, for, there being no failure of performance of his legal duty to support his wife, no promise upon his part to pay will be implied.

On report on an agreed statement. An action of assumpsit to recover for pauper supplies furnished the defendant's wife by the town of Farmington which was reimbursed by the plaintiff town.

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

Frank W. & Benjamin Butler, for plaintiff.

Cyrus N. Blanchard, for defendant.

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

HUDSON, J. Assumpsit in two counts, viz.: "account annexed" and "money paid" to obtain reimbursement for money paid by the plaintiffs to the Inhabitants of Farmington on account of pauper supplies by them furnished to the wife of the defendant while living apart from her husband. The case is reported on agreed statement of facts, as follows:

"For the purpose of this hearing it is agreed:

"1. That the defendant is the lawful husband of Marie L. Weymouth and was at the time the supplies mentioned in the plaintiff's writ were furnished by the Town of Farmington and paid by the plaintiffs.

"2. That the lawful settlement of the defendant was, and is, in the Town of Vienna.

"3. That the said Marie L. Weymouth fell into distress in said Town of Farmington and was confined by childbirth in the Franklin County Memorial Hospital and the expenses paid by the plaintiffs occurred at the time of the said childbirth. That no other supplies have been furnished by the Town of Farmington or paid for by the Town of Vienna.

"4. That the Inhabitants of the Town of Farmington paid said bills and demanded payment of the plaintiffs and were paid on the 27th day of December, 1932.

"5. It is agreed that on the 26th day of September, 1931, the said defendant was arrested on a warrant issued by the Judge of the Municipal Court of Farmington, for failure to provide for his wife, on which warrant the following decree was entered, 'Defendant ordered to pay to Marie L. Weymouth $8.00 per week, first payment to be made November 2, 1931.' That the said defendant appealed to the October Term of the Superior Court, 1931, when and where the Judge reaffirmed said order which was in full force when the pauper

supplies were furnished and that the doctors bills and hospital service were reasonable.

"6. That said decree was in full force at the time the supplies were furnished as described in the plaintiff's writ, and the defendant was paying as ordered.

"7. That neither the Overseers of the Poor of the Plaintiff town or the Town of Farmington were parties to the petition for support, but that the Chairman of the Overseers of the Poor of Farmington was present at the hearing and assisted in the presentation of the case.

"8. That on the 12th day of January, 1933, the plaintiffs brought suit against the defendant for the amount paid by them to the Town of Farmington.

"If on the foregoing facts the plaintiffs are entitled to recover the defendant is to be defaulted, otherwise the plaintiffs are to become non-suit."

Plaintiffs in the first instance base their right to recover on Sec. 39, Chap. 33, R. S. 1930, which provides that "A town which has incurred expense for the support of a pauper, whether he has a settlement in that town or not, may recover it of him, his executors or administrators, in an action of assumpsit."

Does that statute permit recovery in this case? We think not. It is not every expense incurred that is recoverable under this statute. A purely officious payment of expense which a town is under no legal obligation to make is not so recoverable. *Newburyport* v. *Creedon*, 146 Mass., 134, 15 N. E., 157, nor expenses for items not properly classible as pauper supplies. *Freedom* v. *McDonald*, 115 Me., 529, 99 A., 459; 48 C. J., page 520, Sec. 203; nor expenses incurred more than six years prior to the suit, although the statute contains no limitation of time for recovery. *Inhabitants of Kennebunkport* v. *Smith*, 22 Me., 445.

Previously to the furnishing of this relief, by proper process based on Sec. 9 of Chap. 74, R. S. 1930, the defendant had been "ordered to pay to Marie L. Weymouth," his wife, "$8.00 per week," which "decree was in full force at the time the supplies were furnished as described in plaintiff's writ and the defendant was paying as ordered." "The Chairman of the Overseers of the Poor

of Farmington was present at the hearing" in this former proceeding "and assisted in the presentation of the case." It is reasonable to infer as a fact then, and we do, that the Overseers of the Poor of Farmington had actual knowledge of the order at the time they furnished the relief. Even if they did not know that the order had been observed (as to this the Report is silent), yet their knowledge of the fact of the order and its provisions created a legal duty of inquiry as to observance upon their part, would their town successfully seek recovery from the husband.

Had there been no such order, or if an order, the defendant had not complied with it, recovery might have been had under this statute.

Mere coverture is no bar to an action on this statute. A town furnishing necessary relief to a married woman totally deserted by her husband, it having been applied for and received as pauper supplies, may obtain reimbursement from the husband under this statute. *Peru* v. *Poland*, 78 Me., 215.

In the instant case, although she was still the wife of the defendant, yet her rights to support and maintenance from her husband had been judicially determined and defined in this order based on her petition. His duty to support his wife was lawfully fixed in an amount which limited his responsibility until further order of Court.

Certainly if prior to this relief there had been a divorce, this action could not have been maintained because of lack of duty upon the part of the defendant. It follows, we think, that if he was not in default as to his newly and legally determined duty to support his wife at the time the relief was furnished, then recovery could not be had under this statute. This is not to be construed as holding that such a wife is not entitled to relief under the pauper law of this State when in distress but simply that where there is no failure of compliance with a Court decree determining the extent of his obligation to support his wife, no recovery can be had against him by a relieving town. Farmington, then, could not have recovered under this statute against this defendant. The plaintiffs in this action have no greater rights. The statute does not permit recovery on the facts in this case.

The plaintiffs, however, claim a right to recover at common law,

and it is true that recovery may be had at common law by a town against the husband if necessary support applied for by her as a pauper is furnished to her while living apart from her husband for his cause. Because of his duty to his wife, the law implies a promise upon his part to pay for such relief.

"By that law" (meaning the common law) "a husband is bound to provide support for his wife and is liable to pay for it, if it is furnished by other persons, on his refusal or neglect to do so *when he ought*. So he is liable to pay a town for her support, when the town supports her as a pauper." *Inhabitants of Brookfield* v. *Allen*, 88 Mass., 585, on page 587.

A moral obligation, if there be such, to provide support following observance of a specific order for support is not sufficient to show "a neglect to do so when he ought" so as to bring a case within the Rule of Law as above declared. On the other hand, there must be a breach of a legal duty and in this the plaintiff's cause fails for it appears by admission that the defendant had fully complied with the Court order and was not in default at the time this relief was furnished.

In an action brought by a town on a statute but by a third party at common law, *Malden Hospital* v. *Murdock*, 218 Mass., 73, on page 75, 105 N. E., 457, the Court said: "Manifestly when she has availed herself of this remedy and has obtained a decree obliging him to pay to her such sums as it has been adjudged are the amounts for which he should be held, it no longer is true that provision has not been made for her support and the ground for action by third parties against her husband no longer exists."

The foundation for an implied promise upon the part of the husband to pay for such relief is failure of performance of his legal duty. Here there was no such failure and hence the law will not imply a promise to pay.

Our conclusion, then, is that recovery in this action may not be had, either on the statute or at common law. Liability not having been established, "the Plaintiffs will become non-suit" in accordance with the stipulation in the Report.

So ordered.

ALFRED J. RIOUX *vs.* PORTLAND WATER DISTRICT.

PHILIP GREGOIRE *vs.* PORTLAND WATER DISTRICT.

HENRY TARDIFF *vs.* PORTLAND WATER DISTRICT.

Cumberland. Opinion, January 17, 1934.

NEW TRIALS. JURORS.

When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion can not be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law.

It is abuse of judicial discretion which is open to exceptions.

Harmless conduct on the part of the juror, which has no tendency to impair his impartiality or affect the purity of the verdict, and for which the parties, counsel or friends are in no way responsible, is not a sufficient reason for granting a new trial.

In the case at bar, the question before the trial Judge on the motions for mistrials was whether or not the acts of the juror and the witness might have influenced the juror's mind, or were of such a nature as to have any tendency to influence it, rather than whether the mind of the juror had been actually influenced.

This rule excluded actual influence on the juror as a test of the necessity for a mistrial, but did not preclude an inquiry into it which might, in many instances, be the only logical and practical approach to the real question to be decided.

Although the presiding Justice examined into the question of whether the juror had been actually influenced, his subsequent finding that the juror "can and will act as an impartial juror," was the equivalent to a finding that the acts of the juror and the witness were not of a character which might have influenced or have any tendency to influence the juror's mind.

On exceptions by plaintiffs. Three actions of negligence tried together. They are based on allegations that, as a result of the negligent manner in which the defendant left the highway after

repairing a broken water main, the automobile in which the plaintiffs were riding skidded and collided with a tree and they were injured. Trial was had at the June Term, 1933, of the Superior Court for the County of Cumberland. At an adjournment of the trial one of the jurors sitting on the case, gave a witness for the defense, who had finished his testimony, a ride home in his automobile. Counsel for plaintiffs moved for mistrial of the cases. After hearing, the motions were denied. Exceptions were reserved and perfected. Motions for new trials based on the juror's conduct were also filed.

Exceptions overruled. Motions overruled. The cases fully appear in the opinion.

Bernstein & Bernstein, for plaintiffs.

David E. Moulton,

William B. Mahoney,

Theodore Gonya, for defendant.

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

STURGIS, J. These three actions on the case for negligence were tried together. They are based on allegations that, as a result of the negligent manner in which the defendant left a highway after repairing a broken water main, the automobile in which the plaintiffs were riding, skidded and collided with a tree and they were seriously injured. Pleas of the general issue were filed and the verdicts were for the defendant.

During the trial Carl Hanson of Westbrook was called for the defense. As the court adjourned after his testimony had been completed and he had been excused as a witness, one of the jurors sitting on the cases, who also lived in Westbrook, invited him to ride home with him in his automobile. The invitation was accepted. The juror and his daughter, who was driving the automobile, were in the front seat, with the witness sitting alone in the rear seat when they started, but soon joined by two acquaintances who were picked up on the road. When the witness reached his home he alighted from the car. The juror and his daughter continued on towards Westbrook.

On the following morning counsel for plaintiffs, who had seen the witness ride away with the juror, moved for a mistrial of the cases. After hearing, the motions were denied. Exceptions seasonably noted and perfected, as also motions for new trials, bring the cases to this court.

EXCEPTIONS.

The Justice presiding at the trial made careful inquiry into the conduct of the juror and the witness. They and the attorney who had reported the incident were examined under oath and at length as to all that was said and done before and during the ride. It appearing, however, that the cases had been in no way discussed, the trial was allowed to continue with the juror in the panel, and the finding was made that "the incident was entirely harmless," the juror "has in no sense been influenced," and "I believe that he can and will act as an impartial juror." The finding was upon a pure question of fact. The refusal to order a mistrial was a matter of discretion. When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion can not be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law. *Water District* v. *Water Company*, 100 Me., 268, 61 A., 176; *Goodwin* v. *Prime*, 92 Me., 355, 362, 42 A., 785. It is abuse of judicial discretion which is open to exceptions. *Gregory* v. *Perry*, 126 Me., 99, 136 A., 354; *Ritchie* v. *Perry*, 129 Me., 440, 445, 152 A., 621.

The question before the trial Judge on the motions for mistrials was whether or not the acts of the juror and the witness might have influenced the juror's mind, or were of such a nature as to have any tendency to influence it, rather than whether the mind of the juror had been actually influenced. *Driscoll* v. *Gatcomb*, 112 Me., 289, 92 A., 39; *York* v. *Wyman*, 115 Me., 353, 98 A., 1024; *Bean* v. *Fuel Company*, 125 Me., 260, 132 A., 892. This rule excludes actual influence on the juror as a test of the necessity for a mistrial, but does not preclude an inquiry into it. In many instances we have no doubt such an inquiry is the only logical and practical approach to the real question to be decided. This seems to be the case here. Although the presiding Justice found that the juror "has in no sense been influenced," he then stated his belief that the

juror "can and will act as an impartial juror." This, we think, was intended and may be properly viewed as equivalent to a finding that the acts of the juror and the witness were not of a character which might have influenced or had any tendency to influence the juror's mind. This was the test required by the law. It does not appear to have been disregarded or nullified by the examination into and observations concerning actual influence. We find no abuse of discretion.

MOTIONS.

This is not a case where a party, his counsel or friends have attempted to influence the juror as in *Heffron* v. *Gallupe*, 55 Me., 563; *McIntire* v. *Hussey*, 57 Me., 493; *Bradbury* v. *Cony*, 62 Me., 223; *Belcher* v. *Estes*, 99 Me., 314, 59 A., 439. The juror has neither received nor been offered any treat or gratuity. *State* v. *Brown*, 129 Me., 169, 151 A., 9; *Ellis* v. *Emerson*, 128 Me., 379, 147 A., 761; *Bean* v. *Camden Lumber Co.*, 125 Me., 260, 132 A., 892. The juror has not received evidence out of court or discussed the case or expressed an opinion during the trial, as in *Driscoll* v. *Gatcomb*, supra; *Winslow* v. *Morrill*, 68 Me., 362; *Bradbury* v. *Cony*, supra; *Bowler* v. *Washington*, 62 Me., 302. Here it does not appear that contact and association with the witness has or could have affected the juror's verdict. The testimony given by the witness on the stand is not reported. It may have been entirely trivial and of no real importance in determining the issues raised. If it was in any way vital to the case, it should have been brought forward. We find no ground for presuming or even suspecting that the testimony of this witness assumed undue weight or consequence in the mind of the juror as a result of their ride.

This Court has not hesitated to place its seal of condemnation on verdicts not free from improper influence upon the jury by parties, counsel or friends, or tainted with suspicion thereof. *State* v. *Brown*, supra; *Ellis* v. *Emerson*, supra; *Bean* v. *Fuel Company*, supra. But harmless conduct on the part of the juror, which has no tendency to impair his impartiality or affect the purity of the verdict, and for which the parties have no responsibility, has not been deemed a sufficient reason for granting a new trial. In *Gifford* v. *Clark*, 70 Me., 94, 96, where jurors were found to have received out

of court accidental and casual knowledge of facts involved in the issue, this Court said: "Where neither the jurors nor the prevailing party or their agents or friends have been guilty of any misconduct, it is not likely to tend to the advancement of justice to grant new trials at the instance of obstinate litigants on account of the accidental knowledge of some one or more of the jurors respecting some matter of fact involved in the issue, when it does not appear that that knowledge affected the result, or prevented the jury from deciding according to the law and the evidence." And in *Parsons* v. *Huff*, 38 Me., 137, 140, this statement is approved. "When the parties have not misbehaved, there seems no good reason why they should be exposed to the expense and vexation of a new trial on account of the misbehavior of the jury, if there is nothing in the transaction which gives reason to suspect the purity of the verdict."

The motions for new trials are based solely on the alleged misconduct of the juror and the witness. For the reasons stated, the verdicts can not be disturbed.

Exceptions overruled.
Motions overruled.

VORSEC COMPANY *vs.* JOHN GILKEY.

Franklin. Opinion, January 17, 1934.

MORTGAGES. CONDITIONAL SALES.

Maine adopts the Massachusetts rather than the New Jersey rule and holds that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee, unless he is a party to the transaction; and that the question of whether it can or can not be removed without injury to the realty is immaterial.

A lessee's rights of possession are wholly dependent upon his contract with the mortgagor, his lessor. Although the mortgagor is to be regarded as owner of the estate as to all other persons than the mortgagee, he can not create a tenancy

after the execution of a mortgage which will be valid against the mortgagee unless the mortgagee chooses to recognize the tenancy as such.

A mortgagor in possession is not competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold.

His lessee's rights are in no way superior to his own as against the mortgagee.

Unless and until the mortgagee recognizes the lessee, there is no privity between the mortgagee and the lessee.

A conditional sales vendor can not be held to have a greater right to retain title to a chattel and to remove the same, which he permits to be attached as a fixture to real estate, when he is dealing with a lessee than when dealing with a mortgagor of the real estate.

In the case at bar, the Court extends the rule declared in *Gaunt* v. *Allen Lane Company*, 128 Me., 41, and holds that a contract between a lessee of a mortgagor and a third person preserving the chattel character of the property added to real estate as an improvement during the life of the mortgage thereon is ineffective as against the mortgagee, unless he is a party to the transaction.

On report. An action of trover by the successor of a conditional sale vendor against a real estate mortgagee for alleged conversion of certain clothes cleaning machines of the value of $2,025. Trial was had at the October Term, 1933, of the Superior Court for the County of Franklin. After the evidence had been taken out, the case was, by agreement of the parties, reported to the Law Court for its determination upon so much of the evidence as was legally admissible. Judgment for the defendant. The case fully appears in the opinion.

John G. Marshall,

Fred H. Lancaster, for plaintiff.

Frank W. & Benjamin Butler, for defendant.

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

HUDSON, J. Case reported to "Law Court for its determination upon so much of the evidence as is legally admissible."

Action of trover by the successor of a conditional sale vendor against a real estate mortgagee for alleged conversion of property described in the declaration of the writ as: "one 30 x 48 Vorcolne Ace Lo-Front Washer of the value of three hundred dollars; one

32 x 40 Vorcolne Junior Tumbler of the value of seven hundred and fifty dollars; one 26-inch Vorcolne Ace Extractor of the value of three hundred and fifty dollars; one 40-inch Vorcolne Drying Cabinet of the value of two hundred and fifty dollars; one 7½ Horse Power Motor of the value of one hundred and twenty-five dollars; one 20 Horse Power Vertical Boiler of the value of two hundred and fifty dollars."

Plea, the general issue and for brief statement "that he is the holder of a mortgage on the real estate, in which the articles mentioned in the plaintiff's writ were placed. That the articles mentioned in said writ were annexed to and became a part of the mortgage security; that the defendant entered into the possession of said real estate for the purpose of foreclosing said mortgage and is now in possession thereof and that no part of said debt has been paid."

Demand is admitted.

The evidence warrants a finding of the following facts: On August 19, 1929, Irving I. Farmer deeded a certain lot of land in Farmington to Charles C. Stone and Chester P. Davis, who, in pursuance of arrangement made with one Albert S. Conant, erected a building on said lot to be leased to said Conant and occupied by him for the purpose of conducting a clothes cleaning business. Requiring money for the erection of this building, Stone and Davis on October 29, 1929, obtained a loan of $3,000 from the defendant, John Gilkey, no part of which has been paid, and gave him a "mortgage deed covering the said real estate," securing said loan.

By conditional sales contract dated October 2, 1929, but not recorded until January 6, 1930, Vorcolne Corporation, predecessor of plaintiff Vorsec Company, sold the property described in the writ to Conant; the contract containing this provision: "Title to said goods to remain in vendor until fully paid, part payments to be considered as paid for the use thereof." The building, constructed particularly for the use of Conant, was erected subsequently to the giving of the real estate mortgage and was leased by the mortgagors to Conant. The date of the lease does not appear in the case but from Plaintiff's Exhibit 1 we infer that it was given early in December, 1929. Said Exhibit also justifies the inference that the building was completed a short time before the giving of

the lease and that soon afterwards the machinery was installed by Conant, the lessee. The defendant had knowledge of the fact of the lease but not its contents. He knew that this machinery was being installed and made no objection thereto, but had no knowledge of the fact of giving the conditional sales contract or its provisions. Neither did he know that the purchase price of said machinery was not paid.

The lessee, Conant, commenced business March 4, 1930, and continued in it until May 10, 1932. Later Gilkey foreclosed his mortgage and took possession of said real estate.

All of this machinery was installed in the building in such a manner as to become part of the realty. *Gaunt* v. *Allen Lane Company*, 128 Me., 41, 145 A., 255. Its title is now to be determined as between the plaintiff, with rights of a conditional sale vendor, and the defendant, the real estate mortgagee, on the facts above stated.

Had these machines been purchased by the mortgagors, Stone and Davis, with a like provision in the contract of sale as to retention of title in the vendor, the vendor could not have asserted ownership successfully as against the real estate mortgagee in the absence of proof that the real estate mortgagee was a party to the transaction. Maine adopts the Massachusetts rather than the New Jersey rule and holds "that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and that the question of whether it can or can not be removed without injury to the realty is immaterial." *Gaunt* v. *Allen Lane Company*, 128 Me., 41, 46, 145 A., 255, 257.

But in the instant case, the machines were not purchased and installed by the mortgagor but by Conant, the mortgagor's lessee. Is the result the same, then, notwithstanding this noted difference in the facts? We think it is.

In *Wight* v. *Gray*, 73 Me., 297, a frame building was erected by a husband on land of the mortgagor, his wife, and with her consent. The mortgagee, not a party to the transaction, brought an action of trespass *quare clausum* on account of the removal of this building, which required a determination of the respective rights of the

licensee of the mortgagor and the mortgagee. The mortgagee prevailed. The Court, in its decision, quoted with approval this statement from *Lynde* v. *Rowe*, 12 Allen, 100: "If, after the execution of a mortgage of real estate, fixtures are added by a tenant at will of the mortgagor, his right to remove them, after an entry by the mortgagee for the purpose of foreclosure, must be determined by the rule which prevails between mortgagor and mortgagee, and not by that which prevails between landlord and tenant."

In *Inhabitants of Andover* v. *McAllister*, 119 Me., 153, 109 A., 750, 751, a question of ownership of a church bell with tongue and tolling fork was determined. In that case it appeared that the Trustees of the Methodist Episcopal Church in the town of Andover erected a church building on a lot of land owned by the Trustees. While the church was in process of construction, a fund was raised by public subscription with which the bell with tolling fork was purchased, the understanding being that it was to be hung in the belfry of the church and to be used for public as well as church purposes. It was presented to the town and hung in the church upon the condition that it should be rung on all public occasions, never be removed from the town, should be controlled by the voters of the town, and should remain in the church building so long as the Methodist Society held together. The Society ceased to hold meetings and sold its church to the defendant, who took possession of the bell and refused to deliver it up to the town on demand, whereupon the town replevied it. The Court, refusing to apply the law as declared in *Peaks* v. *Hutchinson*, 96 Me., 530, 53 A., 38, which has since become ineffective by enactment of statute (R. S., Chap. 87, Sec. 39), adopted and declared the rule "more cognizant with reason and which accords with the great weight of authority elsewhere" and held: "That chattels attached to the realty in such a manner as to indicate they are fixtures will pass by deed or mortgage of the real estate to a purchaser or mortgagee without notice, notwithstanding an agreement, either express or implied, between the owner of the chattel and the owner of the realty that they are to remain personalty and shall not become a part of the real estate." Citing *Southbridge Savings Bank* v. *Exeter Machine Works*, 127 Mass., 542; *Thompson* v. *Vinton*, 121 Mass., 139, and many cases from other jurisdictions.

In *Thompson* v. *Vinton*, supra, a new wheel, shaft and head gear were put into a mill, not by the mortgagor but by co-partners, of whom one was the mortgagor. Decision was given for the real estate mortgagee, the Court saying: "When the new wheel, shaft and head gear were put into the mill, although they were to be paid for by F. E. Vinton and Purdy, who were then co-partners, they must be considered as annexed by the mortgagor, Purdy. . . . It was not in the power of the mortgagor, by any agreement made at that time, or subsequently when he leased the property to Vinton, to bind the mortgagee to treat them as personalty." Citing *Hunt* v. *Bay State Iron Company*, 97 Mass., 279, 283.

In *Southbridge Savings Bank* v. *Exeter Machine Works*, supra, a boiler was installed in a machine shop by Stevens, the mortgagor, this boiler having been delivered to Stevens to be used on trial with the agreement that it should remain the personal property of the defendant until it was paid for. The Court held that such agreement "would prevent Stevens from claiming it as a part of the realty. It would also prevent any vendee, or the mortgagee, who took with notice of the agreement." It then enunciated the Massachusetts rule that where the "personal property is sold for the purpose of being annexed to the realty, and it is so annexed, an agreement between the seller and the buyer that it shall not become a part of the realty, but shall remain the personal property of the seller, will not bind or affect the vendee or mortgagee without notice. Notwithstanding such agreement, the property will pass to such vendee or mortgagee as a part of the realty."

In *Southbridge Savings Bank* v. *Stevens Tool Company*, 130 Mass., 547, the defendant company having purchased machinery, including a drill in controversy, to be used in the manufacture of a patented machine, made an arrangement with Stevens, the mortgagor, to hire his shop. In anticipation of its occupancy, Stevens was authorized to set the machinery up in his shop. The Court held that the drill, having been placed on the premises by direction of the defendant company, passed to the plaintiff, the mortgagee, as a part of the realty, the plaintiff having had no notice that the company owned the drill until after the foreclosure of its mortgage.

Again, in the same State, in *Meagher* v. *Hayes*, 152 Mass., 228,

25 N. E., 105, it was held that a building erected by license of the mortgagor without the mortgagee's consent did not remain personal property but was covered by the mortgage.

The above cases from both Maine and Massachusetts courts indicate that even though there be an agreement that the property installed remain chattel, and even though the installation is not by the mortgagor but by the licensee of or the contractor with the mortgagor, that the annexation is considered to be as made by the mortgagor, so that the property so annexed becomes real estate subject to a prior real estate mortgage, unless the mortgagee has knowledge of such an agreement and is a party to the transaction. In the case at bar, the defendant, the mortgagee, was not a party to the transaction and had no such knowledge.

The plaintiff, however, relies strongly upon *Paine* v. *McDowell*, 71 Vt., 28, 41 A., 1042, 1043, reported in 41 Atl., 1042, as holding that where the mortgagee allows the mortgagor to remain in possession of the real estate and has knowledge of the renting of the premises by the mortgagor to a tenant, that that is enough to show consent by the mortgagee to that which is done by the mortgagor, and, hence, that the mortgagee is thus precluded from preventing the removal of machinery placed on the premises by another who, by agreement with the lessee, reserves the right so to remove. A critical examination of the facts in that case does not bear out the plaintiff's contention, so far as it may be applied to the facts in this case.

In the Vermont case, the plaintiff, called the oratrix, representative of the deceased, petitioned in chancery to foreclose the rights of the defendant in and to certain real estate on the following facts: The intestate owned a lot in Lowell, Vermont, on which lived one of the defendants, Leonard McDowell. The intestate contracted to sell the lot to McDowell and took his notes for the purchase price. The Court held that this contract gave McDowell an equity of redemption in the premises and made the transaction in legal effect practically the same as a deed and mortgage back. Subsequently the intestate died, and McDowell, in the position of the mortgagor and in possession of the lot, leased a portion of it to one Tucker, another defendant, the leased part of the lot to be used by Tucker for the purpose of building a mill thereon. Tucker

thereafter built the mill and installed certain machinery in it. The oratrix knew of this lease and made no objection thereto. Tucker knew that the lot was under mortgage. The oratrix claimed that the mill and machinery became a part of the real estate, subject to the mortgage, and so that Tucker had no right to remove the mill or the machinery. Tucker claimed to the contrary and that the mill and the machinery retained their character of chattels, not only as to McDowell but as to the oratrix, and hence he had a right to remove both. In addition Tucker also claimed that he was entitled to have invoked the doctrine of trade fixtures.

The Vermont Court, in a brief sentence, denied Tucker any rights under this doctrine, saying: "The doctrine of trade fixtures applies only between landlord and tenant and as Tucker is not tenant to the oratrix it does not apply as to her."

The other claim set up by Tucker was allowed and he was permitted to remove the mill and the machinery. This, however, in our judgment, was due to the fact that Vermont is one of the states that adopts the New Jersey and not the Massachusetts rule. The Court said, on page 1044: "It is true, as between the estate and McDowell, all fixtures are part of the land, and go with it. This is the general rule between mortgagor and mortgagee in all jurisdictions where a mortgage conveys title; and in some of them (notably Massachusetts) no exception to the rule is made in favor of third persons, such as conditional vendors and chattel mortgagees, although the annexations are made after the execution of the mortgage of the land, for they say that the mortgagor can not bind the mortgagee without his consent, by an agreement that the annexations may be removed in a certain event. *Clary* v. *Owen*, 15 Gray, 522; *Hunt* v. *Iron Company*, 97 Mass., 279; *Meagher* v. *Hayes*, 152 Mass., 228, 25 N. E., 125. But we have made an exception in favor of conditional vendors of chattels sold to the mortgagor, and by him annexed after the execution of the mortgage of the land, and held that they do not become fixtures, as between the conditional vendor and the prior mortgagee, but retain their identity and character as chattels, and that the vendor's right thereto is superior to that of the mortgagee, and may be asserted against him; and this is put upon the ground that the mortgagee has parted with nothing on the faith of the annexations

being a part of the realty, and therefore has no reason to complain. *Davenport* v. *Shants*, 43 Vt., 546; *Buzzell* v. *Cummings*, 61 Vt., 213, 218, 18 Atl., 93; *Page* v. *Edwards*, 64 Vt., 124, 23 Atl., 917."

The Vermont case, thus, having specifically stated that it did not adopt the Massachusetts rule and that Vermont made an exception in favor of the conditional sale vendor, then further said: "The exception carried to its logical result, exempts *the annexations in question* from the mortgage." It is to be noted that the annexations in question in the Vermont case were those made not by the mortgagor but by Tucker, the lessee of the mortgagor. Further continuing, the Court said: "For it makes no difference whether the annexations are sold conditionally, or not sold at all. The same reason exists in both cases for treating them as chattels between the mortgagee and the owner, namely, the mortgagee is not misled by the annexations and parts with nothing on the faith of them, and, therefore, does not stand as a bona fide purchaser."

Thus it will be seen that the decision reached in the Vermont case in favor of the lessee of the mortgagor is based solely on the extension of the doctrine of the Vermont exception to the general rule and without the exception, which exception does not obtain in Maine, no such result would have been reached.

We think the Vermont case in its reasoning sustains in part the contention of the defendant in this case, namely, that annexations by the lessee of the mortgagor are to be regarded as though made by the mortgagor, for in the Vermont case the reasoning of the Court is that as under its exception, the conditional sale vendor could hold the chattels as against the real estate mortgagee, where the annexations are made by the mortgagor (and that is not law in Maine), so the conditional sale vendor may prevail over the real estate mortgagee, even though the annexations were not made by the mortgagor but by his lessee.

The Vermont case is further distinguished from the facts in the instant case is this: That in that case the mortgagee knew that the whole lot before the erection of the building was worth only $300, that the building erected was worth $1,000, and the machinery installed $5,000, and so there was good reason in the Vermont case to infer knowledge upon the part of the mortgagee that there was an agreement for removal. Failure, then, to object by one possessed

of such knowledge might have been strong evidence to show waiver of the rights that the mortgagee otherwise would have had. In fact, the Court said: "Hence I, for one, do not see why the case might not well be put on the ground of assent by her."

In the case at bar, we have found, as above stated, that the mortgagee did not consent to and was not a party to the transaction.

The lessee's rights of possession are wholly dependent upon his contract with the mortgagor, his lessor. "The doctrine is well settled, that, although the mortgagor is to be regarded as owner of the estate as to all other persons than the mortgagee, yet that he can not create a tenancy after the execution of a mortgage, which will be valid against the mortgagee, unless the mortgagee chooses to recognize the tenant as such." *Lynde* v. *Rowe, et als.*, 12 Allen, 100, 101.

In *Hunt* v. *Bay State Iron Company, et als.*, 97 Mass., 279, 283, the Court said: "Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees, as well as all other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver."

It seems to us, then, necessarily to follow that if a mortgagor, rightfully in possession, so far as the mortgagee is concerned, can not as against the mortgagee remove fixtures to whose annexation the mortgagee is not a party, the lessee may not, his right being in no way superior to that of the mortgagor. Unless and until the mortgagee recognizes the lessee, there is no privity whatsoever between the mortgagee and the lessee. To allow the lessee of the mortgagor to have greater rights than the mortgagor, who has privity with the mortgagee, can not be justified, either on legal or equitable principles. Neither should a conditional sales vendor be held to have a greater right to retain title to a chattel and to remove the same, which he permits to be attached as a fixture to real estate, when he is dealing with a lessee than when dealing with a mortgagor of the real estate. Justice will be the better accomplished, would the conditional sale vendor obtain such right of removal, to compel him to inform the real estate mortgagee of such proposed an-

nexation, obtain his consent, and thus make him a party to the transaction, rather than to subject the mortgagee, not such a party, to the physical interference with and damage to his real estate security with losses attendant upon the same.

In conclusion, therefore, by this decision, we extend the rule declared in *Gaunt* v. *Allen Lane Company*, 128 Me., 41, 145 A., 255, and hold that a contract between a lessee of a mortgagor and a third person preserving the chattel character of the property added to real estate as an improvement during the life of the mortgage thereon is ineffective as against the mortgagee, unless he is a party to the transaction.

Judgment for defendant.

STATE OF MAINE *vs.* DONALD F. SNOW.

STATE OF MAINE *vs.* DONALD F. SNOW.

Penobscot. Opinion, January 18, 1934.

CRIMINAL LAW. INDICTMENT. EMBEZZLEMENT. EXECUTORS & ADMINISTRATORS.

Possession and custody of the monies, goods and property, of a deceased person, to an extent and for a time, is vested by statute law in an administrator or executor.

Embezzlement is a statutory offense. What are the acts made criminal by the statutes, and who are the persons to be affected by them must be determined from the terms of the statute applicable. To what acts and to what persons they are applicable are to be found by their expression and by the necessary implication of their terms.

In this State an indictment charging in apt words that a person converted the property of another while in the possession of that person as an administrator or executor is good as against demurrer.

On exceptions. Reserving right to plead anew, respondent demurred to indictments charging embezzlement. To the overruling

of the demurrers exceptions were taken. Exceptions overruled. The cases sufficiently appear in the opinion.

James D. Maxwell, for the State.

James M. Gillen, for respondent.

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

BARNES, J. Two cases against Donald F. Snow, of Bangor, arose on indictments returned at the June term, 1933, each charging him with embezzlement. In one case the indictment sets out that while he was serving as executor in the estate of Harriett A. Wentworth, he was guilty of embezzlement; in the other case that while administrator of the estate of George W. Williams he committed the same crime. To these two indictments the respondent demurred, and reserved the right to plead anew, if demurrers were overruled.

The Justice in the lower court overruled the demurrers; respondent took exceptions, and the issue of the sufficiency of the indictments was argued as one case.

The demurrers are general, advancing against the validity of the indictments that they are defective in substance, and the defect relied upon in argument is that they allege embezzlement by the respondent of and from himself.

Possession and custody of the monies, goods and property of a deceased person, to an extent and for a time, is vested by statute law in an administrator or executor.

Prior to the enactments of the Legislature of 1893 the law prohibiting larceny and embezzlement was applied to the acts of persons in classes and groups enumerated in Chap. 120, R. S. 1883, and in those classes an administrator or executor was not included. By-laws of 1893, Chap. 241, the field of operation of the statutes against embezzlement was changed by the addition of the following paragraph:

> "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny."

From that time until this day that section stands as expressing the scope and extent of the statute against embezzlement now written in Sec. 10, Chap. 131, R. S.

Embezzlement is a statutory offense. As such it is punishable only as by statute provided and to the extent that the Legislature has specified. It is apparent that the Legislature of 1893 aimed to obliterate or correct a condition of mischief. What are the acts made criminal by the statutes, and who are the persons to be affected by them must be determined from the terms of the statute applicable. To what acts and to what persons they are applicable are to be found by their expression and by the necessary implication of their terms.

The mischief giving rise to our present statute must have been that persons entrusted with property of others, under conditions that rendered prosecution for larceny inapplicable, had converted to their own use that of which the eventual owners should not be deprived. The intent of the Legislature in correcting practice and obliterating evil can not be held, the respondent argues, to apply if the doer of the tortious act is an administrator or an executor, and the property at the time of conversion in his possession to carry out the mandate of probate law.

We hold such interpretation a fallacy. In this State an indictment charging in apt words that a person converted the property of another while in the possession of that person as an administrator or executor is good as against demurrer.

Exceptions and demurrers overruled.
Respondent is entitled to plead anew.

INHABITANTS OF THE TOWN OF CUSHING

vs.

MCKAY RADIO & TELEGRAPH CO.

Knox. Opinion, January 18, 1934.

TAXATION.

Where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally.

In the case at bar, while the town clerk's records were somewhat informal, aided in certain respect by oral testimony, they were deemed sufficient to establish that the assessors who made the assessment had proper authority. The transcript of the evidence disclosed that the defendant was liable to taxation in Cushing; that, in assessing the tax, the assessors did not exceed jurisdiction; and that any irregularities in procedure thereon, inclusive of the authorization of the commencement of this action, were merely minor ones, not going to the merits of the controversy.

The record did not show that the town voted to fix the date when taxes should be payable, or that interest should be collected thereafter. In this situation, no interest is allowed.

On report. An action of debt for the collection of taxes. Hearing was had at the May term, 1933, of the Superior Court for the County of Knox. After the evidence had been taken out the case was, by agreement of the parties, reported to the Law Court for its determination on so much of the evidence as was legally admissible. Judgment for plaintiff for $510.50, and taxable costs. The case fully appears in the opinion.

Rodney I. Thompson, for plaintiff.

Alan L. Bird, for defendant.

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

DUNN, J. After the evidence on both sides of this case had been closed, it was reserved by the Justice presiding in the Su-

perior Court, for decision by this Court, on a report of the legally admissible evidence.

The action is by the town of Cushing, under R. S., Chap. 14, Sec. 64, to recover $510.50, the unpaid balance of taxes assessed for the year 1931, against the defendant corporation.

The defendant makes some objections to the sufficiency of the records of town meetings, at which assessors, and other public officers, were chosen, and claims that these should wholly preclude the plaintiff.

The town clerk's records are somewhat informal, but, aided in certain respects by oral testimony, are deemed sufficient—recovery of judgment adverse to a delinquent taxpayer being alone asked—to establish that the assessors who made the assessment had proper authority. The transcript of the evidence discloses, additionally, that defendant was liable to taxation in Cushing; that, in assessing the tax, the assessors did not exceed jurisdiction; and that any irregularities in procedure thence on, inclusive of the authorization of the commencement of this action, were merely minor ones, not going to the merits of the controversy. Where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally. *Cressey* v. *Parks*, 76 Me., 532, 534; *Rockland* v. *Ulmer*, 84 Me., 503, 24 A., 949. See, also, in answer to points made by the defense, *Bucksport* v. *Spofford*, 12 Me., 487, 490; *Hathaway* v. *Addison*, 48 Me., 440, 444; *Gerry* v. *Herrick*, 87 Me., 219, 32 A., 882; *Charleston* v. *Lawry*, 89 Me., 582, 36 A., 1103; *Wellington* v. *Corinna*, 104 Me., 252, 258, 71 A., 889, 892; *Greenville* v. *Blair*, 104 Me., 444, 72 A., 177.

Plaintiff establishes its case, in regard to the taxes.

The case of *Jordan* v. *Hopkins*, 85 Me., 159, 27 A., 91, where but two assessors were legally chosen and sworn, the third person participating in the assessment having been chosen and sworn as a selectman only, is in no wise to the contrary; nor is that of *Machiasport* v. *Small*, 77 Me., 109, an action upon a tax collector's bond conditioned to be void upon the faithful performance of official duty.

The record does not show that the town voted to fix the date when taxes should be payable, or that interest should be collected thereafter. R. S., Chap. 14, Sec. 1. In this situation, no interest is

allowed. *Snow* v. *Weeks*, 77 Me., 429, 1 A., 243; *Athens* v. *Whittier*, 122 Me., 86, 118 A., 897; *Bucksport* v. *Swazey*, 132 Me., 36, 165 A., 164. The allegation that prior to suit there had been refusal of demand by the collector for payment of taxes, is supported by proof. The mandate will be:

Judgment for plaintiff for $510.50, and taxable costs.

BEATRICE EMILY DRAKE *vs.* CHESTER LEWIS.

Piscataquis. Opinion, January 18, 1934.

BASTARDY.

Where the only evidence of the complainant is that respondent begot her with child on the twenty-seventh day of February, 1932, *and where the evidence of the respondent is a general denial accompanied with evidence that a normal child was born within seven months, that the complainant had symptoms of pregnancy before the time when the complainant claimed that the child was conceived, with evidence of admission by the complainant that she was herself pregnant before that time, the complainant has failed to sustain the burden of proof that the respondent was responsible for her condition.*

On general motion for new trial by defendant. Respondent, tried before a jury on a complaint in bastardy, was found guilty. A general motion for a new trial was thereupon filed. Motion sustained. The case fully appears in the opinion.

J. S. Williams, for complainant.

John P. White,

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

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

THAXTER, J. This is a complaint in bastardy in which all the preliminary conditions required by the statute seem to have been complied with. The issue was tried before a jury and the respondent

found guilty. The case is now before us on a general motion for a new trial, and the question is whether the evidence is sufficient to justify the verdict.

The complainant accuses the respondent with having begotten her with a child on the twenty-seventh day of February, 1932. Her testimony is specific that the intercourse, from which conception followed, was on that day and on no other. The respondent denied the charge. That there is no corroboration of her testimony is not necessarily fatal, unless there are admitted facts inconsistent with it.

In refutation of it there is the testimony of a woman that prior to February 27 the girl admitted to her that she was pregnant. The complainant's denial of this remark would carry more weight but for two circumstances, which taken together point strongly to the conclusion that she was pregnant before the time when she alleges that she had sexual intercourse with the respondent. In the first place there is the uncontradicted testimony of one witness that the complainant in January had nausea in the mornings, which is one symptom of pregnancy. Then there is the fact that a fully developed child was born on the thirteenth day of October nearly two months before the normal period of gestation would have expired.

These circumstances, more strongly than the respondent's own denial of the charge against him, cast grave doubts on the truth of her accusation. In our opinion the overwhelming weight of the evidence indicates that conception did not take place as claimed by her. She has manifestly failed to sustain the burden of proof.

Motion sustained.

INHABITANTS OF FAYETTE *vs.* INHABITANTS OF READFIELD.

Kennebec. Opinion, January 18, 1934.

TOWNS. BOUNDARIES. R. S. 1930, CHAPTER 5, SECTION 191.

The legislature alone has authority to establish and to change the boundaries of towns. The authority of commissioners appointed to ascertain and determine town lines in dispute is limited to fixing the line which the legislature has designated.

The finding of the commissioners is final both as to law and fact. Where, however, it is clear that the commissioners went beyond the authority given them by the statute, and instead of trying to determine the line as called for by the legislature, established one obviously at variance with it, it is the duty of the Court to sustain objections duly made to their action.

On exception by defendant town to the presiding Justice's acceptance of the commissioners' report on establishment of the town line between Fayette and Readfield. Exception sustained. The case fully appears in the opinion.

McLean, Fogg & Southard, for plaintiff.

Charles J. Cole,

George W. Heselton, for defendant.

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

THAXTER, J. This case is before this court on exceptions by the Town of Readfield to the acceptance by a Justice of the Superior Court of a report of commissioners appointed in accordance with the provisions of R. S. 1930, Chap. 5, Sec. 191, to determine the boundary line between the towns of Fayette and Readfield.

The line in dispute is the easterly line of Fayette and the westerly line of Readfield. This line in the articles of incorporation of the Town of Fayette is designated as follows, the part of the description italicized describing the line itself: "Beginning at the northeast corner of Livermore; thence running south in the east line of Livermore seven miles and ninety rods; thence east about

three miles and ninety rods to the Thirty Mile River, so called; *thence northerly by said River to Lane's pond, so called; thence northerly by said pond on the easterly side thereof to the most northerly and easterly branch of the same; thence north to the most southerly and easterly branch of Crotchet pond; thence on the same course to the southerly line of Mount Vernon.*"

The commissioners were evidently faced with a difficult problem. It is perfectly clear, however, that the line which they have established does not follow the description as called for by the legislative enactment incorporating the town. For at least a part of the distance the commissioners have run a straight line through Lane's Pond in place of a line running "northerly by said pond on the easterly side thereof."

The presiding Justice felt that under the authority of the case of *Winthrop* v. *Readfield*, 90 Me., 235, 38 A., 93, he had no power to recommit or set aside the report. That he was in absolute disagreement with it is evident from his language, when he says: "The report of this commission shown by its language and by the accompanying plan shows that it ascertained and determined a straight line over the water of Lane Pond instead of by said pond on the Easterly side of it. If I believed I had the legal right to re-commit this to the commission for correction of what I consider a palpable error, I should do so. I do not, because I feel bound by the law enunciated in *Winthrop* v. *Readfield* aforesaid and do not consider that I have the right to enlarge, expand or subvert the law in that case. If that case is to be reversed, it is for the Supreme Judicial Court to do it."

The legislature alone has authority to establish and to change the boundaries of towns. *Ham* v. *Sawyer*, 38 Me., 37. The authority of the commissioners appointed under the statute to ascertain and determine town lines in dispute is limited to fixing the line which the legislature has designated. They have no power to establish a new one. *Lisbon* v. *Bowdoin*, 53 Me., 327.

The case of *Winthrop* v. *Readfield*, 90 Me., 235, holds that the conclusions of the commissioners both as to fact and law are final and even though incorrect can not be set aside by the Court. The Court there said, pages 239-240: "All findings of the commissioners, upon questions of fact and conclusions upon matters of law in-

volved, are final. The only power and discretion of the Court, in this respect, is to ascertain and determine if the report is legally correct in form and if all the proceedings have been in compliance with the statute. The power of such commissioners is analogous to that of referees under an unrestricted rule of reference, who are judges of the law as well as of the facts involved, and whose conclusion, as shown by their direct and unconditional award, in the absence of any improper motive, will not be inquired into. So in a matter of this kind, although the power of the Court has not been exhausted when the commissioners have been appointed, but continues until their report is offered and passed upon, the Court has not the power to review the conclusions of the commissioners upon questions of law or fact involved, but only to inquire into the conduct and motives of the commissioners, if anything improper in that respect is alleged, and as to whether the proceedings have been in accordance with the statute and their report legally correct as to form."

The Justice, who affirmed the report of the commissioners, found in it nothing incorrect in form and no non-compliance with the statute, and also no improper conduct on their part, nor any bias, prejudice or fraud. In spite of such finding and conceding the good faith and proper motives of the commissioners, we do not believe that the case of *Winthrop* v. *Readfield*, supra, intended to hold that the Court is powerless to correct an error, where on the face of the record it is perfectly apparent that the commissioners went beyond the authority given them by the statute, and instead of trying to determine the line as called for by the legislature, established one obviously at variance with it. To so hold would place such commissioners above the law from which alone they derive their power.

We think that in this case it was within the province of the Court to sustain the objections of the Town of Readfield. Whether in so doing the report should be recommitted or new commissioners appointed is for the presiding Justice to determine.

Exception sustained.

J. FREDERIC BURNS *vs.* BALDWIN-DOHERTY COMPANY.

Aroostook. Opinion, January 19, 1934.

JUDGMENTS. RES JUDICATA. ESTOPPEL. WARRANTY.

It is a principle of the common law that when a fact is once finally adjudicated, without fraud or collusion, by a tribunal of competent jurisdiction, the judgment binds the parties and their privies.

Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. The same thing may also be said of those who assume to have the right to do these things.

Privity is a "mutual or successive relationship to the same rights of property."

The strict rule that a judgment operates as res judicata only with reference to the parties and privies, expands on occasion beyond the nominal parties,—but a single act, such as the employment of an attorney, will not determine status. The mere fact that one not a party to a pending suit employs counsel to assist in the defense thereof, does not make him a party or privy to such proceedings, nor bar him from contesting the issues decided.

A vendor in possession impliedly warrants the title to personal property sold, and is bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action wherein title is the sole issue, and gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. Nor would it make any difference that there were intermediate purchasers. The defect in title will come home to the first one who sold without a proper title.

A warranty of the quality of a chattel does not, however, run with the chattel on its resale, and hence is not available to a subvendee. Warranties of quality of goods and chattels are personal to the warrantee.

In the case at bar, the Court held that the withdrawal of counsel of this defendant from the defense of the Michaud case, did not appear to have worked injury to this plaintiff. The testimony in the earlier case was sufficient to warrant the conclusion of the jury.

On exceptions and general motion for new trial by plaintiff. An action for an alleged breach of warranty, as to quality, of certain

fertilizer chemicals mixed by the defendant, the original vendor, and sold by plaintiff, the original vendee, to one Michaud. In a suit by Michaud against the present plaintiff the jury rendered a verdict for Michaud. The question at issue in the case at bar was whether the defendant who was duly avouched into court to defend the case *Michaud* vs. *Burns*, was bound by the judgment in that case and estopped to make any defense in this case. Exceptions overruled. Motion overruled. The case fully appears in the opinion.

R. W. Shaw,
A. S. Crawford, Jr., for plaintiff.
T. V. Doherty,
Cook, Hutchinson, Pierce and Connell, for defendant.

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

DUNN, J. This action was for an alleged breach of warranty, as to quality, in negotiations leading to the sale of certain chemicals which, after being mixed by the vendor (now defendant), were delivered by direction of the vendee (present plaintiff) to his subvendee, to fertilize a potato crop.

In the declaration in the writ there are allegations of: (1) express warranty; (2) purchase in reliance thereon; (3) material defects; (4) liability. An additional averment is that, on the subpurchaser suing his vendor, (this plaintiff), claiming the fertilizer was not as represented on resale, the original vendor, though it came in by request to defend such suit, subsequently withdrew, and left the defendant therein to make, without assistance, a defense that proved unavailing. There is assertion that, as between plaintiff and defendant, the matter is res judicata. Issue was joined. The sufficiency of the form of pleading the estoppel is conceded. The jury verdict was for the defendant. Plaintiff perfected exception to the exclusion of evidence, and filed a motion for a new trial. The motion raises the question whether the verdict of the jury is clearly wrong,—i.e., if the verdict is manifestly against the weight of the evidence.

The origin of the litigation was in Houlton, that town being the domicile of both plaintiff and defendant, and also of one Joseph T.

Michaud, who, as plaintiff, prevailed in the action in which this plaintiff was the unsuccessful litigant.

On a day near the last of May, 1930, plaintiff agreed with Mr. Michaud to supply commercial fertilizer for his farm, payment therefor to be in potatoes, at digging time. On buying the fertilizer, or the active chemical constituents thereof, from the defendant, the plaintiff directed that delivery be made to Mr. Michaud, which was done.

Mr. Michaud's crop failed. He sued his vendor, on the theory that inferior fertilizer was the efficient cause for the loss of, or damage to, the crop which it was maintained would have resulted, had the fertilizer been, in regard to quality and fitness, as was represented on selling it to him. *Philbrick* v. *Kendall*, 111 Me., 198, 88 A., 540. At the trial, Mr. Michaud had a verdict of $2,120.32, on which judgment was entered, damages and taxable costs together amounting to $2,200.00. The judgment was fully satisfied.

When, in the instant action, counsel for plaintiff had read aloud, in the presence and hearing of the jury, the declaration in the writ, and finished opening the case, he offered in evidence an exemplification of the record in *Michaud* v. *Burns*, which, objection being interposed, was excluded. The exception makes the point that this was prejudicial error.

It is a principle of the common law that when a fact is once finally adjudicated, without fraud or collusion, by a tribunal of competent jurisdiction, the judgment binds the parties and their privies. *Lander* v. *Arno*, 65 Me., 26; *Van Buren Light & Power Company* v. *Inhabitants of Van Buren*, 118 Me., 458, 109 A., 3; *Old Dominion Copper Min. etc., Co.* v. *Bigelow*, 203 Mass., 159, 214, 89 N. E., 193.

Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. Greenleaf Evid., Sec. 523, 535; *Duchess of Kingston's Case*, 3 Smith's Lead. Cas., 1998 (9th Am. ed.); *Litchfield* v. *Goodnow*, 123 U. S., 549, 31 Law ed., 199. The same thing may also be said of those who assume to have the right to do these things. *Winchester* v. *Heiskell*, 119 U. S., 450, 30 Law ed., 462.

Privity is a "mutual or successive relationship to the same rights of property." Bouv. Law Dict.; Greenleaf Evid., Sec. 189.

Prima facie defendant was not bound by the judgment recovered against Mr. Burns. There must have been some showing of defendant's indemnifying connection with the earlier controversy before the judgment could be admissible in evidence. *Davis* v. *Smith*, 79 Me., 351, 10 A., 55. The exception is without merit, for two reasons. The first is that the matter did not appear upon the record, so that it might be determined by the court, and there was then no evidence upon which, with the rational inferences susceptible of being drawn therefrom, estoppel by judgment could have been found. *Lander* v. *Arno*, supra. Secondly, the very copy of the record which had been excluded, was later admitted into the evidence. *Thomson* v. *Sebasticook & Moosehead R. R. Co.*, 81 Me., 40, 16 A., 332. Cf. *Williams* v. *Williams*, 109 Me., 537, 85 A., 43; *O'Donnell* v. *Portland R. R. Co.*, 106 Me., 201, 76 A., 408.

The initial contract of sale—that by defendant to plaintiff—was an oral one. On conflicting evidence, the existence of a warranty of the quality of that which was sold, was for the jury. The jury, as has already been pointed out, found for the defendant.

It may suffice here to say the jury might validly find, as respects the sale, either of the ingredients of the artificially prepared fertilizer, or the commercial mixture itself: (a) that there was no warranty of quality,—that is, that defendant delivered with respect to quality, precisely what, previously to the sale, it definitely explained; or (b) if there was a warranty, that plaintiff, upon whom the law cast the burden of proof, had not sustained his position as to a breach thereof.

The plaintiff invokes the doctrine of voucher.

The transcript of the evidence discloses that, being himself sued for false warranty, he called his vendor to come and defend the suit, reciting that it had warranted to him. The vendor caused its attorney to enter his appearance on the court docket in defense. The entry was afterwards withdrawn, but not without tendering the defendant in that action (himself a lawyer) any assistance which might be afforded in preparing the case, or at the trial. Thereafter, there was neither conference with, nor request for assistance from, the original vendor or its counsel.

A vendor in possession impliedly warrants the title to personal property sold, and is bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action wherein title is the sole issue, and gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. Nor would it make any difference that there were intermediate purchasers. The defect in title will come home to the first one who sold without a proper title. *Thurston* v. *Spratt*, 52 Me., 202, 205. "The maxim that there must be an end to litigation was dictated by wisdom, and is sanctified by age." *Warwick* v. *Underwood* (Tenn.), 75 Am. Dec., 767.

A warranty of the quality of a chattel does not, however, run with the chattel on its resale, and hence is not available to a subvendee. Warranties of quality of goods and chattels are personal to the warrantee. *Booth* v. *Scheer* (Kan.), 185 Pac., 898, 8 A. L. R., 663, and note; *Welshausen* v. *Charles Parker Co.*, 83 Conn., 231, 76 A., 271.

The plaintiff, in invoking estoppel, must establish that all the essential characteristics of parties were really present in the defendant as a party to the former suit. Estoppels, to be good, must be mutual and reciprocal. *Litchfield* v. *Goodnow*, supra. To this, there are apparent exceptions, not now of importance. *Bigelow* v. *Old Dominion Copper Min. Co.*, 225 U. S., 111, 56 Law ed., 1009. In regard to the case in hand, breaches of contractual duty must be identical. *Penobscot Lumbering Association* v. *Bussell*, 92 Me., 256, 42 A., 408.

The questions actually litigated and determined in the Michaud Case were that Mr. Burns (there defendant and here plaintiff) warranted the quality of the fertilizer to his vendee, and that the diminution in value of Mr. Michaud's potato crop resulted in consequence of breach of the warranty.

True, the strict rule that a judgment operates as res judicata only with reference to parties and privies, expands on occasion beyond the nominal parties,—but a single act, such as the employment of an attorney, will not determine status. *Schroeder* v. *Lahrman* (Minn.), 1 N. W., 801. The mere fact that one not a party to a pending suit employs counsel to assist in the defense thereof does

not make him a party or privy to such proceedings, nor bar him from contesting the issues decided. *Central Baptist Church and Society* v. *Manchester*, 17 R. I., 492, 33 A. S. R., 893; *Old Dominion Copper Min. etc., Co.* v. *Bigelow*, supra.

The withdrawal of counsel from the defense of the Michaud Case, it seems fitting to remark, does not appear to have worked injury to this plaintiff. The testimony in the earlier case need not be narrated. It was sufficient to warrant the conclusion of the jury.

In the instant case, the entry will be:

Exception overruled.
Motion overruled.

SUMMIT THREAD COMPANY *vs.* ROBERT N. CORTHELL.

Androscoggin. Opinion, January 24, 1934.

REVIEW. LAW COURT.

A ruling at nisi prius stated to have been made "pro forma" has the same force and effect as though no qualifying phrase accompanied the ruling.

A petition for review is addressed to the discretion of the Court by which it is heard and its decision can only be revised on exceptions to erroneous rulings in matters of law.

Statutory review is not an appropriate method to obtain the correction of a mistake upon which final adjudication of a cause was based by a court of last resort.

Every judicial tribunal possesses inherent power within reasonable limitations to correct its obvious errors and should be burdened with the responsibility of so doing.

Should a case arise in which it appeared that justice called for such action, the Law Court would be justified in rectifying an error in a final decision on petition and motion addressed directly to it.

Such a proceeding does not involve a re-hearing and would not lie for the purpose of seeking a revision by the Court of its considered conclusions either of fact or law, nor could mere mistakes in opinion and judgment warrant it. It could only be applicable when the Law Court had by mistake assumed to be true

that which the record showed not to be true, or had palpably failed to consider facts proved, or had misstated the law so plainly that the point involved was not arguable, and had based its decision thereon.

The case at bar does not present such a situation or condition.

On exceptions to a pro forma ruling of a Justice of the Superior Court denying a petition for review. Exceptions overruled. The case fully appears in the opinion.

George W. Abele,

Verrill, Hale, Booth & Ives, for petitioner.

Clifford & Clifford, for defendant.

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

PATTANGALL, C. J. On exceptions. Petition for review. The original case, *Robert N. Corthell* v. *Summit Thread Company*, 132 Me., 94, 167 A., 79, came to this Court on report and resulted in judgment being ordered for plaintiff in the sum of $5,000 with interest from the date of the writ.

The then defendant, plaintiff in these proceedings, addressed this petition to a Justice of the Superior Court, asking for a review of the case on the ground of mistake having been made by this Court "in its consideration of the damages alleged to have been suffered" by defendant in review.

The record recites that in the court below the presiding Justice "did not purport to pass upon the case but made a pro forma ruling denying the petition."

Plaintiff contends that the form of the ruling accompanied by the explanatory words brings the case before us unprejudiced by the action of the court below. We do not so understand the situation. Review was denied and exceptions taken to the denial. The case is not here on report but on exceptions. Notwithstanding the form of the decision below, the effect is exactly as though the decree had been entered after careful consideration of the merits of the controversy.

A like question arose in *Wilson* v. *Littlefield*, 119 Me., 144, 109 A., 394. This was a proceeding in equity in which the Justice below

found for the plaintiff and filed a decree ordering payment by defendant of $129.11. The decree contained the following recital, "A transcript of the testimony in the case is filed as part of the decree and my findings are expressly declared to be pro forma." Counsel for defendant argued that, the decision being pro forma and not on the merits, the case stood as though it had come forward on report and that defendant was relieved from the burden of showing that the decision below was clearly wrong, the burden being still on plaintiff to make out a case by preponderating evidence. The Court refused to accept this theory, saying, "We are clearly presented with an appeal and must be governed by the well established rule that in case of an appeal, in equity proceedings the burden is upon the appellant. He must show that the decree appealed from is clearly wrong, otherwise it will be affirmed."

Applying this reasoning to the instant case, we conclude that the force and effect of the finding below is as though the Justice had denied the petition without the explanation given. In fact, if we did not so consider it, plaintiff would have nothing upon which to base exceptions.

It has repeatedly been held in this state that a petition for review is addressed to the discretion of the court by which it is heard, and that its decision can only be revised upon exceptions to erroneous rulings in matters of law. *Thomaston* v. *Starrett*, 128 Me., 328, 147 A., 427, and cases cited. A decree simply denying or dismissing the petition reveals no error of law and exceptions thereto do not lie.

Our discussion of the case might well be concluded at this point but there are certain features of these proceedings concerning which further comment seems necessary. Under our present statute, the Superior Court has exclusive original jurisdiction over petitions for review. We can not agree that the authority thus given extends to cases which have been finally adjudicated in the Supreme Judicial Court sitting as a Law Court.

We are familiar with the case of *Booth Bros.* v. *Hurricane Island Granite Co.*, 115 Me., 89, 97 A., 826, 827. In that case motion for rehearing was filed, alleging errors in the final decision made by the Law Court, and abandoned, there being no provision in this state by statute or rule for such rehearing. Petition for review was

then filed, the ground for relief stated being that "by inadvertence or accident an error was committed by the Law Court in overruling one of the Petitioner's exceptions." Chief Justice Savage, speaking for the Court, said, "The right to a review is created by statute, and is limited to the causes specified in the statute. It may be questioned whether the statute, by proper construction, embraces the inadvertences, or accidents, or mistakes of the tribunal which has heard and decided the case. It might, perhaps, properly be held that the words 'accident' and 'mistake' relate only to the conduct and understandings or misunderstandings or misfortunes of the parties, to extraneous matters connected with the preparation and trial of the case, and not in any sense to errors in the conclusions of the court, however caused. But for the present we have no occasion to say, and do not say, that there might not be a case of such palpable mistake in apprehending the evidence in a trial at nisi prius, or the record in a case before the Law Court, or such failure to consider them, as would bring it within the meaning of the statute. . . . As we conceive it, if there be any ground for holding that an alleged erroneous decision of the Law Court may be cause for review in any case, it is only when the court has by mistake assumed to be true what the record shows is not true, and its decision has been based upon the mistaken assumption, or has palpably failed to consider facts proved. When such a case comes before the court, the question will be considered further. We think no such error appears in this case."

The suggestion, that the failure of the Law Court to consider or to erroneously disallow a just claim might be cause for review, had previously appeared in *Insurance Company* v. *Tremblay*, 101 Me., 585, 65 A., 22; and it is on the authority of these cases that plaintiff in review based his procedure in the instant case and was not unjustified in so doing.

Much as we dislike to disagree with the views of such learned jurists as the authors of the opinions which we have cited, we are obliged to do so. We fully appreciate the position in which the Court was placed when it was suggested that failure to provide means for rehearing a case after final decision for the purpose of correcting manifest and admitted error left the Court helpless to act regardless of the injustice created. To admit such ineptitude

on the part of a court of last resort would be a confession of unpardonable weakness. We do not accept such a conclusion, but nevertheless we can not agree that statutory review points the way out of the dilemma.

Proceedings in review, under our present statute, begin with the filing of a petition in the Superior Court reciting the cause for the request. In such a case as the one at bar, the petition would be based upon the premise that the Supreme Court sitting as a Law Court had rendered a final decision which was obviously based in whole or in part on a mistake of fact or law or both. Should the Judge at nisi prius entertain the petition favorably, it would then be his duty to order the case "tried and disposed of as though it were an original suit." Sec. 10, Chap. 103, R. S. 1930. The correction of a mistake does not necessarily involve a new trial. It might involve a reduction or an increase in damages where damages could be mathematically computed. It might involve the relief from liability of one or more of several defendants. It might, of necessity, reverse the result. Within the narrow limits of the review statute, none of these things could be given consideration. The mistake, if mistake there were, could not be directly corrected and the case closed in a manner consistent with the correction. The suggested remedy involves taking the matter out of the hands of the court responsible for the alleged mistake, submitting to the judgment of one member of an inferior tribunal whether a mistake has or not been made and, if this is decided in the affirmative, beginning proceedings de novo.

In seeking to remedy a wrong, it is well to be careful not to create a situation more to be deplored than that of which original complaint is made. It seems to us such would be the result if statutory review were resorted to for the purpose of correcting a mistake upon which final adjudication of a cause was based by a court of last resort. We do not regard it as an appropriate remedy. On the other hand, we are unwilling to take the position that there is no method by which patent error affecting the result reached by this Court and working injustice may not be corrected.

Every judicial tribunal possesses inherent power, within reasonable limitations, to correct its obvious errors and should be burdened with the responsibility of so doing. Should a case arise in

which it appeared that justice called for such action on our part, it might well be that, on a petition addressed directly to the Law Court, reciting the alleged mistake, accompanied by an appropriate motion, we would be justified in rectifying the error. Such a proceeding does not involve a rehearing. It would not lie for the purpose of seeking a revision by the court of its considered conclusions either of fact or law. *Pickering* v. *Cassidy*, 93 Me., 139, 44 A., 683. Mere mistakes in opinion and judgment would not warrant it. It could only be applicable when the Law Court had by mistake assumed to be true that which the record showed not to be true or had palpably failed to consider facts proved or had misstated the law so plainly that the point involved was not arguable and had based its decision thereon.

No such case is presented here. The mistake alleged to have been made is that the Court erred in its finding as to the amount of damages assessed. It is argued that only nominal damages, if any, were justified by the evidence or, speaking more accurately, that damages beyond a nominal amount were not proven. The Court thought otherwise. It decided that defendant was entitled to substantial damages of a nature which did not permit exact computation but the amount of which could reasonably be determined by study and analysis of the evidence. The Court is still of that view. A different conclusion might have been reached by some other tribunal, but the judgment of the Court to which the question was properly submitted is final and conclusive. It can not be disturbed.

Exceptions overruled.

INHABITANTS OF THE TOWN OF GOULDSBORO

vs.

INHABITANTS OF THE TOWN OF SULLIVAN.

Hancock. Opinion, January 25, 1934.

PAUPERS.

Temporary absences from a home do not prevent the acquirement of a pauper settlement. The test is that of the formed intention of returning.

The settlement of a father, within the State, determines that of his legitimate child.

In order to constitute a settlement, there must be a combination of physical presence with the intention of remaining. The intention must be, not to make the place a home temporarily, but to make it a real home, for an indefinite period. The visible facts may be consistent with either a temporary or a permanent home; each case must depend largely upon its own peculiar facts.

On the issue of one's change of residence, relative to pauper settlement, his declarations unaccompanied by any act material to the issue, would be incompetent. A mere expression of intent, unconnected with any relevant circumstances, would be too remote to be admissible as evidence.

In the case at bar, while the evidence presented a close question, after weighing and considering the transcript in all its phases and features, and balancing the probabilities, the conclusion of the Court is that the plaintiff is not entitled to recover.

On report. An action brought by the plaintiff town against the defendant town to recover for pauper supplies furnished by the plaintiff to one Lawrence H. Stanley who had fallen into distress in the plaintiff town. The issue involved the question of pauper settlement. Judgment for defendant. The case fully appears in the opinion.

Hale and Hamlin,

H. L. Graham, for plaintiff.

Blaisdell & Blaisdell, for defendant.

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

DUNN, J. This case was reserved on a report of the evidence. The suit is purely and strictly statutory. It is by the town of Gouldsboro against the town of Sullivan, on the theory of ultimate liability, for reimbursement for supplies to a needy person, the destitution of whom, and of whose family, Gouldsboro relieved. A stipulation by counsel limits the issue to whether, on the day the person in distress, one Lawrence H. Stanley, was the recipient of public aid (that is, on June 20, 1931), he had his settlement as a pauper in Sullivan.

Lawrence H. Stanley attained full age July 18, 1922, the day preceding the twenty-first anniversary of his birth. 1 Bl. Com., 463. He appears to have been born in Mount Desert, which town was apparently the home, within the meaning of the statute concerning the status of a pauper, of his father. The latter testifies that in 1913 or 1914 (the testimony of another witness is definitely 1914), he removed from Mount Desert to Sullivan, taking his wife and children, and his belongings, with him. He said on the witness stand, in brief, that his settled intention in removing to, and establishing himself in, the last named town, was that thenceforth it should be his home. He purchased property, and he and his family lived there throughout the minority of Lawrence.

The father was not always personally in Sullivan. One summer he was in Vinalhaven, where he had work; one or two winters he worked in the woods in or near Gouldsboro. On at least one of these absences, he took with him some of his household goods, and was accompanied by his family. But he testifies there was never intention to abandon his residence in Sullivan; his purpose to return, which he did, when each job was ended, was fixed and determinate. Such temporary absences do not prevent the acquirement of a pauper settlement. *Ripley* v. *Hebron*, 60 Me., 379; *Rumford* v. *Upton*, 113 Me., 543, 95 A., 226; *Eagle Lake* v. *Fort Kent*, 117 Me., 134, 103 A., 10; *Madison* v. *Fairfield*, 132 Me., 187, 168 A., 782. The test is that of the formed intention of returning. *Warren* v. *Thomaston*, 43 Me., 406; *North Yarmouth* v. *West Gardiner*, 58 Me., 207; *Topsham* v. *Lewiston*, 74 Me., 236.

The father himself was furnished support while Lawrence was yet under twenty-one years of age; to be exact, on May 21, 1917. The assistance was by Sullivan, at the expense of Mount Desert. There is, in the record, no further mention of supplies to him. A person once chargeable to the public for support, but no longer so, is not a pauper. *Wilson* v. *Brooks*, 14 Pick., 341.

The testimony of the father is corroborated in essential respects by that of his wife. Indeed, their testimony stands uncontradicted.

Thereby it is considered as proved that the elder Stanley acquired a settlement in Sullivan. From the time of the pauper supplies (May, 1917) until Lawrence was twenty-one (July, 1922), a period of slightly more than five successive years, he had his home in that town, and maintained himself continuously without having aid, directly or indirectly. R. S., Chap. 33, Sec. 1, Cl. VI.

The settlement of a father, within the State, determines that of his legitimate child. R. S., Chap. 33, Sec. 1, Cl. II. Lawrence H. Stanley's derivative settlement when he came to majority, was in Sullivan. *Fayette* v. *Chesterville*, 77 Me., 28; *Eagle Lake* v. *Fort Kent*, supra; *Ellsworth* v. *Bar Harbor*, 122 Me., 356, 120 A., 50; *Somerville* v. *Smithfield*, 126 Me., 511, 140 A., 195.

This settlement, the defense advances, was defeated by the acquisition of a new one. R. S., Chap. 33, Sec. 3. The situation of the pauper, in connection with his legal right to support, at the time of the supplies in suit, is asserted to have been in Gouldsboro. The burden of sustaining this proposition is on the defendant. *Monroe* v. *Hampden*, 95 Me., 111, 49 A., 604; *Ellsworth* v. *Waltham*, 125 Me., 214, 132 A., 423.

On marriage, in May, 1924, the younger Stanley took his bride to his father's house, where they lived until November. They then went to the wife's parents, in Gouldsboro. In February, 1925, following the birth of a child, they are back in Sullivan, living again in his parents' home. He has work, for a time, on a bridge. In May or June of that year (1925) the young Stanleys return to Gouldsboro, living in the two-room house of a Mr. Hunt. They had with them their dishes, cooking utensils, and bedding. What furniture they had was stored in Sullivan, the Hunt house having its own.

The substance of the positive testimony of the pauper is that he left Sullivan without intending to return there to live, and that he

chose Gouldsboro as his place of residence, with the object of making it his home. Certainly, he was physically present in Gouldsboro, and for the first time he had and kept his separate house. His testimony is explicit that he had no present existing intention of removing from the town. *Knox* v. *Montville*, 98 Me., 493, 57 A., 792; *Ellsworth* v. *Bar Harbor*, supra.

To now (May or June, 1925), he seems to have been perhaps transient or unsettled, but at this time, on the authority of his own testimony—which that of his wife, on the whole, goes to substantiate, his acts tend to confirm, and nothing in the record distinctly refutes—he definitely took up his residence in Gouldsboro.

"A person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein." R. S., Chap. 33, Sec. 1, Cl. VI.

The Stanleys had been living in the Hunt house but three months when, there being a prospect of getting work in Waltham, Massachusetts, they took their household effects to Mrs. Stanley's parents' house, in Gouldsboro, and themselves went to Waltham.

The wife came back to her mother's in April, 1926, the husband arriving one month later (May). He worked in Gouldsboro, on roads, that summer. In June, the mother's family went to Southwest Harbor, the Stanleys continuing in the parents' home—(to which the furniture had, up to then, been left in Sullivan, was brought)—until November, 1926.

Stanley now returned to Waltham, to work in the watch factory, his wife joining him early in 1927. She returned to Gouldsboro in May. He is there that summer "on his vacation"; then goes back to Waltham, where he stays until early September. Shortly after returning to Gouldsboro, he left for Southwest Harbor, and remained, with his family, with his wife's people (who, at that time, were staying there). In January, 1928, they all returned to Gouldsboro, the Stanleys going to her grandmother, who was ill. They were with her two months.

Immediately after that, they are living by themselves in the Randall camp, in Gouldsboro. Since 1928, Stanley has not been away from that town for any length of time, nor has his wife. She did go to Sullivan, in 1930, in an advanced stage of pregnancy, that she might be near her physician.

In order to constitute a settlement, there must be a combination of physical presence with the intention of remaining. The intention must be, not to make the place a home temporarily, but to make it a real home, for an indefinite period. The visible facts may be apparently consistent with either a temporary or a permanent home; each case must depend largely upon its own peculiar facts. *Sanders* v. *Getchell*, 76 Me., 158, 165. In the case at bar, the pauper testifies that he went to Gouldsboro in May or June of 1925—(help was on June 20, 1931)—with the intention of there establishing his home, which intention was carried into effect.

There is no reason to disbelieve this. Stanley did not thereafter spend every day of five successive years in Gouldsboro; absences were frequent; but, in every instance, so is the testimony, he departed simply and solely that he might work and earn money to support himself and his family, his always continuing purpose being to remain away only so long as he should have a job. The facts are not necessarily averse. That, (in the language of plaintiff's brief), Stanley pays no taxes to the town of Gouldsboro, is simply a matter to be weighed in the case. Taxation, while important, is not conclusive. *Monroe* v. *Hampden*, supra. Incidentally, nothing shows the assessment or payment of any tax, there or elsewhere. Nor is it of controlling moment that he might not have had, in Gouldsboro, a particular house to which he might return as a matter of right. *Warren* v. *Thomaston*, supra; *South Thomaston* v. *Friendship*, 95 Me., 201, 49 A., 1056. Counsel note that he whose pauperism is involved "did not express his intention to anyone of making Gouldsboro his home." On the issue of one's change of residence, relative to pauper settlement, his declarations, unaccompanied by any act material to the issue, would be incompetent. *Knox* v. *Montville*, supra. A mere expression of intent, unconnected with any relevant circumstances, would be too remote to be admissible as evidence. *Deer Isle* v. *Winterport*, 87 Me., 37, 32 A., 718. Also see *Holyoke* v. *Holyoke*, 110 Me., 469, 479, 87 A., 40, 46. As to voting, there is no evidence.

When a person moves from place to place, the question as to his settlement sometimes becomes difficult. It must be found, as a fact, from all the evidence, that within the contemplation of the pauper statutes, Lawrence H. Stanley's intention to make Gouldsboro

his home over the requisite period of time, was actual. *Solon* v. *Embden*, 71 Me., 418. More specifically, there must have been personal presence in that town, and also an intent to remain, continued for five consecutive years, without his receiving public aid, and without being absent during such five years with an intent not to return. *Ellsworth* v. *Bar Harbor*, supra.

The case is rather close. There may be room for reasonable minds to differ. However, after weighing and considering the transcript in all its phases and features, and balancing the probabilities, the conclusion of the Court is that the plaintiff is not entitled to recover.

This view of the controversy necessitates the entry, which the report authorizes, of

Judgment for defendant.

GEORGE MCCARTHY *vs.* WILLIAM S. MASON.

GRACE MCCARTHY *vs.* WILLIAM S. MASON.

Penobscot. Opinion, January 31, 1934.

MOTOR VEHICLES. NEGLIGENCE.

Negligence is the want of ordinary care, that is, the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situation or under like circumstances.

The care which ordinarily prudent and careful persons take is commensurate with the necessity for care and the dangers of the situation.

No good reason exists why the rights possessed by a fire department by virtue of R. S. 1930, *Chapter* 29, *Section* 13, *granting a right of way to police, fire department, traffic emergency repair vehicles, and ambulances, when operated in response to calls, and while acting within its home jurisdiction in the performance of its important and necessary service should not obtain as well when reasonably engaged in that kind of service outside its home limits.*

The "fire chief's car" is within this statute as a part of the "fire department vehicles."

Such "a right of way," however, does not do away with the requirement that reasonable care shall be exercised at all times.

The speed employed by the driver of such fire apparatus must be exerted with reasonable care and due regard to the lives and limbs of those who may be met upon the way, and the driver is bound to exercise reasonable care, reasonable control, to be on the alert, on the lookout, and to be observant of the rights of others who have the right to be upon the streets.

Section 69, *Chapter* 29, *R. S.* 1930, *providing for rates of prima facie lawful speed of motor vehicles on highways does not apply to fire apparatus when on the way to a fire.*

By reason of the necessities of the situation and the public interest, and in the absence of a clear expression of legislative intent to the contrary, fire apparatus vehicles whose function is the saving of life and property are, when in use for such purpose, exempt from traffic regulations, such as those fixing speed limits.

To limit the speed of fire apparatus in accordance with the provisions of said statute would have a very great tendency to slow up the activities and diminish the efficiency of a fire department and destroy in great measure its service necessary for the preservation of property, and, in many instances, life itself.

Carte blanche, however, as to speed in the operation of said fire apparatus is not given by this decision.

The test as to due care in this case is whether or not at that time and place, under all the circumstances as they then and there existed, the defendant was operating his car as the ordinarily careful and prudent driver of such a car, in the performance of such a duty, would have done. If so, he was in the exercise of due care; otherwise, not.

The determination of the test is a matter of law. The application of it is for the jury and the jury's verdict must stand, unless, on the whole record, there is no weight of evidence adequate to satisfy the minds of reasonable men, fairly tending to support the jury's finding.

Operators of motor vehicles attempting to cross a right of way of cars coming from behind must act with due care.

Before making such a crossing, they are charged with the duty of so watching and timing the movements of the other car as to reasonably insure themselves of a safe passage, either in front or rear of such car, even to the extent of stopping and waiting if necessary.

In the case at bar, the defendant had the right of way, and that was one of the facts to be considered by the jury as an element in determining whether or not,

under all the attending circumstances, the defendant was then and there in the exercise of due care. The jury finding that the defendant was negligent will not be disturbed, for it does not appear that it was manifestly wrong.

No signal, by hand or otherwise, was given by either plaintiff of an intention to drive across the highway. It was easily demonstratable that the defendant's car must have been clearly in view when the plaintiffs started to cross the road in front of it. If they had looked back just as they had started to cross, they would have seen it. If they had seen it coming with such speed and so near and started across, they would have been negligent. If they had looked to see it and did not see it, likewise they would have been negligent.

A driver is charged with knowledge of objects in the highway which are in plain view. These plaintiffs both failed utterly to exercise due care immediately preceding this collision, and, because of their contributory negligence, neither verdict for the plaintiff can be allowed to stand.

On general motions for new trials by defendant. Two actions on the case to recover damages for the alleged negligent operation of the automobile of the defendant, Fire Chief of the City of Bangor, which collided with automobile of the plaintiff, Grace McCarthy, on the Odlin Road near the Hermon line. Defendant was responding to a fire call. Trial was had at the September Term, 1933, of the Superior Court for the County of Penobscot. The jury rendered a verdict for the plaintiff in each case. General motions for new trials were thereon filed by the defendant. Motions sustained. Verdicts set aside. New trials granted. The cases fully appear in the opinion.

E. P. Murray,

Milton R. Geary, for plaintiffs.

William S. Cole, for defendant.

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

HUDSON, J. On motions. Actions of tort brought severally by the husband and wife against the defendant as a consequence of a collision between the car in which both of the plaintiffs were riding and the car driven by the defendant. The cases tried together resulted in verdicts for both plaintiffs.

Some of the facts attending the accident are not in dispute, namely: That it happened about noon of a pleasant day, November 4, 1932, in Bangor, but outside the city limits, at a point

where the Odlin Road from the south enters State Route 2, the trunk line leading westerly from Bangor through Hermon and Newport to Augusta and Portland. It was a two lane cement road with ordinary gravelled shoulders on each side. From the point of collision easterly toward Bangor for a distance of at least a quarter of a mile the road is straight and vision unobstructed. Westerly for some hundreds of feet the road is visible.

The plaintiffs were returning home from Bangor in a Studebaker touring car owned and operated by the wife, Mrs. McCarthy, her husband sitting on her right in the front seat. They "were going to turn down into the Odlin Road." Before so doing, however, and before reaching the Odlin Road, a fire truck overtook and passed the plaintiffs and presently, upon reaching the Odlin Road, another fire truck passed them, followed by a coupe about one hundred feet behind the second piece of fire apparatus. The plaintiffs' car was "turned to go into the Odlin Road" and when at a point at the entrance of this road, when either the whole of the automobile was off the cement or the front wheels only, the defendant's car ran into the left side of their car and caused it to make "two or three jumps sideways and up against a large telephone pole," about forty feet distant.

It is not denied that at the time the defendant was Fire Chief of the City of Bangor; that the two pieces of fire apparatus above mentioned had been sent out in response to a call on account of a fire not in Bangor but in Hermon, an adjoining town; that the defendant, having learned that they were proceeding with wrong information as to the location of the fire, was attempting to overtake said fire apparatus and direct it aright. For said purpose, the defendant was operating the car himself, unaccompanied, it being a red coupe known as "the Chief's car."

The basis of any right of recovery by the plaintiffs in these cases is negligence. Could they recover, it would be because of sufficient legal proof of negligence of the defendant as the proximate cause of the collision and lack of contributory negligence by them thereto. Negligence, many times defined, lately by our Court, is said "to be the want of ordinary care, that is, the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situ-

ation, or under like circumstances. The terms 'ordinary care' and 'reasonable prudence,' as applied to the actions and affairs of men, have only a relative significance, depending upon the incidents and surroundings of the particular case. They defy arbitrary definition. What might be reasonable care under one condition of things might be negligence under another. In other words, the care which ordinarily prudent and careful persons take is commensurate with the necessity for care and the dangers of the situation." *Gravel* v. *LeBlanc*, 131 Me., 325, 328, 162 A., 789, 790.

Defendant's Negligence

The facts in this case warrant, if they do not compel, a discussion of the law with relation to what constitutes due care upon the part of the driver of fire apparatus in response to an alarm. No case in Maine, thus far, has dealt with this subject.

That the defendant was acting in his capacity as Fire Chief is unquestioned. It is stated, however, that he had no right so to act in this instance because the fire was not in Bangor, and it is particularly claimed that Section 13 of Chapter 29, R. S. 1930, is inapplicable, which statute provides: "Police, fire department, traffic emergency repair vehicles, and ambulances, when operated in response to calls, shall have the right of way; and on the approach of any such vehicle the driver of every other vehicle shall immediately draw his vehicle as near as practicable to the right hand curb and parallel thereto and bring it to a standstill until such public service vehicles have passed."

The statute itself in no way qualifies the words "when operated in response to calls." It specifies calls neither from within nor from without. Only one case have we found that seems to bear on this issue. In *Hubert* v. *Granzow et al.*, 155 N. W., 204, a Minnesota case, the Court held that a fire apparatus of a city while on its way to a fire is excepted from the speed restrictions imposed by the Motor Vehicle Act, although the fire be outside the city limits, and said: "It is probably true that no legal duty is imposed upon a city fire department to assist in extinguishing fires outside the city; but it is a matter of common knowledge that such departments almost invariably respond when called upon in such cases. Actuated by motives of humanity rather than by the mandate of strict legal

duty, they seldom refuse to give their services to their neighbors in case of need. While the law may not impose a legal duty upon them to assist in extinguishing fires outside the city, it certainly does not forbid them from doing so."

We concur. We see no good reason why such rights possessed by a fire department while acting within its home jurisdiction in the performance of its important and necessary service should not obtain as well when reasonably engaged in that kind of service outside its home limits. The needs are the same, whether the call comes from within or without the city.

The language in our statute is general, not specific, and we do not feel called upon by reason or authority to limit its application to calls within the city.

It is also claimed, although not strenuously so, that the Fire Chief's car is not within the statute as a fire department vehicle. This contention can not be sustained. It is common knowledge that chiefs of fire departments do not ordinarily go to fires on fire trucks but in the Fire Chief's car. It is important that a Chief reach a fire as quickly as possible, exercising due care, however, in doing so, in order that he may direct the work to be accomplished by the use of the apparatus. The use of the Chief's car tends to make this possible. We can not believe that the Legislature intended to exclude a Fire Chief's car from the intendment of this statute. It stipulates "fire department vehicles" and makes no exception as to the Chief's car.

In a recent New Hampshire case, *Vandell* v. *Sanders*, 155 Atl., 193, the Court held that an act exempting "fire department vehicles travelling in response to fire alarm" from speed laws included private cars used for transporting firemen to fires.

We hold, then, that Section 13 of Chapter 29 aforesaid, is applicable to this case, that by reason of it the defendant had "the right of way" and that that was one of the facts to be considered by the jury as an element in determining whether or not, under all the attending circumstances, the defendant was then and there in the exercise of due care.

But although the defendant had the right of way, it did not give him a right to act other than in the exercise of due care under all the circumstances.

"A 'right of way' over the city streets does not do away with the requirement that reasonable care shall be exercised at all times. A 'right of way' is necessarily subject to the preservation of the safety of those who may be lawfully upon the street, and while the emergency in the case of fire apparatus undoubtedly justifies speed in driving to the scene of the disaster, such speed must be exerted with reasonable care and due regard to the lives and limbs of those who may be met upon the way." *Farrell* v. *Fire Insurance Salvage Corps*, 179 N. Y. Supp., 477, 481.

A driver of fire apparatus is "bound to exercise reasonable care, reasonable control, to be on the alert, on the lookout, and to be observant of the rights of others, who had the right to be upon the streets." *Idem*, page 479.

We come now to the consideration of a point, novel in Maine and undecided, as to whether or not the statutory provisions as to speed have application to fire apparatus when on the way to a fire.

Section 69, Chapter 29, R. S. 1930, provides: "Any person driving a vehicle on a way shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a way at such a speed as to endanger any person or property. . . . It shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe it shall not be lawful."

Then follow in this same section special provisions as to speed prima facie lawful, as (1) Fifteen miles an hour when passing a school during school recess or when children are going to and leaving school during the opening and closing hours; (2) Fifteen miles an hour when approaching within fifty feet and in traversing an obstructed intersection of ways; (3) Twenty-five miles an hour on a way in a business district or built-up portion controlled at intersections by traffic officers or stop and go signals; (4) Twenty miles an hour on all other ways in a business district or built-up portion as defined in the statute; (5) Twenty-five miles an hour in a residence district or built-up portion as defined in the statute and in public parks, unless a different speed is fixed by the municipal officers and approved by the State Highway Commission and duly

posted; (6) "Thirty-five miles an hour under all other conditions." This is followed by the provision that "it shall be prima facie unlawful for any person to exceed any of the foregoing speed limitations" with an exception not here pertinent.

If this statute be held to include speed of fire apparatus in going to a fire, the prima facie lawful speed in this case would be not in excess of thirty-five miles an hour and any speed in excess thereof would be prima facie unlawful.

Whether or not speed regulations apply to the operation of fire apparatus has been decided differently by the Courts outside of Maine. Some of the earlier cases, and occasionally a later case, have held that they did apply. The greater weight of the authority, however, is to the contrary.

In *Hubert* v. *Granzow et al*, 155 N. W., 204, the Minnesota Court said: "It is the general and perhaps universal rule that regulations governing the rate of speed upon public streets and highways do not apply to fire apparatus on the way to a fire."

In an exhaustive opinion, *Balthasar et al* v. *Pacific Electric Railway Company*, 187 Cal., 302, 202 P., 37, 19 A. L. R., page 452, the California Court held: "The provisions of the Motor Vehicle Law with respect to motor vehicles upon the streets and their course in turning corners do not apply to fire apparatus of a municipal corporation in going to a fire in which the municipality is exercising its governmental functions." Appended to this decision is an annotation containing a collection of cases in point. The annotator says, on page 460: "While the cases on this question are not numerous, a conflict of authority exists. In some cases the rule is sustained that statutes or ordinances regulating the speed of motor vehicles on the street are inapplicable to the police or fire apparatus while on active duty, notwithstanding the fact that the acts establishing the speed limit employ the words 'all vehicles,' 'any vehicle,' or 'any person.'" *Citing Balthasar* v. *Pacific Electric Railway Company*, supra; *Devine* v. *Chicago*, 172 Ill. App., 246; *Edberg* v. *Johnson* (Minn.), 184 N. W., 12; *Farrell* v. *Fire Ins. Salvage Corps*, supra, and other cases cited in a previous annotation in 9 A. L. R., 367.

"Apart from any express grant of privileges in these respects, it is usually considered that, by reason of the necessities of the sit-

uation and the public interest, and in the absence of a clear expression of legislative intent to the contrary, fire apparatus and other vehicles of a municipal fire department, whose function is the saving of life and property, are, when in use for such purpose, exempt from traffic regulations, such as those fixing speed limits and prescribing the mode of turning at intersections." 42 C. J., Section 765, page 1026. The author cites many cases, including *Balthasar* v. *Pacific Electric Railway Company*, supra. To the same effect is 13 R. C. L., Section 395, page 484.

"Statutes and ordinances frequently limit the speed at which vehicles may be driven along streets and highways, and such provisions are generally recognized as valid if reasonable. They have been held to apply to street cars and private ambulances, but, as a rule, do not apply to members of the fire department, or to members of a salvage corp organized under statutory authority while responding to an alarm of fire." 13 R. C. L., Section 235, pages 283 and 284.

West Virginia, in *Waddell* v. *City of Williamson*, 127 S. E., 396, holds likewise, and, in distinguishing between a speed employed by a driver of fire apparatus and that of other drivers, quotes from *Hanlon* v. *Milwaukee Electric Ry. & Light Co.*, 118 Wis., 210, 95 N. W., 100, as follows: "Among those things which distinguish the conduct of the driver of fire apparatus from others is, primarily, the duty and necessity of great speed. The loss of moments may mean destruction of lives or property. The public purpose which such men and appliances serve would be defeated by the hesitation and caution which does and should characterize the ordinary traveler. To serve this public purpose, the driver must and does seize every opportunity to make expedition. He takes chances, in deference to the imperative necessity for speed, which would be wholly unjustifiable otherwise. These things firemen do. These things they must do. The conclusion seems irresistible, either that they are consistent with ordinary care under those circumstances, or that the ordinarily prudent man can not hold a position in the fire department."

Other cases to the same effect might be cited were it necessary.

We are convinced that it was not the intention of the Legislature to have these speed laws apply to the driver of fire apparatus on

the way to a fire. To hold that the driver of a fire engine in going to a fire can not exceed some of the particular speeds as specified in our statute without being prima facie guilty of the commission of a crime is the attainment of an end, in our judgment, beyond that intended by the enactment of this statute. So to hold would have a very great tendency to slow up the activities and diminish the efficiency of a fire department and destroy in great measure its service necessary for the preservation of property and in many instances life itself.

Still, we must not be misunderstood. Carte blanche as to speed in the operation of fire apparatus is not given by this decision.

"The fact that a fire department vehicle is either expressly or impliedly exempt from the operation of traffic regulations does not relieve the operators of such vehicles from the general duty of exercising due care for the safety of others, and their own safety, even when answering emergency calls, although, in determining what is due care on the part of the operator of such a vehicle, his right to assume that others will recognize and respect his superior rights on the streets is an element to be taken into consideration." 42 C. J., Section 767, page 1027.

"While it has been held that firemen driving to a fire are not required to use the same care to avoid collision with other vehicles that is required of a driver of an ordinary private vehicle, the true rule would seem to be that the degree of care required in both cases is the same; that is, that a fireman as well as others must use ordinary care to prevent injury to himself and others, which means care commensurate with the circumstances but that the exigencies of a fire call may require a fireman to take risks, particularly as to speed of travel, which it would not be necessary for a traveller under ordinary conditions to take." 13 R. C. L., Section 224, pages 272 and 273.

Thus we return to our own definition of negligence already stated in the quotation from *Gravel* v. *LeBlanc*, supra, in which case our Court said with reference to due care: "What might be reasonable care under one condition of things might be negligence under another. In other words, the care which ordinarily careful and prudent persons take is commensurate with the necessity for care and the dangers of the situation."

So, then, in this case, the facts that there was a fire, and that the defendant as Fire Chief was acting in performance of a duty with relation to that fire, constituted an elemental part of the situation and were for the consideration of the jury.

The test as to due care is whether or not at that time and place, under all the circumstances as they existed then and there, he was operating his car as the ordinarily careful and prudent driver of such a car in the performance of such a duty would have done. If so, he was in the exercise of due care; otherwise, not.

The determination of the test to be applied is a matter of law. The application of it is for the jury and its verdict must stand, unless "on the whole record" there is "no weight of evidence adequate to satisfy the minds of reasonable men fairly tending to support the jury's finding." *Walker* v. *Norton*, 131 Me., 69, 70, 158 A., 926.

The jury determined that the defendant was negligent.

The plaintiffs contended that the defendant was driving with so much speed that he did not have his car under reasonable control and, as a consequence, negligently drove it against the plaintiff's car, although its operator was in the exercise of due care.

The evidence as to speed was conflicting. Neither plaintiff saw the defendant's car before the accident, nor testified as to observed speed. Both plaintiffs, however, testified that following the accident the defendant, in the police station, in answer to a question by the husband as to how fast he was driving, said "he had her wide open" and was driving "fifty or sixty" miles an hour. This the defendant denied and produced witnesses who gave negative testimony that they heard no such statement made by him.

The only direct testimony as to speed came from the plaintiff's witness, Hathaway, a disinterested and unbiased witness, as far as the evidence appears, and the defendant himself.

The witness, when asked as to speed, said: "I never figured any speed; I don't know. Just going the ordinary rate." The jury, no doubt, inferred that the witness meant that the defendant was driving at the ordinary rate of fire apparatus on the way to a fire. In this connection, it had the right to, and no doubt did, place significance upon the testimony of the defendant himself that, although he left Bangor "two minutes" after the other pieces of apparatus had

left, he was attempting to overtake them and had "caught up" with them to within a distance of nine hundred feet just before the accident. Hathaway, in speaking of the other apparatus which he saw go by, said "that it whizzed by." The jury was justified in believing that the defendant was driving at considerably greater speed than that employed by the other apparatus on the way to the fire. The witness also testified, "I saw this red car coming and I says 'if they don't look out there is going to be a collision' and before I could think of anything else there was the blow."

The defendant did not claim that he applied his brakes or diminished his speed at all as he approached the plaintiffs' car. The jury may well have thought that the defendant, realizing that he had the right of way, took too much for granted as to the probable operation of plaintiffs' car and so did not exercise that care that the ordinarily careful and prudent driver would then and there have exercised to prevent a collision, should the plaintiffs attempt to cross the highway. The defendant admitted that he saw the plaintiffs' car as it was proceeding ahead of him on this State road, and from the top of the hill easterly of the place of collision he had a straight, unobstructed road with a complete possibility of sight of the plaintiffs' car and its movements. The entrance to the Odlin Road he either knew of or could have seen. He was approaching an intersection of the State road and either did or should have seen that the plaintiffs' car had stopped or was slowing up at that place. Still, he kept on with undiminished speed.

The defendant claimed that he was driving from thirty-five to forty miles an hour and no faster. This either the jury did not believe or, if believed, deduced that with the exercise of due care he could have avoided the collision by application of his brakes or by passing to the rear of the plaintiffs' automobile.

On this conflicting testimony, we can not say that the jury in finding the defendant negligent was manifestly wrong.

Contributory Negligence

The jury absolved the plaintiffs from contributory negligence. Can its finding in that regard be sustained? No.

In *Verrill* v. *Harrington*, 131 Me., 390, 395, 163 A., 266, 268, this Court said: "It is familiar law that the operator of a motor

vehicle intending to cross the street in front of a car coming from the opposite direction on its own right of way must give notice of the intention to cross in order to charge the driver of the other car with negligence in pursuing its course. The law charges the driver of a car making such a crossing with the duty of so watching and timing the movements of the other car as to reasonably insure himself of a safe passage, either in front or rear of such car, even to the extent of stopping and waiting if necessary. *Fernald* v. *French*, 121 Me., 4, 9, 115 A., 420; *Esponette* v. *Wiseman*, 130 Me., 297, 155 A., 650. No less strict rule can be applied to operators attempting to cross the right of way of cars coming from behind. Reasonable care must be exercised in ascertaining their presence in the passing lane. The precautions above stated must then be taken."

Before attempting to cross this State Highway and enter the Odlin Road, did the plaintiffs exercise due care to ascertain the presence and approach of the defendant's car? They say they had stopped on their own side but with their car quartering in toward Odlin Road. This is corroborated by their witness, Hathaway. They also say that before starting across they looked up and down the main road (the witness gives no testimony on this point) and did not see the defendant's car. Neither the witness nor the plaintiffs themselves testify that the plaintiffs gave any signal, by hand or otherwise, that they intended to drive across. What was their situation? Two pieces of fire apparatus had just passed them at great speed and they knew, no doubt, there was a fire. As these pieces of apparatus were leaving them, they heard a siren, although they claim they thought that siren was on the fire apparatus that had passed by. Their witness, however, testified that that siren then heard kept coming nearer and nearer.

"Q. And when you saw her car stopped there did you at that time hear the siren on the fire chief's car?

"A. Yes, sir, in the distance.

"Q. When you next looked, what did you see?

"A. I saw her car right about here (indicating).

"Q. Meaning the McCarthy car?

"A. Yes, sir, and I saw this red car right about here (indicating) and in the snap of a finger I heard the blow. . . .

"Q. Did you at that time hear the siren on the fire chief's car?
"A. It kept coming nearer. Yes, sir.
"Q. And it was blowing continuously, wasn't it?
"A. Why, I should say the same as they always blow it."

This was a much travelled road, a trunk line between Bangor and Portland. Besides its ordinary traffic, to the knowledge of the plaintiffs, fire apparatus was on its way to a fire. Nevertheless, without giving notice of their intention so to do, the plaintiffs started across this road.

But they both say that before so doing they looked up and down the road towards Hermon and back toward Bangor and saw no approaching vehicle. Towards Bangor, from which direction the defendant was coming, they could have seen thirteen hundred feet, with absolutely nothing to obstruct their view. Before wholly across, they were hit. Easily mathematically demonstrable it is that the defendant's car must have been clearly in view when the plaintiffs started to cross the road in front of it, being driven, as they now say, at a terrific rate of speed. If they had looked back just as they started to go across, they would have seen it. If they had seen it and started across, they would have been negligent; if they had looked to see and did not see it, they would have been equally negligent.

This statement of the Court in *Hartnett* v. *Standard Furniture Co.*, 299 Pac., 408, 413, is here pertinent. "We can not brush aside his testimony that he looked and failed to see a fire truck which could not have been more than a few seconds time distant from the intersection. Had he in fact looked, he would have seen." A driver "is chargeable with knowledge of objects in the highway which are in plain view." *Steele* v. *Fuller* (Vt.), 158 A., 666, 668.

Not only did they not give notice of their intention to cross this highway, but could not even have looked back to see if it were reasonably safe to proceed across, for it is preposterous to believe that had they actually looked back and had seen the defendant's car coming so near and so fast, that they would have deliberately driven in front of it. They failed utterly to exercise the due care required by the decision in *Verrill* v. *Harrington*, supra.

The presence of fire apparatus is always attractive and engaging and it may well be that the plaintiffs' minds were so much oc-

cupied with viewing the progress of the fire apparatus that had passed by them that they failed to sense their own situation and so gave no heed whatever to traffic from behind.

Although the husband was a passenger riding with his wife, yet this point is not stressed or even mentioned by counsel for him, no doubt because it sufficiently appears in the case that immediately before the accident he participated in the control and management of the car then operated by his wife.

In conclusion, we can not discover that there was "any weight of evidence adequate to satisfy the minds of reasonable men which fairly tends to support the jury's finding that the plaintiffs were in the exercise of due care." *Walker* v. *Norton*, supra.

Motions Sustained.
Verdicts Set Aside.
New Trials Granted.

HAROLD SHEA *vs.* J. GIRARD HERN.

CHARLES W. GILLIAM *vs.* J. GIRARD HERN.

DORIS E. GILLIAM *vs.* J. GIRARD HERN.

FRANCES H. THOMPSON *vs.* J. GIRARD HERN.

MERLE L. THOMPSON *vs.* J. GIRARD HERN.

Cumberland. Opinion, February 2, 1934.

MOTOR VEHICLES. NEGLIGENCE. RES IPSA LOQUITUR.

To rebut the presumption of negligence arising from the fact that an automobile went off the road, the explanation by the defendant driver must be a reasonable one with as much probative force as the inference itself.

It is common knowledge that many automobile casualties occur without apparent reason. Injuries may result from mere inattention on the part of an operator of a car, from his fleeting glance to left or right, which can not 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. When, however, nothing is left to inference the doctrine of res ipsa loquitur does not apply.

A judicial admission is binding on the one making it. It is not necessarily so on the adverse party. An admission of fact against the interest of a party does not preclude the introduction of evidence by the opposing side to show the details of the picture relied upon to establish liability.

Excessive speed by the driver of an automobile does not preclude recovery by the passenger. The question is whether, in view of the particular circumstances, there was a duty on the part of the passenger to have warned the driver. They were not obliged to assume control over the management of the car, and their failure to warn is not negligence if such warning would have been futile.

In the case at bar, the question whether the automobile of the defendant went off the road because of unreasonable speed at the turn, or because of his inattention, or by reason of his failure to keep it under proper control, was left to the jury to determine. If the jury discovered no specific act of negligence, they had a right to infer it from the circumstance that the car was driven off the road.

An admission of excess speed by the defendant did not prevent the plaintiffs from showing that it was of such a character that responsibility for it rested on the operator of the car, and not on the passengers. Their failure under the circumstances to act on such short notice as they must have had, can not be held negligence as a matter of law. To charge them under the conditions presented in this case with negligence, would be in effect to make them responsible for the actual operation of a car, over which they had no practical control.

On exceptions and general motions for new trial by defendant. Five cases in tort for negligence, tried together. The actions by Frances H. Thompson, a married woman, and Doris Gilliam, a minor, were to recover damages for personal injuries alleged to have been sustained by them through the negligence of the defendant, while riding with him in his automobile as guest passengers. The actions by the husband of Frances H. Thompson, and the father of Doris Gilliam, were to recover for loss of services and for expenses incurred by them as a result of said personal injuries. The action of Harold Shea, another guest passenger, was to recover for personal injuries sustained by him. Trial was had at the April Term, 1933, of the Superior Court for the County of Cum-

berland. To the refusal of the presiding Justice to direct a verdict for the defendant in each case, and to his refusal to give certain specific instructions, the defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiffs in each case, filed a general motion for new trial in each case. Exceptions overruled. Motions overruled. The cases fully appear in the opinion.

Edward W. Bridgham, for plaintiff Shea.

Ellis L. Aldrich, for plaintiffs Gilliam and Thompson.

William B. Mahoney, for defendant.

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

THAXTER, J. These five cases were tried together before a jury, which rendered a verdict for the plaintiff in each case. They are now before this court on the defendant's exceptions and general motions for new trials.

The plaintiffs, Harold Shea, Doris E. Gilliam and Frances H. Thompson, sue for personal injuries J. Girard Hern, the operator of an automobile in which they were passengers. Charles W. Gilliam, the father of Doris, seeks to recover for medical expenses, incurred in the care of his daughter, and compensation for the loss of her services. Merle L. Thompson claims damages for loss of consortium of his wife, Frances, and for expenses in attempting to cure her of her injuries. Except in the case of Miss Gilliam the injuries suffered were serious and the damages assessed large, but the sole issue before us is the liability of the defendant.

Hern owned a Peerless roadster, which he was driving just after midnight of August 11, 1932, over the bridge between Bailey's Island and Orr's Island. He was proceeding in a northerly direction toward Orr's Island. Seated beside him was Miss Gilliam, next to her was Shea, and Mrs. Thompson sat on Shea's lap. The bridge is approximately a quarter of a mile long, and slopes gradually downward from the center toward each end. There is a slight curve to the right in the bridge at the north end, and as traffic leaves it here to continue over Orr's Island, the road bends first to the right and then to the left. The plaintiffs, as well as the defendant, were fully acquainted with the road, and in fact had driven over it several times on the night of the accident.

It seems to be conceded that the defendant drove his car over the southerly part of the bridge in a careful manner, and that as he approached Orr's Island he increased his speed. Mrs. Thompson and Miss Gilliam say slightly. Shea, and two pedestrians who were on the north end of the bridge, testify that as the car left the bridge it was going between forty and fifty miles an hour. The defendant himself states that his speed was much less than that, and he is corroborated by another witness who was near at hand. The defendant made the first bend to the right, but in attempting to turn to the left, at a point about three hundred feet from the bridge, the car went off the road; the right wheels travelled about forty-five feet through the grass; and it was finally stopped, when it struck with great force a pole, which was a little over two feet on the right of the travelled part of the highway.

The Exceptions

The defendant's first exception is to the refusal of the presiding Justice to direct a verdict for him. The motions raise the same question, and it is accordingly unnecessary to discuss this exception.

The second exception is to the refusal to give an instruction requested by defendant's counsel on the duty of a gratuitous passenger. The exception is not argued, and it is perhaps sufficient to say that the law is correctly stated in the charge, which includes an important qualification not present in the requested instruction.

Exceptions three, four and five are not seriously pressed. They are to the refusal to give certain instructions, and to the charge as given relative to the evidence necessary to rebut the presumption of negligence arising from the fact that the automobile went off the road. The defendant contends that any explanation offered is a sufficient rebuttal. The presiding Justice was correct in ruling that the explanation must be a reasonable one with as much probative force as the inference itself: *Edwards* v. *Cumberland County Power & Light Co.*, 128 Me., 207, 146 A., 700; *Humphrey* v. *Twin State Gas & Electric Co.*, 100 Vt., 414, 139 A., 440.

The sixth exception is to that part of the charge wherein the presiding Justice discusses the doctrine of *res ipsa loquitur*. The use of this presumption has been fully discussed by this court.

Chaisson v. *Williams*, 130 Me., 341, 156 A., 154. It was there carefully pointed out that the mere fact of the happening of an accident is not evidence of negligence, but that the character of the accident may be such as to impose on the defendant the burden of an explanation. The Court said at page 346: "Where an automobile, and the operation thereof, are exclusively within the control of the defendant, whose guest is injured, and it is not reasonably in the power of such guest to prove the cause of the accident, which is one not commonly incident, according to every-day experience, to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on the part of the defendant. *Res ipsa loquitur*, the thing speaks for itself. The question of the defendant's negligence arises as a matter of law."

If such doctrine is held inapplicable to accidents resulting from the operation of automobiles, and if evidence must be offered in every instance not only to prove that an accident has happened but why it happened, many plaintiffs may fail to establish their cases where the inference of negligence is clear. 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 can not 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.

We do not understand, however, that the defendant takes issue so much with the law as laid down in *Chaisson* v. *Williams*, supra, but rather with its relevancy to this case. It is perfectly true that where nothing is left to inference the doctrine of *res ipsa loquitur* does not apply. 20 R. C. L., 188. With this principle in mind the defendant argues that this accident happened because of the excessive speed of the defendant's automobile, and that accordingly it was prejudicial error for the court to charge on the rule of *res ipsa loquitur*. The declarations, however, in four of the cases allege negligence in general terms,—that the accident happened because of the "careless, negligent and improper conduct of the defendant

in his control and operation of said automobile." In the fifth case there are five counts, some general, but one of which sets out excessive speed. Whether the automobile went off of the road because of unreasonable speed at the turn, or because of the inattention of the defendant, or by reason of his failure to keep it under proper control, was left to the jury to determine. If the jury discovered no specific act of negligence, they had the right to infer it from the circumstance that the car was driven off the road. In this respect the case is no different from *Chaisson* v. *Williams*, supra. Neither by alleging in the alternative a definite act of negligence, nor by offering proof of it, did the plaintiffs forfeit their right to rely on the doctrine of *res ipsa loquitur*. *Humphrey* v. *Twin State Gas & Electric Co.*, supra, page 424. The charge of the presiding Justice made it manifestly clear that this presumption of negligence would arise only in case the jury should determine that negligent speed was not a proximate cause of the accident. The charge was definite on this point and stated the law correctly.

The Motion

The basis of the defendant's argument on the motion is that his speed was excessive, that this constituted negligence and was a proximate cause of the accident. But he says if he was negligent, it necessarily follows that the plaintiffs, who were passengers, were also negligent and that therefore their recovery is barred. There are several answers to this contention.

A judicial admission is binding on the one making it. It is not necessarily so on the adverse party. An admission of fact against the interest of a party does not preclude the introduction of evidence by the opposing side to show the details of the picture relied upon to establish liability. *Dunning* v. *Maine Central Railroad Co.*, 91 Me., 87, 97, 39 A., 352. So here an admission of excess speed does not prevent the plaintiffs from showing that it was of such a character that responsibility for it rested on the operator of the car and not on the passengers.

Furthermore there was evidence in this case from which the jury would have been justified in finding that something other than negligent speed was the cause of the accident. The testimony as to speed is very conflicting; and the defendant as a witness claimed

that his speed was reasonable. Such being the case, he can not by an admission of that particular brand of negligence, which he now regards as most favorable to himself, prevent the plaintiffs from proving negligence in some other form.

But beyond all this, assuming that excessive speed in making the turn was the cause of this accident, it was not for the court to determine that the passengers had not used due care. Excessive speed by the driver does not preclude recovery by the passenger. The question is whether, in view of the particular circumstances, there was a duty on the part of these passengers to have warned the driver. They were not obliged to assume control over the management of the car, and their failure to warn is not negligence if such warning would have been futile. *Dansky* v. *Kotimaki*, 125 Me., 72, 76, 130 A., 871; *Peasley* v. *White*, 129 Me., 450, 152 A., 530.

In this instance all agree that the speed over the bridge was reasonable. It is only in approaching the end that anyone suggests that it was excessive. From the end of the bridge to the spot where the car went off the road was but a hundred yards. At the rate of thirty-five miles an hour this would have been covered in six seconds. The failure under these circumstances of a passenger to act on such short notice can not be held negligence as a matter of law. Moreover, reductions in the speed of an automobile can be made in fractions of a second, and why should these passengers be charged with the failure to anticipate that the driver, who knew this road, would not, as he rounded the bend, instinctively by the mere pressure of his brake reduce the speed so that the turn could be made in safety? To charge them under the conditions here presented with negligence would be in effect to make them responsible for the actual operation of a car, over which they had no practical control.

Exceptions overruled.
Motions overruled.

JAMES H. ABBOTT *vs.* ALEXANDER E. ZIRPOLO.

JAMES H. ABBOTT *vs.* ALEXANDER E. ZIRPOLO.

CHRISTINE ABBOTT *vs.* ALEXANDER E. ZIRPOLO.

LOTTIE ABBOTT *vs.* ALEXANDER E. ZIRPOLO.

Oxford. Opinion, February 13, 1934.

PLEADING AND PRACTICE. NEGLIGENCE. DAMAGES.

Questions of jurisdiction and venue may properly come before the Law Court on exceptions to the overruling of motions to dismiss the suits.

In the case at bar, the jury had the defendant's testimony that when he found his right wheels were off the concrete and on the gravelled margin which he had said was from eight to twelve feet wide at that point, he did not reduce his speed so that the catching of the rear wheel caused his car to skid to the left very quickly, and occupy the southerly portion of the highway. They had abundant evidence to justify the finding that negligence of the defendant was the proximate cause of the accident.

The Court holds, however, that on the record the amount of the verdict in each case was so excessive that it could not be allowed to stand. In the case of James H. Abbott, remittitur was ordered of all the amount recovered in excess of $1,634.35; in the second case of James H. Abbott, the Court ordered a remittitur of all the amount recovered in the excess of $500.00; in the case of Christine Abbott, the Court ordered a remittitur of all the amount recovered in excess of $1,750.00; in the case of Lottie Abbott, the Court ordered a remittitur of all the amount recovered in excess of $500.00; otherwise motions for new trials sustained in each case.

On exceptions and general motions for new trial by defendant. Four actions in tort for negligence arising out of collision of automobiles on the highway. Trial was had at the February Term, 1933, of the Superior Court for the County of Oxford. The jury rendered a verdict for the plaintiff in each case. To the refusal of the admission of certain testimony, and to the denial of certain

motions made by the defendant, exceptions were taken, and after the jury verdicts a general motion for new trial was filed in each case. Exceptions overruled. Verdicts excessive on the evidence. Motions sustained unless remittitur is filed in each case. The cases fully appear in the opinion.

Fred H. Lancaster,
John G. Marshall, for plaintiffs.
Reginald H. Harris,
Cook, Hutchinson, Pierce & Connell, for defendant.

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

BARNES, J. Four cases, tort actions arising from an automobile collision were argued together.

Plaintiffs, James H. Abbott and Christine Abbott, his wife, were residents of Wellesley, Massachusetts, Lottie Abbott, of Paris, Maine, and defendant a resident of Brooklyn, New York.

Verdicts were returned for the several plaintiffs. Exceptions and motions for new trial by defendant in each case bring them before this court.

Exceptions to question put to Dr. Murphy, and to his answer, affecting only the case of James H. Abbott, in the first writ for him, are in the Bill, but as they were not argued it may be assumed counsel consider their client not aggrieved at the admission, a conclusion the Court would be inclined to agree with.

Answer to George F. Hill as to the fair market value of a certain automobile, Maker's No. M18114, was prevented by the Court, because the witness had never seen the car. The answer was not given.

This exception is overruled.

At time of issuance of the writs, all four plaintiffs were known, of record, as not residents of this state. Subsequently motion to amend the declaration of Lottie Abbott was filed and granted. The four writs were entered in court at the November Term, 1932, and at the same term motions to dismiss the several actions, challenging the jurisdiction of the court and attacking the constitutionality of the statute allowing substituted service of process, R. S., Chap. 29, Sec. 130.

At the same time defendant filed in each case a paper entitled Plea in Abatement. These papers, as pleadings are not pleas in abatement.

The object of filing each is in it stated to be "for the sole purpose of contesting the jurisdiction of this Honorable Court."

If there were place for such it would be considered a motion to dismiss. But that objection was properly raised at the return term. The motion to dismiss was then overruled. No exception to the ruling was taken. The issue of jurisdiction and venue was then settled, and the cases continued.

On the first day of the February term the so-called Pleas in Abatement were presented to the court and overruled. In his argument before us counsel for the defendant argued the questions of jurisdiction and venue. These might have been before the court on exceptions to the overruling of the motions to dismiss, had such exceptions been taken. They are not before us for consideration.

On motions for new trial: The collision occurred on the main highway between Norway and South Paris villages, at a point nearly opposite the automobile entrance to the grounds of the Oxford County Fair association between 10 o'clock and half past 10 in the evening of a rainy day in August.

Plaintiff James H. Abbott was driving his car; the other plaintiffs were his guest passengers.

The road at the site of the collision, for a long stretch to the east toward Paris and westward toward Norway is practically on a level, wide and well constructed, with an eighteen feet strip of concrete along the median line of its travelled part.

Just before the collision plaintiff's car was moving toward Paris, and on the southerly side of the concrete; defendant moving in the opposite direction and on the northerly side. There is testimony that automobiles were proceeding in advance of each of the cars of the parties hereto. The usual court revelation as to speed is found in each driver's testimony, a very moderate pace; and on other facts in relation to the collision there is practically no difference in the testimony of witnesses.

It seems that the right wheels of defendant's car rolled off the edge of the concrete; that defendant attempted to swing to his left

so as to return the wheels to the concrete surface; that some cause deflected his car sharply to his left (he testifies, "the front wheel went on with no difficulty, but the rear wheel was right under the edge of the cement and that made the front part of the car skid towards, across the road") and the cars were in collision, both on the southerly side of the concrete roadway.

Verdicts for the several plaintiffs were properly returned. The jury had defendant's testimony that when he found his right wheels were off the concrete and on the gravelled margin which he had said was from eight to twelve feet wide at that point, he did not reduce his speed so but that the catching of the rear wheel caused his car to skid to the left very quickly, and occupy the southerly portion of the highway. They heard his testimony that he saw no cars approaching from the west when he attempted to swing up on the concrete, and that his car was hit by the Hupmobile on the spare wheel, carried near the door on the right side of his car. They had abundant evidence to justify the finding that negligence of the defendant was the proximate cause of the accident.

But, on the record, it is plain that the amount of the verdict in each case is so excessive they can not be allowed to stand.

By the first writ, James H. Abbott sues to recover for damage to his automobile, and for loss of wages, expense of medical and surgical attention, past and future, and for pain and suffering attributable to the accident. The jury awarded him $2,957.35.

A presumably impartial witness, called by plaintiff, testified that repairs to the car, a Hupmobile sedan, '28 model, were charged for to the amount of $249.85.

It is in evidence that painting the car would require $75.00, and a new tire and tube, not replaced, would call for $16.00, a total of $340.85 for complete repair.

The plaintiff, as manager of a drug store, did not lose his job. He was unemployed on account of the accident for one-half week, with loss of wages $21.50, and then returned to his work, lost no further time, and continued this employment to the time of the trial. He paid for professional services $72.00.

As to the sum he should recover for his pain and suffering computation, never exact, is difficult.

For the suffering a punctured wound below the knee, a cut and a few bruises and contusions on legs and chest would entail, the sum of $2,500 is grossly excessive.

Motion sustained unless within thirty days from filing of this mandate plaintiff files a remittitur of all of the amount recovered in excess of $1,634.35.

By the second writ, James H. Abbott, plaintiff, recovery is sought for necessary expenditures in restoring plaintiff's wife, Christine R. Abbott, as nearly as may be to the condition she was in before the collision, and for the husband's loss of services and consortium.

The jury awarded $1,265.00. Proven loss of services and expense of professional treatment of the wife cost plaintiff $85.00.

The record contains no evidence of loss of consortium. The injuries proved, and sued for by Christine in her writ, were cuts and bruises on the forehead. They were not to be considered by the jury, under this writ, except as they reduced the value of her services, to her husband and in his behalf, and as diminishing that imponderable factor known in law as consortium.

The court is agreed a verdict of $1,265.00 is excessive.

Motion in this case sustained unless within thirty days from filing of this mandate plaintiff files a remittitur of all the amount recovered in excess of $500.00.

By the third writ James H. Abbott's wife, Christine, seeks to recover for pain and suffering and the embarrassment she is forced to sustain from facial disfigurement, if any, caused by what Dr. Littlefield called two skin wounds, closed without stitches and requiring dressing every second day for a time. She was not a witness. Her age is not given. The testimony is that for months before the trial she has been doing the work of the household, with the help of a man who works for his board.

The jury awarded her the sum of $4,000.00, a sum, as the Court reviews the record, grossly excessive.

Motion sustained, in this case, unless within thirty days from filing of this mandate plaintiff files a remittitur of all of the amount recovered in excess of $1,750.00.

On the fourth writ Lottie Abbott recovered a verdict for $812.50 as damages for personal injuries.

At the time of the accident she was sixty years of age and employed in Paris, the town of her residence, as a housekeeper. She retained her position, and till the trial did all the work of housekeeper with help from a man, perhaps a dozen times in six months, at an expense of 50 cents each time.

As to the injury, she testified she was sitting in the rear seat of her son's car; that at the collision she was thrown up and "come down and struck the back of the seat across my stomach and my feet were under the footrest, and I tore up the footrest." She complains of "bad ankles and a bad side and back."

Her side and back had troubled her in former years, then ceased troubling her, but she claimed that the collision has brought on a recurrence of pain in her abdomen. Before the accident she said she weighed 185 pounds, but has lost 15 pounds.

She testified that she had suffered, before the accident, from fallen arches, and since from pain in the tops of the feet, "It is the top of the feet." Since the accident she has worn a support to the arch of her left foot. In all she consulted a doctor but once.

Dr. Littlefield, a physician of South Paris, treated Mrs. Abbott once, a day or two after the accident, and testified she complained then only of lame and sore ankles. He found them quite badly swollen and "rather sore to move," recommended heat and bandaging, fee $2.00.

All the medical testimony, including that of two experts, leads to the conclusion that Mrs. Abbott has flat feet, as the doctors in this case phrase it, with relaxation of ligaments and change in position of the ankle bones. One theory is that some of the difficulty may be due to sprain or to rupture of ligaments during the collision, the other that the present condition has been long coming on.

Taking her testimony as true: that she went to a physician but once, and had done the work required of her as housekeeper, unquestionably upon her feet and moving about for hours every day, it is impossible to deduce the conclusion that any sprain suffered in the collision was severe. Mrs. Abbott testified she had used support for the arches for years before the accident.

The only physician who examined the organs in the pelvic region accounts for distress in that region as resulting from rupture at childbirth not repaired, and general physiological change accom-

plished in most women before reaching the age of sixty. The admission of the plaintiff that she has done all the work of her position, with only occasional assistance from a man, taken with all the other evidence makes it imperative to reduce the verdict or order new trial.

Motion sustained in this case unless within thirty days from filing of this mandate plaintiff files a remittitur of all the amount recovered in excess of $500.00.

Exceptions overruled.
Motion sustained in each case unless remittitur as prescribed in the opinion.

WALDO LUMBER COMPANY *vs.* FRED C. METCALF.

Penobscot. Opinion, March 12, 1934.

EQUITY. ACCOUNTING. JOINT ADVENTURE.

R. S. 1930, CHAPTER 96, SECTION 17.

An equitable action for an accounting is the proper remedy of a party to a joint adventure to recover his share of the profits or fix the liability for losses.

In the case at bar, the record clearly indicated that the relation of principal and agent or broker did not exist between the parties.

There was evidence, however, in the report which indicates that they may have entered into a joint adventure in which it was agreed that the profits and losses of the purchase and sale of the lumber in controversy should be shared equally after the payment of certain agreed prices for hauling, milling and loading, allowances for customer's discounts, interest charges and insurance.

The true state of the accounts between these parties as a result of this lumber deal was admittedly uncertain. It could be determined by an accounting in equity.

The issues here raised were not the same as those which were tried or might have been tried in the former action of *Wilkins* v. *Lumber Company*, 130 Me., 5. The judgment there entered was not a bar to an accounting between the parties to this action.

The case falls within the provisions of *Revised Statutes, Chapter* 96, *Section* 17, which authorizes the Law Court to transfer an action at law commenced in the Superior Court to the equity docket for the county in which it originated, there to be heard and determined in equity.

The pleadings are to be struck out. The parties must plead anew in equity in the same cause and the action will stand transferred to the equity docket for the County of Penobscot, there to be heard and determined in equity. The costs of this suit at law, including the report of the case to the Law Court, will be charged against this plaintiff in the final decree.

On report. An action of assumpsit to recover disbursements made by plaintiff and alleged to be chargeable to the defendant. Questions at issue were whether plaintiff company was acting as the agent or broker of the defendant in its lumber contract or whether the deal constituted a joint adventure between the parties. Cause transferred to the Equity Docket for the County of Penobscot, there to be heard and determined in Equity. The case fully appears in the opinion.

Ralph O. Brewster, for plaintiff.

Frank W. & Benjamin Butler,

C. N. Blanchard, for defendant.

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

STURGIS, J. Action of assumpsit on account annexed with omnibus count attached. The plea is the general issue with a brief statement of special matters of defense. The case is reported for determination upon so much of the evidence as is legally admissible.

The action grows out of a hardwood lumber deal in which the plaintiff, the Waldo Lumber Company, a corporation having its principal place of business at Bangor, Maine, and Fred Wilkins, administrator of the estate of George W. Staples, formerly of Temple, Maine, were involved. In the summer and fall of 1928, Daniel F. Adams, a salesman for the Waldo Lumber Company, at the direction of Irving G. Stetson its general manager, negotiated for the purchase of a lot of hardwood lumber owned by the Staples estate, obtained an order from the Gem Crib & Cradle Co. of Gardiner, Mass., for more than 180 M feet of hardwood squares to

be sawed from the lumber, and arranged with the defendant in this action, Fred C. Metcalf, who operated a saw mill at West Farmington, Maine, to do the hauling, milling and loading. On November 4, 1928, Adams, signing for the Waldo Lumber Company as agent, but without authority, joined Wilkins, the administrator, in the execution of a written contract under seal in which it was agreed that the Company would purchase at a stated price all the lumber belonging to the Staples estate which was then on the sticks in Temple. On November 27, 1928, Metcalf began hauling the lumber from Temple, tallying it as it came in, and milling it to the specifications of the Gem Crib & Cradle Co. order. In all, 329,038 feet of lumber was hauled to the mill from Temple, and 20,000 feet was left on the sticks. Metcalf milled and shipped five carloads of the lumber to the Gem Crib & Cradle Co. on orders sent from the Waldo Lumber Company, which billed the shipments direct from its Bangor office and made the collections. On April 9, 1929, Metcalf, on orders from the Waldo Lumber Company, stopped milling. The lumber which had been hauled but was not milled was left in piles in or near Metcalf's mill yard.

The Waldo Lumber Company having refused to pay for the lumber, the administrator of the Staples estate brought suit against it and recovered a verdict of $5,481.64 in the Trial Court. On motion and exceptions brought to the Law Court, it was held that the evidence warranted a finding that the Waldo Lumber Company, through its general manager, with full knowledge of all material facts, took and retained a part of the benefits of the unauthorized contract which its salesman made and, having impliedly ratified the transaction in part, thereby bound itself for the entirety. The verdict was sustained. *Wilkins* v. *Lumber Company*, 130 Me., 5. The transcript of evidence in that case is, by stipulation, made a part of this record. The facts thus far recited are drawn from that transcript and the reported opinion and are the background of the instant action.

Here, the Waldo Lumber Company advances the claim that in purchasing this hardwood lumber from the Staples estate it was acting merely as the agent or broker of the defendant Fred C. Metcalf, and is therefore entitled to reimbursement from him for the entire expense of the transaction, a commission on the sale of the

lumber, the cost of the litigation with the original owner, and interest accrued, which altogether, according to its computations, amounts to $5,890.56. This is the basis of its declarations in its writ and the gist of its contentions throughout the brief. The claim is without merit. The general manager of the Waldo Lumber Company admits that he never talked with the defendant Metcalf about handling the lumber on a commission basis and there is no proof of such an arrangement elsewhere in the evidence. The record clearly indicates that the relation of principal and agent or broker did not exist between these parties.

The conclusion reached upon the primary issue in this case, however, does not necessarily determine the respective rights and liabilities of these litigants. There is evidence in the report which indicates that the defendant Metcalf and the Waldo Lumber Company may have entered into a joint adventure in which it was agreed that the profits and losses of the purchase and sale of the lumber in controversy should be shared equally after the payment to Metcalf of fixed and agreed prices for hauling, milling and loading, with allowances for customer's discounts, interest charges and insurance. Such a venture was undoubtedly proposed to Metcalf by the salesman Adams with the knowledge and consent of the general manager of the Waldo Lumber Company. Following repeated telephone conversations and an extended correspondence, Metcalf by letter of December 27, 1928, unqualifiedly offered to join the venture on the terms proposed, but whether the Waldo Lumber Company accepted this offer and obligated itself accordingly is a controverted question. Its general manager, on December 27, 1928, but before the receipt of the offer from Metcalf, had made a substantially similar but conditional proposal to him and the two counter-offers, written on the same day, passed each other in the mails. The Waldo Lumber Company acknowledged receipt of Metcalf's offer by letter of December 28, 1928, but without mention of its counter-offer or other reservation, and immediately set up and carried an account in the name of the joint adventurers on its books. We find no mention of this correspondence by Metcalf, either in his testimony or letters, but his subsequent conduct, as does that of the manager of the Waldo Lumber Company, permits the inference that from and after December 28, 1928, the parties

understood that they were engaged in a joint adventure and dealt with each other accordingly.

The state of accounts between these parties as a result of this lumber deal is admittedly uncertain and as yet undetermined. The Waldo Lumber Company credited its receipts from the shipments of lumber to the Gem Crib & Cradle Co. and charged its advances for hauling, loading, insurance and other expenses to the joint account. Metcalf collected moneys from the sale of waste, but his records of his receipts and disbursements are more or less incomplete and his statements of how much lumber he hauled and milled and the amount, if anything, now due him therefor are indefinite. It is claimed that a quantity of softwood lumber sold to Metcalf personally by the Staples estate was included in the judgment recovered against the Waldo Lumber Company in the former action and that Metcalf's hauling charges cover that as well as hardwood. Another and independent lumber transaction between the parties is involved in the accounts. Each party charges the other with responsibility for the abandonment of the milling operation and the order of the Gem Crib & Cradle Co. and the losses which resulted. Apparently an accounting is necessary. This can be had only in equity. An equitable action for an accounting is the proper remedy of a party to a joint adventure to recover his share of the profits or fix the liability for losses. *Simpson* v. *Spinning Company*, 128 Me., 22, 32; 15 R. C. L., 507; 33 C. J., 867 and cases cited.

The issues here raised are not the same as those which were tried or might have been tried in the former action of *Wilkins* v. *Lumber Company*, supra. The judgment there entered is not a bar to an accounting between the parties to this action. Except as to the claim of the plaintiff that it was the defendant's agent or broker, which we here decide can not be sustained, on the case brought forward it appears that the rights of the parties can be better determined and enforced by a judgment and decree in equity. The uncertainty and incompleteness of the record does not permit that determination here, as in *Savings Bank* v. *Hurley*, 117 Me., 211, 215. The case falls within the statute authorizing the Law Court to transfer an action at law commenced in the Superior Court to the equity docket for the county in which it originated, there to be heard and determined in equity. R. S., Chap. 96, Sec. 17.

The pleadings at law are to be struck out. The parties must plead anew in equity in the same cause, and the action will stand transferred to the equity docket for the County of Penobscot, there to be heard and determined in equity. The costs of this suit at law, including the report of the case to the Law Court, will be charged against this plaintiff in the final decree.

So ordered.

RUFUS P. HATCH *vs.* GLOBE LAUNDRY COMPANY.

Cumberland. Opinion, March 12, 1934.

NEGLIGENCE. MOTOR VEHICLES. PROXIMATE CAUSE.

If a defendant is to be held answerable in damages to a plaintiff, his negligence must be the proximate cause of the injury. Negligence is ordinarily said to be the proximate cause when the injury is the natural and probable consequence of the negligence. Viewing the occurrence in retrospect it is only essential that the consequences appear to flow in unbroken sequence from the negligence.

The independent act of a third person, intervening between the wrong complained of and the injury, is not sufficient to break the causal connection, if such act should have been foreseen or reasonably anticipated.

One attempting to rescue another is not to be held negligent by exposing himself to imminent danger, unless his conduct is to be regarded as rash or reckless. The law is indulgent to the rescuer, if in the emergency he fails to use the same judgment and adopt the same measures for his protection, that he might if the opportunity were given for calm deliberation.

In the case at bar, the question of the defendant's negligence in leaving the truck as it was and whether it was a proximate cause of the accident were issues of fact to be decided in this instance by the presiding Justice.

On exceptions by defendant. An action on the case to recover damages for personal injuries caused by the alleged negligence of the defendant's servant, in the operation of a motor truck. Trial was had at the November Term, 1933, of the Superior Court for the County of Cumberland, before the presiding Justice without

jury. Judgment was for the plaintiff in the sum of $1,500.00. Exceptions were seasonably taken by the defendant. Exceptions overruled. The case fully appears in the opinion.

Frank H. Purinton, for plaintiff.

Robinson & Richardson, for defendant.

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

THAXTER, J. In this action the plaintiff seeks to recover for personal injuries caused, as he alleges, by the defendant's negligence. The case was heard by the presiding Justice with a right reserved by both parties to except in matters of law. He found for the plaintiff, and the defendant filed exceptions, which are now before us.

The circumstances of the accident, as set forth by the pleadings and established by the evidence, are peculiar. There is no serious dispute as to what happened. On the twenty-third day of June, 1933, one Small, an employee of the defendant, parked a truck of the defendant on Lincoln Street in Portland, while he went to a house to deliver a package of laundry. The truck, with emergency brake set, was on the left side of the street, headed down hill on quite a grade. The presiding Justice found that the front wheels were turned away from the curb. There is no direct evidence on this point, but a reasonable inference can be drawn from what subsequently happened that the driver did not take the precaution of turning the wheels toward the sidewalk. The truck was electrically operated, of slow speed but powerful. There were no gears, and all that was necessary to do to start it was to move a small wheel, which controlled a rheostat. This wheel, which turned easily, was located on the steering post, and, with the left side of the truck toward the side of the street, was readily accessible to anyone who might step on the running board from the sidewalk. There was a circuit breaker, which consisted of an oblong piece of metal or key inserted in a slot between two contact points. If this were pulled out, power could not pass to the motor, even though the rheostat might be opened. Although it was perfectly simple to remove this key, Small testified that he never did so, except when he left the

car in the garage at night. The truck was low and had no doors. Deering Avenue, an important highway, intersected Lincoln Street a short distance below the point where the truck was stopped, and beyond Deering Avenue was the main thoroughfare of Forest Avenue. Other cars were parked on the sides of the street in front of the truck. As Small entered the house with his laundry, he noticed children playing on the same side of the street, although, as he says, not in the immediate vicinity of the truck. He was in the house about four minutes according to his estimate. Almost immediately, however, two boys four and five years old, who were playing nearby, got into the truck, turned the wheel controlling the rheostat, until the full power from the batteries was thrown into the motor; and, in spite of the fact that the emergency brake remained set, the car started down the hill with the children in it. The plaintiff, who was seated on the porch of a house across the street, seeing their predicament and realizing the danger to them and to other persons lawfully on the highway, dashed out, jumped into the moving truck, and attempted to stop it. Unacquainted with the operation of an electric vehicle, he was unaware that the power was on, but thought that the emergency brake had been released and that the car was coasting down hill. His attempts to put more pressure on the brake were unavailing, and the car continued on its course. The children saved themselves by jumping off. Deering Avenue, with traffic moving across it in front of him, was but a hundred and fifty feet away; and, in order to avoid what seemed to him an inevitable accident to himself and to others, he turned the truck from the street into an open space between two houses. In going over this rough ground, he was thrown off and injured. The truck finally stopped, when it struck a tree.

The plaintiff contends that the defendant's driver was negligent in leaving the truck as he did with the opportunity so readily to start it open to young children, who were near at hand. The defendant claims that the act of the children was an intervening and a proximate cause of the accident, for which the driver of the truck was in no way responsible. The exceptions to specific findings of the presiding Justice all merge into this general question, and the issue before us is whether there is any evidence to support the ruling below. *Chabot & Richard Co.* v. *Chabot*, 109 Me., 403.

The universal rule is that if the defendant is to be held answerable in damages to the plaintiff, the negligence must be the proximate cause of the injury suffered. To lay down a general definition of proximate cause, which will furnish a solvent for all cases, is, however, well nigh impossible. Each case presents its own problem. *Page* v. *Bucksport*, 64 Me., 51; *Fairbanks* v. *Kerr*, 70 Pa., 86. The most usually cited rule is that the injury must be the natural and probable consequence of the negligence. *Marsh* v. *Great Northern Paper Co.*, 101 Me., 489, 502. But even this formula has its limitations and exceptions, as is pointed out by Judge Smith in an article in 25 Harv. L. Rev., 103, 115. As he shows, a wrong-doer may in some instances be liable for a probable consequence because it was foreseeable, even though it may not have occurred in the ordinary course of nature. This phrase, however, does furnish a reasonable guide for the solution of the vast majority of cases. It is not necessary that injury in the precise form suffered should have been forseen; it is only essential that, viewing the occurrence in retrospect, the consequences appear to flow in unbroken sequence from the negligence. *Marsh* v. *Great Northern Paper Co.*, supra, 502; *Palsgraph* v. *Long Island R. R. Co.*, 248 N. Y., 339, 344; *Dalton* v. *Great Atlantic & Pacific Tea Co.*, 241 Mass., 400.

It is sometimes said that the independent act of a third person intervening between the wrong complained of and the injury is sufficient to break the chain of causation. *Leavitt* v. *Bangor & Aroostook Railroad Co.*, 89 Me., 509, 520. In many instances this is true, but there are innumerable cases where it is not. Such rule undoubtedly had its genesis in the language of the court in the famous "squib case." *Scott* v. *Shepherd*, 2 W. Bl., 892, 1 Smith Leading Cases, 797. A lighted squib was thrown into a market house and fell on a stand of one proprietor, who instinctively threw it off, and it fell on the stand of another, who likewise threw it. It then struck the plaintiff, exploded, and put out his eye. The court held the one who first threw it responsible. The opinion suggests that the intervening acts were done under compulsion, instinctively, and that if a free agent had intervened, the result would have been different. Applied to the facts of the particular case, the language is of course correct, but a glance at the cases shows that it is not universally applicable.

In *O'Brien* v. *J. G. White and Co.*, 105 Me., 308, the plaintiff was employed as a lineman by a contractor, who was building a transmission line. Through the negligence of an employee of a power company, which had nothing to do with the construction work, a current of electricity was permitted to escape over the wire on which the plaintiff was working. The defendant was held liable for its negligence in failing to protect the plaintiff from the consequence of the intervening act of the third party.

In *Luedeke* v. *New York Central & H. R. R. Co.*, 149 N. Y. S., 525, a trespasser in a railroad yard opened the throttle of a locomotive left unattended on a side-track. It ran out on the main line, and collided with another locomotive operated by the plaintiff's intestate, who was killed. It was held a question for the jury whether the defendant should have taken precautions against the commission of such intervening wrongful act.

In *Lane* v. *Atlantic Works*, 107 Mass., 104, cited by our court with approval in a number of cases, the declaration alleged that the defendant left a truck loaded with iron on a street in Boston, that the iron on said truck was carelessly placed and rolled off injuring the plaintiff. The evidence showed that children were accustomed to play in the street. A boy twelve years old called to the plaintiff, who was a child of about seven, to come over and see him move the truck. The plaintiff did so, and the other boy moved the tongue sideways so that the truck tilted and the iron rolled off and injured the plaintiff. The trial court ordered a verdict for the defendant. This ruling was held erroneous, for the court said it was a question for the jury whether the occurrence was one which should have been reasonably apprehended. If so, the negligence of the older boy in moving the cart would not prevent a recovery, even though it contributed to the result. The case later came before the court again, 111 Mass., 136, on exceptions by the defendant after a verdict for the plaintiff. In sustaining the verdict the court said, 139-140: "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated,

not in the number of subsequent events and agencies which might arise."

Gay v. *Essex Electric Street Railway Co.*, 159 Mass., 238, came before the court on an appeal from a ruling of the trial court sustaining a demurrer and ordering judgment for the defendant. The declaration alleged that the defendant left certain street cars standing on a public street in violation of a city ordinance with the brakes wound up. The plaintiff's intestate, while playing on these cars with other children, was injured by the unwinding of a brake. The court held that he was a trespasser and that no right of action accrued to him. We find, however, at page 241 this significant dictum: "If the cars had been set in motion by other children, and the plaintiff's intestate had been injured by them while lawfully upon the highway, the defendant clearly would have been liable."

In *Lynch* v. *Nurdin*, 4 Perry & Dav., 672, decided in the Queen's Bench in 1841, the following facts were brought out. The defendant's servant left his horse and cart in the street for about half an hour with no one to care for them. The plaintiff, a boy of seven, and several other children were playing about the cart. While he was getting down from it one of the other boys set the horse in motion, and the plaintiff was injured. The question was whether the servant's negligence in leaving the horse and cart was the proximate cause of the injury. The issue was left to the jury and on appeal this ruling was held correct. Lord Denman said, page 675: "If I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

The question whether or not negligence is a proximate cause of an injury is answered, not as a rule by determining that the act of a third person contributing to the result does or does not intervene, but rather by deciding whether the occurrence should have been foreseen or reasonably anticipated. The rule is thus stated by Judge Smith in the article previously referred to. 25 Harv. L. Rev., 113. "By the decided weight of authority, A. would be liable if he foresaw, or ought to have foreseen, the commission of B.'s

tort, and the resultant damage, as a not unlikely consequence of his earlier tort."

In *Lake* v. *Milliken*, 62 Me., 240, we find the following statement, page 242: "The general rule is that a man is not answerable for the consequences of a fault, only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast."

In *O'Brien* v. *J. G. White and Co.*, supra, we find the following at page 314: "If the act of a third party concurs with the negligence of the defendant in causing the injury complained of, such concurring act does not relieve the defendant from liability if such act ought to have been foreseen or anticipated."

In *Chickering* v. *Lincoln County Power Co.*, 118 Me., 414, there was a demurrer to a declaration which alleged that the plaintiff's intestate was killed while climbing a tree by coming in contact with an improperly insulated electric wire of the defendant. In sustaining a decision of the presiding Justice overruling the demurrer, this court said, page 418: "No one may with impunity totally disregard the natural habits and the childish inclinations of boys at play to climb the dooryard shade-trees."

In *Hawkins* v. *Maine & New Hampshire Theatres Co.*, 132 Me., 1, the question was whether a theatre management was negligent in not guarding against the wilful act of a twelve-year-old boy in shooting a sling shot in a crowded theatre. In holding the defendant not liable under such circumstances the rule was thus stated, page 4: "A recovery may be had, even though the wilful or negligent act of a third person intervenes and contributes to the injury, provided such act should have been foreseen."

In the case of *The Lusitania*, 251 Fed., 715, one question was whether the proximate cause of the sinking of the liner was the negligence of the Cunard Steamship Co., or the unlawful act of a German submarine. The court absolved the company on this issue, on the ground that an act so brutal and so contrary to the law of nations could not have been anticipated.

Chief Judge Cardozo in *Palsgraf* v. *Long Island R. R. Co*,. supra, at page 345, most aptly refers to this aspect of the doctrine of proximate cause as "the range of reasonable apprehension."

See to the same effect as the above cases, *Fairbanks* v. *Kerr*,

supra; *Isham* v. *Dow's Estate*, 70 Vt., 588; Shearman & Redfield, Negligence, 4 ed., Sec. 34.

That the facts in the case before us are undisputed does not raise an issue of law provided reasonable men may reach different conclusions from them. *Nugent* v. *Boston, Concord & Montreal Railroad*, 80 Me., 62; *Brown* v. *Rhoades*, 126 Me., 186. The determination of the issue of proximate cause requires the drawing of inferences sometimes from disputed and often from uncontroverted facts, and is peculiarly the province of the jury. *Milwaukee & St. Paul R'y Co.*, 94 U. S., 469, 24 Law Ed., 256; *Lashley* v. *Dawson*, 162 Md., 549, 160 A., 738; *Lynch* v. *Nurdin*, supra.

In applying these rather well-known principles to cases similar to that now before us, the overwhelming weight of authority seems to hold that the question raised is one of fact and not of law.

In the case of *Jackson* v. *Mills-Fox Baking Co.*, 221 Mich., 64, 26 A. L. R., 906, the facts are in some respects similar to those before us. An electric truck left in front of a house was started by children, and the plaintiff was injured. The court reversed a judgment for the plaintiff. The determining factor in the mind of the court was that the driver of the truck did not go out of sight of it. Had he done so and remained away knowing that children were in the vicinity, the court admits that the decision might have been different.

The New York courts have considered somewhat similar facts in *Berman* v. *Schultz*, 81 N. Y. S., 647; *Frashella* v. *Taylor*, 157 N. Y. S., 881; *Austin* v. *Buffalo Electric Vehicle Co.*, 158 N. Y. S., 148; *Lazarowitz* v. *Levy*, 185 N. Y. S., 359; *Pesaty* v. *Hearn*, 202 N. Y. S., 264; *Kaplan* v. *Shultz Bread Co.*, 208 N. Y. S., 118. In each of these cases it was held that there was no liability; but in each one there are certain important facts which distinguish it from the case, which we are considering here. In no one of them does it appear that the defendant left unattended on the street a truck of such construction and so placed that it could be readily started by children so young that they could not comprehend the mischief which they might cause. In any event two cases decided by the Court of Appeals appear to clarify the law in New York.

In *Maloney* v. *Kaplan*, 233 N. Y., 426, 26 A. L. R., 909, the following facts appear. The plaintiff's testator was killed by a truck

which was left on an incline with the emergency brake set, which was apparently released by boys. The court set aside a verdict for the plaintiff, not on the ground that the question was not properly a jury one, but for the refusal of the trial judge to instruct the jury that the defendant was not liable, if the truck driver took the precaution of setting the emergency brake, turning the wheels toward the curb and throwing off the switch. In this connection also the court made it clear that it was not a case where the danger was apparent of interference by little children indulging in their natural instincts of play.

In *Connell* v. *Berland*, 228 N. Y. S., 20, the facts are very similar to those now before us except that the automobile, being operated by gasoline, could not be so readily started as was the truck of this defendant. It was left unguarded for a longer period of time, to be sure, but it is hard to see why this fact is particularly material. The court in affirming a judgment for the plaintiff said, page 21: "The jury were justified in finding from the evidence that the defendant was negligent, in that he parked his automobile in a congested locality where concededly he knew that children were constantly playing in the street, leaving the car, which was equipped with a self-starter, with the doors unlocked and with the ignition key in the switch." *Maloney* v. *Kaplan* is distinguished because in that case the situation was not presented of apparent danger of interference by little children. The decision in this case was affirmed by the Court of Appeals. *Connell* v. *Berland*, 248 N. Y., 641.

The opinion of *Rhad* v. *Duquesne Light Co.*, 255 Pa., 409, cited by counsel for the defendant, shows that the emergency brake of an automobile was released by a boy twelve years old. The facts bring it within the rule laid down in *Hawkins* v. *Maine & New Hampshire Theatres Co.*, supra. It is clearly distinguishable from the case at bar. The conduct of a boy of twelve is no measure of what should be expected from one of five.

In the case of *Campbell* v. *Model Steam Laundry*, 190 N. C., 649, we find facts almost identical with those before us. The defendant's electric truck was parked in violation of a municipal ordinance on the left side of the street, while the driver was delivering a package of laundry. From the direction in which the car

subsequently moved, the inference could be drawn that the wheels were not turned toward the curb. The evidence likewise showed that by reason of the car being parked with its left side toward the curb, the steering wheel and control lever could be reached by a child without entering the car. The switch plug or circuit breaker was not removed. As the driver went into the house he saw a four-year-old child coming out. This child climbed on the wheel, turned the control lever and the car started. A passer-by jumped on the truck and tried to stop it, but the child fell off and was killed. After judgment for the plaintiff the defendant appealed. It was held that there was no error, that the negligence of the driver in leaving the truck as he did was the proximate cause of the accident, and that the act of the child was not an intervening, efficient cause.

In the case before us it seems clear that the question of the defendant's negligence and whether it was a proximate cause of the accident were issues of fact to be decided in this instance by the presiding Justice.

This brings us to a consideration of the question of the plaintiff's due care. It would be a distinct reproach to the law to hold that one must act at his peril, who risks his own safety to protect those put in jeopardy by the negligence of a third person. The overwhelming weight of authority is that one attempting to rescue another under such circumstances is not, by exposing himself to imminent danger, to be held negligent unless his conduct is to be regarded as rash or reckless. *Eckert* v. *Long Island Railroad Co.*, 43 N. Y., 502; *Bond* v. *Baltimore & Ohio Railroad Co.*, 82 W. Va., 557; *Seaboard Air Line R'y Co.* v. *Johnson*, 217 Ala., 251; *Christiansen* v. *Los Angeles & S. L. R. Co.*, 77 Utah, 85; *Lashley* v. *Dawson*, supra; Shearman & Redfield, Negligence, 4 ed., sec. 85. Likewise the contributory negligence of the person injured does not preclude recovery by the person attempting the rescue. *Bond* v. *Baltimore & Ohio Railroad Co.*, supra. Furthermore the law is indulgent to the rescuer, if in the emergency he fails to use the same judgment and adopt the same measures for his protection, that he might if the opportunity were given him for calm deliberation, *Lashley* v. *Dawson*, supra.

Defendant's counsel both in written and oral argument has conceded that there was no negligence on the part of the plaintiff. As

this precise question, however, has not heretofore been before this court, we have felt it advisable to express our opinion on it.

Exceptions overruled.

PHILIP F. CHAPMAN *vs.* GUY P. GANNETT.

PHILIP F. CHAPMAN *vs.* PORTLAND MAINE PUBLISHING COMPANY.

Cumberland. Opinion, March 15, 1934.

PLEADING AND PRACTICE. DEMURRER. LIBEL.

The allowance of an amendment to a declaration, which is itself demurrable, is improper.

To determine whether a given publication is libelous the language thereof must be taken in its ordinary significance and must be construed in the light of what might reasonably have been understood therefrom by the persons who read it.

In interpreting the language, it is not a question of the intent of the speaker, or author, but of the understanding of those to whom the words are addressed and of the natural and probable effect of the words upon them. If the language is plain and free from ambiguity, it is solely a question for the Court whether it is actionable.

In the case at bar, the Court holds that to the reader of ordinary intelligence "former president of closed banks," as admittedly published in May of 1933, is not an expression of reproach and slander. The colloquium presents the plaintiff as of highest standing and the words charged as libelous are not of that character.

On exceptions by defendant. Actions for libel brought to the Law Court on exceptions by defendant to the ruling granting plaintiff leave to amend his declaration, the same having been adjudged bad on demurrer. Demurrer sustained. Exceptions sustained. The cases fully appear in the opinion.

Ralph O. Brewster, for plaintiff.
Jacob H. Berman,
Edward J. Berman, for defendant.

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

BARNES, J. Both actions herein are of libel, alleged on one publication, tried and heard by this court at the same sessions. One opinion will suffice for both.

Publication was in the Portland Press Herald on May 4, 1933, when an editorial appeared under the title "Plans for Reopening Closed Banks."

In his declaration plaintiff inserted from the editorial this extract: "With reference to the so-called 'Casco Plan' which was advocated chiefly by Philip F. Chapman, former president of the closed banks," and claimed that by its publication he was damaged.

To the declaration a general demurrer was duly filed, and it was argued that the declaration set out no cause of action because the entire editorial was not published.

The effective result of the hearing on demurrer was that the same was sustained, the declaration adjudged bad and plaintiff granted leave to amend.

In due time there was filed an amended declaration setting forth the entire editorial. In other respects the amended declaration was identical with that originally filed. The court allowed the amendment, and defendant excepted.

Defendant further filed a general demurrer to plaintiff's amended declaration, and when this demurrer was overruled, noted exceptions.

Consideration of defendant's exceptions to the overruling of the demurrer to the amended declaration will dispose of the case.

If the amendment offered and allowed is in itself demurrable its allowance was improper. *Garmong* v. *Henderson*, 112 Me., 383, 92 A., 322; *Gilbert* v. *Dodge*, 130 Me., 417, 156 A., 891.

The declaration, both in its original form and as amended, makes clear what all intelligent readers may be held to know, that for three days, about the 4th of March, 1933, all banks in the state, of the class of banks in which plaintiff had been active, as the declaration states, were closed.

They were closed by order of government, the weak with the strong.

Plaintiff deemed the original declaration libelous because of the words already quoted, and the only words in the amended declaration urged as libelous are the same, namely: "With reference to the so-called 'Casco Plan,' which was advocated chiefly by Philip F. Chapman, former president of the closed banks."

The rule of construction in libel is acceptably stated as follows: "In determining whether a given publication is libelous, the language thereof must be taken in its ordinary significance and must be construed in the light of what might reasonably have been understood therefrom by the persons who read it. The question is how would persons of ordinary intelligence understand the language. The published article alone must be construed, stripped of innuendo, insinuation, colloquium, and explanatory circumstances. In interpreting the language, it is not a question of the intent of the speaker, or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed and of the natural and probable effect of the words upon them. A person is presumed to intend the natural consequences of his acts and defamation consists solely in the effect produced upon the minds of third parties. If the language is plain and free from ambiguity, it is solely a question for the Court whether it is actionable." Cooley on Torts, 4th Ed., 503, Section 146; *Thompson* v. *Sun Co.*, 91 Me., 203, 39 A., 556; *Bradburg* v. *Segal*, 121 Me., 146, 116 A., 65; *Emery* v. *Prescott*, 54 Me., 269; *Patterson* v. *Wilkinson*, 55 Me., 42.

The words to which the Justice could look were: "Philip F. Chapman, former president of the closed banks." Properly construed, the language complained of is not libelous.

The characterization of plaintiff is not false. It is not claimed by plaintiff that the alleged libelous characterization holds him forth to have been president of all the banks of Portland, closed when the same was published.

It is not false, for the declaration sets out that from 1917 until 1929 plaintiff was president of The Chapman National Bank, a bank most assuredly "closed," since May 1, 1929, when it ceased to do business as a National Bank and "was reorganized as a state banking and trust company," as the declaration recites.

It is probable there can be found no court ruling that an averment is scandalous, slanderous or defamatory which holds a man up only as having been president of a closed bank.

Despite the fact that some presidents of banks, closed when the Casco National Bank was closed have, upon examination, revealed conditions that were, to say the very least, irregular, yet we hold that to the reader of ordinary intelligence "former president of the closed banks," as admittedly published in May of 1933, is not an expression of reproach and slander. The colloquium presents the plaintiff as of highest standing and the words charged as libelous are not of that character. The amendment is demurrable, hence the declaration is bad and the entry will be:

Exceptions sustained.

ALFRED A. LANGEVIN, ADMR., ESTATE OF EMMA B. LANGEVIN

vs.

PRUDENTIAL INSURANCE COMPANY.

Oxford. Opinion, March 15, 1934.

EXECUTORS AND ADMINISTRATORS. PLEADING AND PRACTICE. INSURANCE.

If an insured during lifetime would have been entitled to sue for a disability benefit under the policy, an administrator of the insured's estate is so entitled.

Where there is any evidence to support them, findings of fact by a sitting Justice hearing the case are conclusive, and exceptions do not lie.

In case of ambiguity, or inconsistency, the Court will give the policy a construction most favorable to the assured, for the reason that as the insurer makes the policy and selects his own language he is presumed to have employed terms which express his real intention.

In the case at bar, under the policy sued on, if the insured had lived, deprived of sight, until the insurer or the Court decided her blindness was total and permanent, she could have collected $320.00, and subsequent to her death the administrator of her estate could have collected the death benefit. The court

below decided the insured sustained a permanent loss of the sight of both eyes. So long as life remained in her the stricken one was totally blind. The number of days or years of such blindness is of small moment. The plaintiff as administrator is therefore entitled to recover the amount of $320.00 with interest.

On exceptions by defendant. An action to recover under the terms of a disability provision extending to a policy of insurance of a party deceased, intestate, the amount claimed due under such disability provision for the permanent loss of the sight of both eyes. Trial was had at the May Term, 1933, of the Superior Court for the County of Oxford, by the Court without jury. The Court found for the plaintiff in the sum of $332.47. Exceptions were thereupon taken by the defendant. Exceptions overruled. The case fully appears in the opinion.

Albert Beliveau, for plaintiff.

Skelton & *Mahon*, for defendant.

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

BARNES, J. Exceptions by defendant, at trial by the Court, without jury, with all rights of exception reserved by both parties.

Suit was brought, after the death of the insured, by her legal representative, on an Industrial Policy, so-called, on the life of the insured, dated September 20, 1909, which provided, at issue, for payment, on the death of the insured, to either or any of persons named therein, of the sum of $330.00.

After the death of the insured, payment of the death claim was made to one entitled to receive it, by a Company check, endorsed as follows: "This check is in full payment of claim under policy or policies mentioned thereon, and the payee accepts it as such by endorsement below. No other receipt required." But, subsequent to the issue of the policy of insurance, that contract was materially changed, for the mutual benefit of the parties thereto, by attachment thereto or incorporation therein of a distinct and different agreement of insurance, expressing liability in another field, if the insured should find herself therein, in words as follows.

"If the Insured while this Policy is in full force and effect and while there is no default in the payment of premium shall sustain

a physical impairment such as specified below, total and permanent disability shall be deemed to exist and the disability benefit hereinafter provided shall be granted immediately upon receipt of due proof of such impairment; in event of the loss by severance of one hand or one foot, an amount equal to one-half of the amount of insurance at the time of such loss shall be paid in cash; or in event of the loss by severance of two hands or two feet, or one hand and one foot, or the permanent loss of the sight of both eyes, an amount equal to the full amount of insurance at the time of such loss shall be paid in cash; and in either event no further premiums shall be required thereafter and the Policy shall be endorsed as fully paid up for the amount of insurance as specified in the Schedule above. The amount payable in cash under this provision on account of disability as herein defined shall in no event exceed an amount equal to the full amount of insurance under this Policy."

On the 25th of April, 1930, while the policy in every particular was in effect, and when there was "no default in the payment of premium," the insured suffered a stroke of apoplexy, and on May 1, 1930, became totally blind. She lived, without sight, until May 6, when she died.

If the insured, during her lifetime would have been entitled to sue for the disability benefit, the administrator of her estate is so entitled.

On argument two issues only were presented, (1) Whether the insured suffered disability for which she was entitled during her lifetime to compensation under the policy, and (2) If she would have been entitled to compensation, whether recovery of compensation is barred by the settlement of the death benefit claim.

The bill of exceptions raises questions both of fact and of law.

The court below must have decided that the insured sustained a physical impairment, to wit: the permanent loss of the sight of both eyes, which was independent of and not incidental to dissolution. We find abundant evidence in the record to justify that decision, and in a case tried as this was, "the findings of facts by the Justice hearing the case, if there is any evidence to support them, are conclusive, and exceptions do not lie." *Chabot* v. *Richard Company*, 109 Me., 403, 84 A., 892.

So long as life continued in her the stricken one was totally blind. The number of days or years of such blindness is of small moment.

In an opinion construing the expression "continuous disability," in an insurance policy, the Court held the disability continuous, on testimony "that within 12 hours after the cutting of the finger the insured became sick, and that on the third day after his injury he took to his bed, which he never left." *Rorabaugh* v. *Great Eastern Cas. Co.*, 117 Wash., 7, 200 P., 587, 590.

On the second issue it is argued that because the impairment suffered was concomitant with other diseases which progressed to dissolution in six days after the appearance of total blindness there can be no recovery for loss of sight.

There are before us two contracts of insurance. The original contract called for a payment after the death of the insured: by the second contract the Company tendered to the insured, and the latter accepted, insurance as in the first contract, with additional insurance as indemnity for total and permanent disability, upon receipt of due proof of the permanent loss of the sight of both eyes.

This indemnity, according to the terms of the provision added to the original policy, shall be equal to the full amount of insurance at the time of such loss, and shall be paid in cash; and . . . "no further premiums shall be required thereafter and the policy shall be endorsed as fully paid up for the amount of insurance as specified in the schedule above."

It is to be noted there is no expression that the physical disability indemnity is to be in lieu of or in settlement of the death benefit. It is to be in "amount equal to the full amount of insurance."

And, again, the policy is not to be surrendered, the contract at an end. Rather, after payment of the indemnity for physical disability, "the policy shall be endorsed as fully paid up etc."

In common understanding when a death benefit policy is classed as "fully paid up," there remains nothing further for the insured to do under the contract of insurance.

It is argued that payment for permanent loss of sight, after payment of the death benefit is inconsistent; that the administrator would exact double liability. We find to the contrary.

"In case of ambiguity, or inconsistency, it is often said that the court will give the policy a construction most favorable to the assured, for the reason that as the insurer makes the policy and selects his own language he is presumed to have employed terms which express his real intention." *Dunning* v. *Accident Ass'n*, 99 Me., 390, 394, 59 A., 535.

The right of the estate of the insured or his beneficiary to collect is as expressed in the policy. From the insurer other benefits than the death benefit may flow, according to the terms of the contract.

Under the policy sued on, so far as we may glean from the excerpts submitted to us, if the insured had lived, deprived of sight, until the insurer or the Court had decided her blindness was total and permanent, she could have collected $320.00, and subsequent to her death the administrator of her estate could have collected the death benefit.

The interpretation urged by defendant can not be had from the wording of the contract. A contract justifying such interpretation is easily drafted, and may be elsewhere encountered, but not in this case.

No receipt given by another than this plaintiff bars recovery in this action, and the amount is to be $330.00 with interest from the date of death.

Exceptions overruled.

JOHN C. HANSON *vs.* CASCO LOAN AND BUILDING ASSOCIATION.

Cumberland. Opinion, March 23, 1934.

PLEADING AND PRACTICE. REFEREES.

A plaintiff, before opening his case to a jury, or to the Court, when tried before the Court without the intervention of a jury, may become nonsuit as a matter of right; after the case is opened, and before verdict, leave to become nonsuit is within the discretion of the Court; after verdict there can be no nonsuit.

A hearing and report of Referees is equivalent to a finding by a single Justice or the verdict of a jury.

In the case at bar, the report of Referees had been filed before the plaintiff's motion for voluntary nonsuit. There was no abuse of judicial discretion in denying the motion.

On exception by plaintiff. An action at law referred to two Justices under rule of court with no right of exception reserved. After hearing and after report of Referees, plaintiff filed a motion for a voluntary nonsuit. To the denial of this motion exception was seasonably taken. Exception overruled. The case sufficiently appears in the opinion.

Howard Davies, for plaintiff.

Ralph M. Ingalls,

Edward J. Harrigan, for defendant.

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

BARNES, J. An action at law was referred to two Justices, under a rule of court, with no right of exceptions reserved. Thus, by agreement of the parties to the suit, they submitted the cause to a tribunal of their own selection.

Full hearing of testimony by both parties and their witnesses was had, and a report was issued on June 6, 1933. Subsequently, on June 29, of that year, plaintiff filed a motion for a voluntary

nonsuit. The motion was denied, and exceptions taken and allowed.

In his brief plaintiff objected to denial of the motion "without hearing."

The rule in this State is thus expressed, in *Washburn* v. *Allen*, 77 Me., 344, "The plaintiff, before opening his case to jury, or to the court, when tried before the court without the intervention of a jury, may become nonsuit as a matter of right; after the case is opened, and before verdict, leave to become non-suit is within the discretion of the court; after verdict there can be no nonsuit."

Under the foregoing rule, a hearing and report of Referees is equivalent to a finding by a single Justice or the verdict of a jury. Hence we hold that when, as in this case, report of Referees has been filed, it is the duty of the Court to deny a plaintiff's motion for voluntary nonsuit, and in doing so without hearing there is no abuse of judicial discretion.

Exceptions overruled.

HOWARD F. MAXIM *vs.* THE E. L. TEBBETS SPOOL COMPANY ET ALS.

Oxford. Opinion, March 29, 1934.

PATENTS. CONTRACTS. COURTS.

The line of demarcation between cases involving matters concerning patents which may properly be litigated in the State Courts and those in which the Federal Courts have exclusive jurisdiction is clearly drawn.

Summarizing the law as laid down by the authorities generally, it may be said that whenever a contract is made in relation to patent rights which is not provided for and regulated by a Federal statute, the State Court having jurisdiction of the parties is the proper tribunal to hear and decide the case; but where the plaintiff sets up some right, title or interest under the patent laws or at least makes it appear that some such right or privilege will be defeated by one construction or sustained by an opposite construction, the jurisdiction of the Federal Courts is exclusive.

There is a clear distinction between questions arising under the patent laws and cases arising under them. The former arises when plaintiff sets up a right under the patent laws as ground for recovery. Such cases are exclusively for the Federal Courts.

A grant to a patentee of an exclusive right to manufacture and vend an article described therein is a grant of property; and if the validity of the patent is unquestioned, State Courts will protect the owner of such property in the enjoyment thereof, by injunction, to the same extent as they would do were the subject matter of the litigation of any other description. But where as in the case at bar, the validity of the plaintiff's patent is put in question by the pleadings in a State Court, and the defendants present such proofs upon the trial as render it necessary for the Court to examine and pass upon conflicting patents or claims of priority in invention, in order to determine whether the plaintiff has such a property in the subject matter of the grant as entitles him to the exclusive and unmolested use of it, and an objection is taken to the jurisdiction of the Court for that reason, the bill must be dismissed; for in such cases the jurisdiction is in the Courts of the United States exclusively.

On exceptions by defendant. An action on the case to recover damages for an alleged conspiracy entered into by the defendants to deprive the plaintiff of a patent for an automatic lathe which the plaintiff claimed he invented. To the overruling of defendant's general demurrer, exceptions were seasonably taken. Exceptions sustained. The case fully appears in the opinion.

Nicolaus Harithas, for plaintiff.

Carl C. Jones,

Walter L. Gray, for defendants.

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

PATTANGALL, C. J. Plaintiff sued to recover damages based on the charge that defendants conspired to prevent him from securing a patent on an automatic lathe which he claimed to have invented. Defendants filed general demurrers which were overruled. Exceptions were seasonably taken, bringing the case forward. The sole issue, therefore, is whether or not plaintiff's declaration sets out a cause of action on which he is entitled to be heard.

The facts related and relied upon may be summarized as follows. In 1912 and 1913, plaintiff "conceived an invention" relating

to an automatic lathe used in wood turning, which "he disclosed to several parties"; in 1920 he "conceived" two improvements thereon which he disclosed to "several parties including one of the defendants in February, 1922"; in November, 1922, he was asked by another defendant to make drawings of the invention which he "conceived" in 1912 and 1913, which he made and delivered to this defendant and a few days afterward orally explained to the first named defendant the later invention. He was an employee of the defendant corporation from 1891 to 1926 and was in daily contact with all of the defendants. In 1923 defendants caused a lathe, embodying the various improvements invented by him, to be manufactured, and one of them stated to plaintiff that the lathe so equipped was a failure, notwithstanding which plaintiff in October, 1924, applied for patents covering the alleged improvements.

Meanwhile, one of the defendants in April, 1924, filed an application for a patent on a similar device, claiming to be the inventor thereof, although plaintiff alleges it embraced nothing more nor less than what he had himself invented and disclosed to defendants.

In October, 1926, the United States Patent Office declared an interference between the application of plaintiff and that of this defendant and a hearing was had thereon, the issue being that of priority of invention. On that issue the decision was against plaintiff, excepting as to two minor improvements. No appeal from this finding was taken, although appeal is provided for by Federal statute.

Plaintiff's case as thus stated rests primarily upon the proposition that he was entitled to a decision in his favor in this hearing. He seeks to review and set aside the findings of the United States Patent Office. He asks this Court to adjudicate the issue of priority of invention. Unless and until that issue is decided favorably to him, he has suffered no damage. He must establish that position as a basis for his claim and, unfortunately, his declaration sets out the fact that a decision on that point was recorded against him by a competent tribunal to which he submitted his case. He has had his day in court, and no appeal lies from the decision there rendered excepting that provided by Federal Law.

The line of demarcation between cases involving matters concerning patents which may properly be litigated in the State Courts and those in which the Federal Courts have exclusive jurisdiction is clearly drawn and fully discussed in the case of *Carleton* v. *Bird*, 94 Me., 182, 47 A., 154.

Summarizing the law as laid down by the authorities generally, it may be said that whenever a contract is made in relation to patent rights which is not provided for and regulated by a Federal statute, the State Court having jurisdiction of the parties is the proper tribunal to hear and decide the case; but where the plaintiff sets up some right, title or interest under the patent laws or at least makes it appear that some such right or privilege will be defeated by one construction or sustained by an opposite construction, the jurisdiction of the Federal Courts is exclusive.

In *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S., 255, the Court expressed the idea in these words: "There is a clear distinction between questions arising under the patent laws and cases arising under them. The former arises when plaintiff sets up a right under the patent laws as ground for recovery. Such cases are exclusively for the Federal Courts."

In *Hyatt* v. *Ingalls*, 49 Sup. Ct. (N. Y.), 375, the Court said: "A grant to a patentee of an exclusive right to manufacture and vend an article described therein is a grant of property; and if the validity of the patent is unquestioned State Courts will protect the owner of such property in the enjoyment thereof, by means of a decree of injunction, to the same extent as they would do were the subject matter of the litigation of any other description. But where the validity of the plaintiff's patent is put in question by the pleadings in a State Court, and the defendants present such proofs upon the trial as render it necessary for the Court to examine and pass upon conflicting patents or claims of priority in invention, in order to determine whether the plaintiff has such a property in the subject matter of the grant as entitles him to the exclusive and unmolested use of it, and an objection is taken to the jurisdiction of the Court for that reason, the bill must be dismissed; for in such cases the jurisdiction is in the Courts of the United States exclusively."

Plaintiff relied upon *Chapelle* v. *U. S. Machinery Corp.*, 272 Mass., 465, 172 N. E., 586, and *Becher* v. *Contoure Laboratories, Inc., et al*, 279 U. S., 388; but these cases are readily distinguished from that presented here. The cases cited involved a determination of the contractual rights of the parties with regard to certain patents. In the instant case, the pleadings raise directly the issue of priority of invention.

Defendants argued the insufficiency of plaintiff's declaration on other grounds than those we have discussed but we deem it unnecessary to go farther. On the face of the declaration, the State Court lacked jurisdiction.

Exceptions sustained.

LOUIS SALIEM *vs.* BENJAMIN GLOVSKY AND HARRY E. FOGG.

Oxford. Opinion, April 4, 1934.

PLEADING AND PRACTICE. ABUSE OF PROCESS. DAMAGES.

To sustain an action of malicious abuse of process these two elements are essential: (1) *The existence of an ulterior motive and,* (2) *an act in the use of the process other than such as would be proper in the regular prosecution of the charge.*

The gist of the wrong consists in the unlawful use of a lawful process and, hence, the validity of the process is not a defense to such an action.

One can not lawfully appoint a keeper of property wrongfully attached.

The sale by the attaching officer or the keeper appointed by him of property attached is improper use of process when made prior to sale on execution, unless it be by consent of the debtor and creditor; or of property liable to perish, be wasted, greatly reduced in value by keeping, or be kept at great expense.

Abandonment of the possession by a keeper dissolves the attachment.

Damages recoverable for abuse of process are compensatory for the actual results of the wrong and may include recompense for physical or mental injury, expenses, loss of time, and injury to business, property, or financial standing.

Punitive damages are justifiably recoverable where the unlawful acts are wilfully and designedly committed.

In the case at bar, where the command in the writ was to attach property to the value of $70.00, the jury was justified in finding that an attachment in value from $1000.00 to $1200.00 was not made in the exercise of sound discretion or good faith, and the making of such an excessive attachment constituted an improper use of the process.

The officer who made such an excessive attachment of all of the property in the store was not justified in depriving the owner of his key and excluding him from the premises.

The ulterior motive sufficiently appeared in the facts, that prior to the attachment defendants stated their purpose to be "to attach the store, put in a keeper and take what money they could get and then get out"; that when advised by an attorney that he considered such action illegal, reply was made by one of the defendants in the presence of the other that he had been doing that sort of thing and getting away with it and he considered it legal. Punitive damages were justifiably assessed.

On general motion for new trial by defendant. An action on the case for abuse of process. Trial was had at the November Term, 1933, of the Superior Court for the County of Oxford. The jury rendered a verdict for the plaintiff in the sum of $250.00. A general motion for new trial was thereupon filed by defendant. Motion overruled. The case fully appears in the opinion.

Albert Beliveau, for plaintiff.

Benjamin L. Berman,

David V. Berman, for defendants.

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

HUDSON, J. Action on the case for abuse of legal process. Defendants move to set aside the plaintiff's verdict for $250.00 because they assert it is against law and evidence and damages recovered are excessive.

Chronologically stated, the credible facts are (no evidence in defense was offered) that on September 2, 1932, the plaintiff, then indebted to the Bell Tire Company in the sum of $33.65 for tires and tubes, operated a small grocery store in the town of Rumford. Late afternoon of this day, these defendants, in behalf of said

Company, went to the office of a reputable attorney in Rumford and there had him make a common attachment writ on said claim, returnable to the Rumford Municipal Court on the fourth Tuesday of that month. By the writ the officer (Deputy Sheriff Roderick) was commanded "to attach the goods and estate" of Mr. Saliem "to the value of seventy dollars ($70.00)." The attorney, testifying as to the conversation in his office, participated in by the officer, both defendants, and himself, said: "They" (meaning defendants) "explained the situation to Mr. Roderick, what they wanted to do. . . . They said they wanted to attach the store of Mr. Saliem and put in a keeper and take all the money they could get and then get out:" and that he, the attorney, then informed them that he "didn't think it was the proper thing to do and didn't think it was legal. Wouldn't advise it," whereupon "Glovsky said he had been doing that sort of thing and getting away with it and he considered it legal."

Immediately thereafter, Glovsky alone appeared in the plaintiff's store, represented that he had a camp at the lake, and proceeded to purchase a bill of merchandise which he said he wanted to buy at a discount because he desired to re-sell the same. The plaintiff gave Glovsky his requested discount, the goods bought amounting to $16.17. This sale was in accordance with the plan proposed in the law office, for there, according to the testimony of the Deputy Sheriff, Glovsky "said he would go in and do the buying until he bought enough, and he came out and gave me" (meaning the Deputy Sheriff) "the signal before he turned the money over to Saliem, and I was to put Mr. Fogg in as keeper." Then, Glovsky's purchase made but not paid for, upon notice, Defendant Fogg and Deputy Sheriff Roderick came into the store, when the attachment was made. Glovsky requested the officer to put Fogg in as keeper, and he did. The officer took from Saliem the only key to the store and gave it to the keeper. The property attached was all of the plaintiff's stock and fixtures in the store, said merchandise in value being between $400.00 and $500.00, and the fixtures between $500.00 and $600.00, unencumbered except as to a small mortgage on a Frigidaire. At the time of the attachment, seven-thirty in the evening, the plaintiff remonstrated and told the officer that he did not think that he was acting within his legal rights.

After the departure of the officer, the keeper having the key and charge of the store, it was kept open for trade. Customers came in, to whom some of the attached merchandise was sold by the keeper, and some also by the plaintiff, but only by permission of the keeper. The keeper took and kept the money obtained from all sales so made, as well as the $9.00 or $10.00 that was in the cash register before the property was attached. Glovsky took possession of the merchandise he had purchased and paid its purchase price to Fogg, the keeper. In about half an hour after the Deputy Sheriff left, during which time these sales, as stated, had been made to the customers, the plaintiff left the store to seek the advice of an attorney and did not return that night. About ten o'clock that evening, the officer returned the key to him but neither the officer nor the keeper returned or offered to return any of the money received as above stated, nor was the plaintiff informed as to the amount retained.

Principles pertinent to abuse of process have lately been enunciated by this Court. To sustain such an action, "these two elements are essential: (1) the existence of an ulterior motive, and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge. The first of these elements may, perhaps, be inferred from the second, but existence of the first can not, in reason, dispense with proof of the second; for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial. . . . The test is, probably, whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do." *Lambert* v. *Breton*, 127 Me., 510, 514, 144 A., 864, 866; *Bourisk* v. *Lumber Company*, 130 Me., 376, 156 A., 382; 1 Cooley on Torts (3rd Ed.), 355, 356; *Spear* v. *Pendill* (Mich.), 130 N. W., 343; 1 R. C. L., 103, Sec. 4.

The plaintiff in this action sues not for malicious use but for malicious abuse of process. They are distinguishable. 1 R. C. L., 102, Sec. 2. "The fundamental distinction between malicious use and malicious abuse of process is that the first is an employment of process for its ostensible purpose, although without probable cause, whereas the second is employment of process for a purpose not contemplated by law. Another distinction is that, in the case of

malicious use, it must be shown that the action in which the process was used has terminated favorably to the plaintiff, whereas this is unnecessary in an action for malicious abuse." Sec. 373, 50 C. J., page 612, and cases cited.

In an action for abuse of process "the gist of tort or wrong consists in the unlawful use of a lawful process. The bad intent must culminate in an actual abuse of the process by perverting it to a use to obtain a result which the process was not intended by law to effect. . . . Regular use of process can not constitute abuse, even though the user was actuated by a wrongful motive, purpose or intent." Sec. 376, 50 C. J., pages 614 and 615; *Wood* v. *Graves*, 144 Mass., 365, 11 N. E., 567; Cooley, supra; *Spear* v. *Pendill*, supra; *Glidewell* v. *Murray-Lacy & Co., et al.*, 98 S. E., 665; 4 A. L. R., 225.

Validity of the process is no defense to an action for its abuse. *Glidewell* v. *Murray-Lacy & Co., et al.*, supra; Sec. 379, 50 C. J., page 617. But good faith is a defense in such an action. *Williams* v. *Eastman*, 208 Mass., 579.

All persons who knowingly participate in the abuse of process are liable for damages caused thereby . . . but a plaintiff in a process who does not direct or participate in abuse of the process by the officer and does not ratify his acts is not liable. Sec. 383, 50 C. J., page 618; *Wood* v. *Graves*, supra; 1 R. C. L., 109, Sec. 14.

We come, then, to apply the law, and particularly that stated in *Lambert* v. *Breton*, supra, to the facts in this case and thus will we examine, then, to discover whether there was "any ulterior motive," and, further, if there were "any acts in the use of the process other than such as would be proper" in its regular prosecution.

What was done with this process and by whom? The Deputy Sheriff was the agent of these defendants. They were personally present and directed his conduct.

First: Was the attachment excessive? Commanded to attach to the value of $70.00, property in value from $1000.00 to $1200.00 was attached. We are not unaware that our Court, in *Devereaux Company* v. *Silsby*, 120 Me., 362, on page 365, stated: "This Court has frequently held that attachments less or exceeding the directions in the precept do not render the officer serving the pre-

cept liable for an abuse of process where he acted in good faith and in the exercise of a sound discretion," or that in *Jensen* v. *Cannell*, 106 Me., 445, on page 447, 76 A., 914-915, this Court stated: "Generally an officer is not liable for attaching too much or too little property, if he exercises a sound discretion and acts in good faith." Also see *Williams* v. *Eastman*, supra. We hold that this jury was justified in finding in this case that neither sound discretion nor good faith was exercised.

Good faith and sound discretion required the attachment of at most not more than one tenth of this property. Only so much property attached, it might have been easily separated and removed by the officer, the plaintiff left in possession of his store and his conduct of it not otherwise interfered with. The attachment was grossly excessive.

Second: The appointment of a keeper was unnecessary and can not be justified. As it was an improper use of this process, whose *ad damnum* was only $70.00, to attach all of the stock and fixtures, so it necessarily follows that it was equally improper to appoint Fogg to keep it. One can not justify the appointment of a keeper of property wrongfully attached.

Third: The plaintiff's only key to the store was taken from him. True, he was not forcibly ejected. He was not locked out until later in the evening, when the keeper went from the store and locked the door. Still, the officer's taking of the key and consequent possession of the store deprived the plaintiff of his right to conduct and carry on his own business. If he would have been justified in attaching only a portion of the stock of merchandise and fixtures, then the remainder not attached could not lawfully have been separated from the plaintiff by lock and key, unless by his consent. The locking up of this store, without consent of the plaintiff, was clearly an abuse of this process.

Fourth: The keeper, if he could be said to be rightfully appointed as keeper, instead of keeping all of the property attached, sold some of it and converted it into cash. Our statute authorizing the attachment of personal property provides: "All goods and chattels may be attached and held as security to satisfy the judgment." R. S., 1930, Sec. 24, Chap. 95.

Prior to sale on execution, personal property attached can be sold only "by consent of the debtor and creditor." R. S., 1930, Sec. 31, Chap. 95, (and here consent by the debtor is lacking); or when "liable to perish, be wasted, greatly reduced in value by keeping, or be kept at great expense" such property, before sale on execution, may be sold by the attaching officer, without consent of the parties. R. S. 1930, Sec. 32, Chap. 95.

The sale of this property finds justification neither in the statute nor other sound principle of law. Such conduct was clearly without authority and improper use of this process.

Furthermore, the attachment was discharged when the officer returned the key to the plaintiff. "When the keeper abandons the possession, the attachment is dissolved." *Wheeler* v. *Nichols*, 32 Me., 233, 240; *Gower* v. *Stevens*, 19 Me., 92; *Brown* v. *Howard*, 86 Me., 342, 344, 29 A., 1094. The subsequent retention of the money taken was tortious and actionable.

Thus the defendants, by their own and their agent's acts, exceeded the authority of the process in these several respects, and, exceeding its authority, became trespassers *ab initio*. *Knight* v. *Herrin*, 48 Me., 533.

"An officer who attaches property on mesne process and sells it thereon, without the consent of the creditor and owner, or otherwise than by the mode prescribed in the statute, becomes a trespasser *ab initio*." *Ross* v. *Philbrick*, 39 Me., 29.

"When entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*. Or in other words, 'where the law has given an authority, it is reasonable, that it should make void everything done by an abuse of that authority, and leave the abuser, as if he had done everything without authority.' Bacon's Abr. Trespass, B." *Ross* v. *Philbrick*, supra, at page 31; *Boston & Maine Railroad* v. *Small*, 85 Me., 462, 465, 27 A., 349.

Improper acts alone, however, in the use of process are not enough to establish liability for abuse of process. Such acts must be accompanied by "the existence of an ulterior motive." *Lambert* v. *Breton*, supra. Was there such here? The motive may be inferred from the improper acts, as stated in the case last cited. Here there is no necessity to resort to inference, for there is abundance of

direct testimony to show that these defendants had an actual intent to make an improper use of this process. The jury could well believe, and no doubt did, that the real purpose of these defendants was not to cause this property to be attached and to be "held as security to satisfy the judgment" that might be obtained, but, adopting the Deputy Sheriff's sworn statement as to what these defendants said in the law office, "to attach the store, . . . put in a keeper, and take what money they could get and then get out." Thus, the ulterior motive appears, not inferentially but as actually declared by the defendants themselves. When advised by the attorney, whose conduct is to be commended, that he considered such action illegal, in spite of that advice, they persisted in making such improper use of this process. It is perfectly apparent that at the time of the taking out of the process, if not before then, this unlawful plan or scheme was concocted and determined upon. Cunning and deception attended its execution. No Court of Justice should countenance it. Ample evidence there was to justify the verdict of the jury on the question of liability.

Damages

"Damages recoverable for abuse of process are compensatory for the actual results of the wrong and may include recompense for physical or mental injury, expenses, loss of time and injury to business, property, or financial standing." Sec. 392, 50 C. J., page 621; *McGann* v. *Allen*, 105 Conn., 177, 184, 134 Atl. 810; *Malone* v. *Belcher*, 216 Mass., 209, 103 N. E., 637; *Barnett* v. *Reed*, 51 Pa., 190, 88 Am. Dec., 574.

We have no knowledge as to the way in which the jury arrived at the $250.00 declared in its verdict. Although the only specific item of compensatory damage was the money taken and not returned, yet the jury had the right, if it found the facts would warrant, to allow the plaintiff reasonable compensation for some of the other elements above enumerated.

Besides compensatory damages, "actual damage having been proved, the jury were justified in adding punitive damages. 'Acts wilfully and designedly done which are unlawful are malicious in respect to those to whom they are injurious.' *Page* v. *Cushing*, 38

Me., 528"; *Bourisk* v. *Lumber Company*, 130 Me., 376, 378, 156 A., 382, 383. It has not been made to appear that the damages assessed by the jury are excessive so as to warrant a new trial.

Motion overruled.

OVIDE BEAULIEU'S CASE.

Androscoggin. Opinion, April 4, 1934.

WORKMEN'S COMPENSATION ACT.

In measuring the compensation of an employee for partial incapacity under the statute, the loss or reduction in wages that he is able to earn after the accident, which is occasioned by general business depression, here referred to as "industrial conditions," must be considered. In so far as the wages of a partially incapacitated employee are reduced by that element, the loss must be borne by him, not the employer. That is not a loss "due to said injury."

An employee's wage loss resulting from partial incapacity is not measured solely by the yardstick of his former employment.

Compensation in such a case is awarded not for incapacity to do the same kind of work as before, but for incapacity to earn in his crippled physical condition.

The inquiry is whether, as a matter of fact, he can perform any kind of available work and thereby earn wages, and this need not be in the same kind of employment in which he was engaged at the time of the injury.

When, as in the case at bar, it does not appear that the occupation which the employee is now following is the same or similar to that in which he was engaged before the accident, the current wages of his former employment do not necessarily measure his present earning ability.

In such case, the question to be determined is what can the employee now earn in the work which is available and he has the capacity to perform, and how much more would he be able to earn in such employment if there were no depression. The difference between the amounts of these earnings is his loss due to the business depression or "industrial conditions."

The determination of this fact is not aided by a computation of the difference between the wages paid before and after the accident in the same employment.

The claimant here is entitled to have his compensation for partial incapacity determined by the rule here announced, and the case is remanded for that purpose.

A Workmen's Compensation Case. Appeal from decree in equity affirming decision of the Industrial Accident Commission on a petition for review of incapacity.

Appeal sustained. Court below to fix employee's expenses on appeal. The case fully appears in the opinion.

Benjamin L. Berman,
David V. Berman, for plaintiff.
Eben F. Littlefield,
William B. Mahoney, for respondents.

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

STURGIS, J. This is an appeal from a decree affirming the decision of the Industrial Accident Commission on a petition for review of incapacity filed by the employer and the insurance carrier.

Ovide Beaulieu, the claimant, on January 3, 1930, sustained an injury to his left knee while employed as a weaver in the Androscoggin Mills at Lewiston, Maine. On his original petition under the Workmen's Compensation Act, he was allowed compensation for total incapacity at the rate of $18 per week. On Petition for Review of Incapacity filed by the employer and the insurer, on December 14, 1932, he was found to be entitled to compensation for partial incapacity at the rate of $13.15 per week. On a new Petition for Review, his compensation for partial incapacity, as of September 6, 1933, was reduced to $8.93 per week. The claimant appeals from the decree in equity affirming this decision.

The weekly compensation which an employer shall pay an injured employee while the incapacity for work resulting from the injury is partial is fixed by Section 12 of Chapter 55 of the Revised Statutes, which reads:

> "While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to two-thirds the difference, due to

> said injury, between his average weekly wages, earnings or salary before the accident and the weekly wages, earnings or salary which he is able to earn thereafter, but not more than eighteen dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the eighth day following the accident."

The question raised here concerns the application of this provision under existing industrial conditions.

The Commissioner found that the employee, through partial incapacity to work as a result of his accident, could "do light work which did not require him to be on his feet too much" and could "earn one dollar a day or six dollars a week so far as the accident is concerned." He then wrote into his finding concerning the employee the following:

> "His pre-accident average weekly wage was $29.72. The present pay for similar work, i.e., the work he was doing when injured, is $19.40 per week; therefore, the sum of $10.32 per week wage loss is due to industrial conditions and not the accident. The wage loss due to the accident is $13.40 per week.",

and observing that "compensation for partial incapacity must be based upon wage loss due to the injury solely," ruled:

> "Therefore, beginning September 6, 1933, compensation for partial incapacity to work should be paid to said employee at the rate of $8.93 per week," etc.

We are of opinion that the statute does not authorize this method of computation. No cases are cited where, under similar or analogous compensation statutes, such a method has been approved, and we find none.

It is well settled that, in measuring the compensation of an employee for partial incapacity under such a statute, the loss or reduction in wages that he is able to earn after the accident, which is occasioned by general business depression, here referred to as "industrial conditions," must be considered. In so far as the wages which he is able to earn now are reduced by that element, the loss must be borne by him, not the employer. It is not a loss "due to

said injury." That is represented by his further loss of wages not due to his own fault. *Ray's Case*, 122 Me., 108, 119 A., 191; *Milton's Case*, 122 Me., 437, 120 A., 533; *Lavallee's Case*, 277 Mass., 538, 179 N. E., 214; *Trask* v. *Modern Pattern & Machine Co.*, 222 Mich., 692, 193 N. W., 830; *Jordan* v. *Decorative Co.*, 230 N. Y., 522, 130 N. E., 634; 2 A. L. R., 1637 n.

However, the workman's wage loss resulting from partial incapacity is not measured solely by the yardstick of his former employment. Compensation is awarded not for incapacity to do the same kind of work as before, but for incapacity to earn in his crippled physical condition. *Milton's Case*, supra. The inquiry is whether, as a matter of fact, he can perform any kind of available work and thereby earn wages. This need not be in the same kind of employment in which he was engaged at the time of the injury. *Connelly's Case*, 122 Me., 289, 119 A., 664. Obviously, when, as here, it does not appear that he is following the same or a similar occupation, the current wages of his former employment do not necessarily measure his present earning ability. The question to be determined is what can he now earn in the work which is available and he has the capacity to perform, and how much more would he be able to earn in such employment if there were no depression. The difference between the amounts of these wages is his loss due to the business depression or "industrial conditions." This can not be determined by computing the difference between the wages paid before and after the accident in the same employment.

The method of computation which we have outlined is in accord with that applied in *Durney's Case*, 222 Mass., 461, 111 N. E., 166. It is a reasonable and just rule which we think will carry out the intent and purpose of our statute, and should be followed in this State. The claimant here is entitled to have his compensation determined in accordance with it and the case is remanded for that purpose.

Appeal sustained.
Court below to fix employee's expenses on appeal.

INHABITANTS OF TOWN OF GEORGETOWN

vs.

WALTER E. REID, INDIVIDUALLY AND AS TRUSTEE FOR EVERETT H. REID AND RAYMOND REID.

Sagadahoc. Opinion, April 6, 1934.

TAXATION. PLEADING AND PRACTICE.

In an action of debt brought to recover an amount due for taxes, it is not necessary that the assessment contain a particular description of the property assessed or that separate valuations should be made in case there are several parcels, as in a case where forfeiture might ensue.

It is no defense to such an action that there was included in the assessment property not in fact owned by the taxpayer.

If he had not been at the time of the assessment an inhabitant of the plaintiff town and therefore not subject to the jurisdiction of its tax assessors, this defense might be tenable.

If land is taxed to a resident which he does not own or is not in possession of, it is merely an over-valuation of his property, and over-valuation is not a defense to an action of debt for taxes.

In the case at bar, the fact that a somewhat misleading entry, for which the taxpayer was responsible, referring to the ownership of property, appeared in the records of the town did not affect the validity of the assessment or furnish an excuse for refusing to pay the tax.

On exceptions by plaintiff. An action of debt by plaintiff town to recover taxes assessed against the defendant individually and as trustee for his two sons. Hearing was had before a Referee with right of exceptions reserved. The Referee found for the defendant. The plaintiff filed objection to the acceptance of the report, and seasonably excepted to the overruling of such objection. Exceptions sustained. The case fully appears in the opinion.

John P. Carey, for plaintiff.

Harry C. Wilbur, for defendant.

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

PATTANGALL, C. J. Action of debt to recover tax on real estate under the provisions of Sec. 64, Chap. 14, R. S. 1930. Referred under Rule of Court with right of exceptions reserved. Referee found for defendant. Plaintiff filed written objections to acceptance of report, setting forth the reasons therefor and, being overruled, seasonably excepted.

The defenses raised before the Referee were (1) that the property was insufficiently described, (2) that defendant was not the owner of certain lots which were included in the assessment, and (3) that the tax was assessed against "Walter E. Reid for Everett H. Reid and Raymond Reid."

In his brief, defendant's counsel raises another defense, not suggested below, namely that no proof was offered in support of the necessary allegation in plaintiff's writ that written direction was given by the municipal officers authorizing the bringing of the suit. That issue was not raised before the Referee, who apparently regarded it as a fact agreed upon because his sole reason for deciding in defendant's favor was that "as a matter of law the Assessors did not make a legal assessment of taxable property of this defendant in accordance with the statutes in such cases made and provided." Under these circumstances we do not feel that this somewhat belated defense needs to be considered here, plaintiff's exceptions relating solely to the finding quoted above.

The report does not make clear in just what respect the Referee found the assessment illegal, but the only defects argued before him were the three first above mentioned. We may, therefore, reasonably conclude that he regarded one or more of them as decisive against plaintiff.

Taking them in order, we find that on the authority of *Cressey* v. *Parks*, 76 Me., 532; *Rockland* v. *Ulmer*, 84 Me., 503, 24 A., 949; *Rockland* v. *Farnsworth*, 111 Me., 315, 89 A., 65; *Town of Milo* v. *Milo Water Co.*, 131 Me., 372, 163 A., 163; and *Bucksport* v. *Swazey*, 132 Me., 36, 165 A., 164, it is not necessary in this form of action that the assessment contain a particular description of the property assessed or that separate valuations should

be made in case there are several parcels as in a case where forfeiture might ensue.

Nor is the defense that there was included in the assessment property not in fact owned by the taxpayer open to him in these proceedings. If he had not been at the time of the assessment an inhabitant of the plaintiff town and thereby not subject to the jurisdiction of its assessors, this defense might be tenable. *Ware* v. *Percival*, 61 Me., 391; *McCrillis* v. *Mansfield*, 64 Me., 198. As it is, if land was taxed to him which he did not own or of which he was not in possession, in addition to that which he did own or possess, it was merely an over-valuation of his property. An over-valuation may consist in assessing to a person property which he does not own as well as in estimating too highly that which he does own, *Bath* v. *Whitmore*, 79 Me., 182, 9 A., 119, and over-valuation is not a defense to this action.

There remains then only the criticism that assessing the tax against "Walter E. Reid for Everett H. Reid and Raymond Reid" excuses the non-payment of the tax. It appears that in 1930 Walter E. Reid was an assessor of the plaintiff town and that it was under his direction that this method of designating the taxpayer was adopted. He testified that the property in question was in part owned by him and in part by his sons Everett and Raymond. He was a resident of the plaintiff town. His sons resided elsewhere. Apparently the peculiar entry in the assessment was made as a matter of convenience. It did not affect the amount of tax paid. No one suffered injustice by it. Without doubt, upon request of defendant and information furnished by him, the assessors would have made an assessment in exact accordance with ownership. At present, defendant, being in possession of the property, is liable for the tax and the fact that he caused a somewhat misleading entry to be made in the records of the town furnishes no excuse for refusing to pay it.

Exceptions sustained.

IDA W. TURCOTTE *vs.* LENA B. DUNNING.

Penobscot. Opinion, April 6, 1934.

JURY FINDINGS. COURTS. VERDICTS.

Where issues involved are purely of fact, the jurors are the authorized triers of the same and are also judges of credibility of witnesses; but if a result is reached by them which is so out of accord with any reasonable interpretation of the evidence the duty of the Law Court is plain. It will set aside a verdict which finds support only in testimony which on its face is incredible or is obviously untrue.

In the case at bar, the plaintiff's testimony was most unsatisfactory. Her son was the sole corroborating witness called by her and his testimony added nothing to her case. The requirements necessary to sustain the burden of proof which the law demands in order to justify the verdict were not satisfied. There was no sound basis for the verdict in favor of the plaintiff.

On general motion for new trial by defendant. An action of assumpsit with account annexed and also money counts, brought to recover for board and care of one Hattie Chick, in the plaintiff's home, and at a small private hospital at Bangor; also for an assigned account of plaintiff's son to plaintiff, for care. The jury found for the plaintiff in the sum of $1128.97. A general motion was thereupon filed by the defendant. Motion sustained. The case fully appears in the opinion.

Fellows & Fellows, for plaintiff.

Charles P. Conners, for defendant.

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

PATTANGALL, C. J. On motion. Assumpsit to recover $870.00 claimed to be due for board, room, care and nursing of an invalid under an alleged agreement of defendant to pay the same; in addition thereto an account in favor of plaintiff's son amounting to $2,225.00 based on services rendered in connection with the case

and assigned to plaintiff. Plea, general issue and statute of limitations. The assigned account was clearly barred by the statute. It was not considered by the jury and need not be further discussed. Verdict for plaintiff in the sum of $1,128.97. This result was apparently reached by awarding the full sum of $870 claimed to be due plaintiff personally and adding thereto $258.97 as interest. On no theory of the case could interest to this extent be justified. In any event, the verdict is wrong in amount.

The issue presented here is whether or not the evidence warranted a finding in plaintiff's favor of the principal amount stated above with the addition of interest properly computed.

We approach the decision of that question with some hesitation. The issues involved were purely of fact. The record discloses a sharp conflict of testimony and we are fully aware that jurors are the authorized triers of fact and are also judges of the credibility of witnesses. We neither desire nor intend to assume their responsibilities nor to usurp their powers; but if a result is reached by them which is so out of accord with any reasonable interpretation of the evidence that we can not place upon it even the stamp of a reluctant approval, our duty is plain. This Court has not hesitated and will not hesitate to set aside a verdict which finds support only in testimony which on its face is incredible or is obviously untrue.

The story of the case begins in 1915 when one Hattie Chick, a woman approaching sixty years, first became an inmate of a hospital or nursing home conducted by plaintiff, remaining there until December, 1916. She resided elsewhere from the last named date until March, 1918, when she returned and remained until her death in October, 1931. During this period she was without means and for a time defendant, whose husband was a cousin of Miss Chick's, collected from various relatives sufficient money to pay the bills at the hospital, at first banking in Miss Chick's name, who gave weekly checks to plaintiff, and later giving personal checks to plaintiff.

During the first year, the charge was $12.00 per week, then $18.00, and when Miss Chick's condition became such that she required constant care, the compensation was increased to $35.00. This continued to January, 1924, the last payment by defendant

being on January 10th for the four weeks ending January 5th and amounting to $140.

Defendant then notified plaintiff that she had transferred to Mrs. Bertha Walker the balance of the money which she had collected for Miss Chick, that she would have no more to do with the matter, and that Mrs. Walker would attend to the payments so far as possible from that time on. In pursuance of this arrangement, defendant left with Mrs. Walker the sum of $128.50. Mrs. Walker collected further money and continued to make payments to plaintiff up to September 1, 1927, at which time the account is claimed to have been $870 in arrears. During a portion of that period, Mrs. Walker also paid plaintiff's son $425 for assisting his mother. In September, 1927, plaintiff sold the hospital, but Miss Chick remained there until her death.

Plaintiff had no dealings with defendant and, so far as the evidence shows, no conversation or correspondence with her between January, 1924, and June 27, 1928, when plaintiff mailed defendant a bill for the amount claimed. Nothing further was done until suit was brought in September, 1932.

Plaintiff claims that the reason for her delay in bringing the suit was that her arrangement with Mrs. Dunning was that the bills contracted after January, 1924, in so far as they were not paid by Mrs. Walker, should not be paid until after Miss Chick's death, and that she had a definite, positive agreement with defendant that whatever balance was due her should then be paid. But, the record contains a letter written by plaintiff to defendant under date of June 27, 1928, which negatives both of these propositions.

"Bangor, Me., June 27, 1928.

Mrs. George W. Dunning,
371 Union St.,
Bangor, Me.
Dear Madam:—

Inclosed find statements of accounts as yet unpaid concerning the care of Miss Hattie Chick.

These accounts are long past due, and as you are the one that looked after having her brought to my place I feel that you are the one responsible for the payment of the bills. If it

is not possible for you to pay the whole at one time, will you make small payments at regular intervals, until the bills are paid?

Trusting this will meet with your approval, I remain

Yours truly,

Ida W. Blake,

98 Court St., Bangor, Maine"

The position taken by plaintiff with regard to the claim assigned to her by her son casts suspicion upon the good faith of her case. In order to bring this account within the statute of limitations, credits totaling $425 appear as having been made at various dates between March 11, 1924, and June 13, 1927. But defendant introduced as an exhibit a bill rendered by the son for his services in attending Miss Chick at $35.00 per week from October 27, 1923, to October 24, 1925, for $2,600.00, against which was credited without date the sum of $425. The bill, however, was rendered October 20, 1925. He received no payment on account after that time and the attempt to bring his claim within the statute failed. Significant also is the fact that, although plaintiff and her son both strenuously insist that they looked to defendant and defendant alone for their pay and that their reason for doing so was because of an express agreement entered into between the parties to that effect, this bill rendered by the son in 1925 was made out to Mrs. Charles M. Walker who was described therein as debtor to Henry B. Blake.

Prior to the introduction of this document, the son testified that it was explicitly agreed between defendant, plaintiff and himself in October, 1923, that defendant was to pay both his mother's bill and his own against Miss Chick, but that they were not to be paid until after Miss Chick's death. He did not explain why if this were so he should have rendered the bill above referred to. He also testified that the first payment of cash which he received was $150 paid by defendant to him in March, 1924, although it appears that defendant ceased to make any payments on Miss Chick's account in January, 1924, and that whatever he or plaintiff received after that date came from Mrs. Walker.

He was the sole corroborating witness called by plaintiff and his testimony added nothing to his mother's case. Plaintiff's own testimony, already referred to, was most unsatisfactory. She stated that the charge agreed on for the care of Miss Chick in March, 1918, was $18 per week. Checks received by her during the following year strongly indicate that it was $12, which would necessarily reduce the balance due her by about $300, although she says that she was paid in full up to August, 1926. She stated that Hattie Chick never paid any part of the bill with her personal check but defendant produced seventeen checks for $12, each signed by Miss Chick, payable to plaintiff and endorsed by plaintiff, cashed during the year following March, 1918. She admitted that her own signature looked somewhat familiar but insisted that she had received no checks such as were shown her, although finally, after long cross examination, she agreed that she might be in error concerning the matter.

Without going into unnecessary details, her testimony may be summarized as evasive, inconsistent and contradictory. It does not satisfy the requirements necessary to sustain that burden of proof which the law demands in order to justify a verdict in her behalf. On the other hand, the testimony of defendant, corroborated in important details by that of Mrs. Walker and defendant's husband, is straightforward and convincing.

An impartial study of the record fails to reveal sufficient basis for the conclusion that any contractual relation existed between the parties. Defendant charitably endeavored to assist in caring for a needy family connection. She assumed no legal liability and she should not be penalized for having performed this kindly and praiseworthy act.

Motion sustained.

PETER MEDICO

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

PHILIP MISTERLY *vs.* SAME.

JOSEPH MIANO *vs.* SAME.

SALVATORE GASCONE *vs.* SAME.

Cumberland. Opinion, April 18, 1934.

INSURANCE. PLEADING AND PRACTICE. EQUITY.

R. S. 1930, CHAPTER 60, SECTIONS 177-179.

A foreign insurance company must, before transacting business in this state, appoint the Insurance Commissioner its attorney, upon whom there may be the serving of legal processes against it; and such service so made shall be deemed sufficient.

While the general equity rule is that all persons materially interested in the case must be parties thereto, the cases distinguish between those who may properly be made parties to a suit in equity and those who must necessarily be joined.

Necessary or indispensable parties are those without whom the Court will not proceed to any decree, even as to the parties before it. Formal or nominal parties, sometimes termed proper parties, are those who have no interest in the controversy between the immediate litigants but who have an interest in the subject matter which may be conveniently settled in the suit and thereby prevent future litigation. Such persons may be made parties or not at the option of plaintiff, provided the decree can be made in their absence without prejudice to the parties before the court. The criterion by which to determine when one is a mere formal or nominal party is whether or not a decree is sought against him.

The fact that one is a non-resident relieves plaintiff from joining him as a party even though, had he been a resident, it might have been necessary to do so.

A defense based on the alleged giving of false testimony by the insured is more properly designated fraud or collusion than lack of co-operation. Such a defense is admissible under our statutes.

In order to make out this defense, lack of good faith must be proved and is not to be inferred. An honest error in the statement of facts or failure to disclose some collateral fact will not necessarily excuse insurer. To escape liability, the insurer must show that variances between different statements of the insured resulted in substantial prejudice and injury. The insured must have wilfully misinformed the company concerning the essential facts or in collusion with the plaintiff attempted to defraud the company by refusing to testify to the real facts or testifying falsely concerning them in order to relieve the insurer from liability.

The record in the case at bar discloses no evidence of bad faith on the part of the insured and no more inconsistencies in the different versions which he gave of the accident than may be accounted for by honest error or failure of recollection.

On report. Bills in equity against the defendant as insurance carrier of James Dodero, brought under the provisions of Sections 177 to 180 of Chapter 60, R. S. 1930, to reach and apply the insurance money to satisfaction of judgments obtained by the plaintiffs against James Dodero. Both plaintiffs and Dodero were residents of Massachusetts. Bills sustained with costs. Decrees in accordance with this opinion. The cases fully appear in the opinion.

Benjamin L. Berman,
David V. Berman, for plaintiffs.
William B. Mahoney, for defendant.

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

PATTANGALL, C. J. On report. Bills in equity to reach and apply the obligations of insurer in satisfaction of judgment debts of an insured in favor of plaintiffs, brought under authority of Sections 177 and 179, Chapter 60, R. S. 1930. The cases may be discussed as one, the issues being the same in all.

Defendant is a foreign corporation authorized to transact business in this state and subject to process through service on the Insurance Commissioner of Maine. It issued in Massachusetts on January 22, 1931, to one James Dodero of Brockton in that Com-

monwealth, a policy of insurance against personal liability for negligence in the operation of his automobile. The policy contained an extra-territorial coverage provision within the limits of the United States and Canada. The assured is bound by a condition in the policy to co-operate with the insurer in investigating and settling resulting claims, securing the attendance of witnesses, and defending actions. While this insurance was in effect, the automobile owned and driven by insured collided with a bridge abutment in Maine, thereby causing physical injury to the plaintiffs, residents of Massachusetts but then commorant in Lewiston, his guest passengers. During the succeeding twelve months, plaintiffs recovered judgments severally in tort actions against the insured in the Superior Court of this state, which judgments were returned unsatisfied and are still in force and effect. After the requisite lapse of time, these bills in equity were brought and service had through the Insurance Commissioner.

Counsel for the insurance company defended the actions at law. During the course of the trial, he insisted that there was a material difference between statements made by defendant prior to the trials and his testimony. Reserving whatever defenses might be open to the insurer by reason of the conduct of the insured, should actions be brought against it by judgment creditors, counsel went on with the cases with the result stated.

In these proceedings, the defenses relied upon are (1) no legal service on defendant, (2) non-joinder of insured as a party, and (3) breach by insured of the co-operative clause in the policy.

So far as the first point is concerned, it is only necessary to say that a foreign insurance company must, before transacting business in this state, appoint the Insurance Commissioner its attorney, upon whom there may be the serving of legal processes against it; and such service so made shall be deemed sufficient. Secs. 105, 118, Chap. 60, R. S. 1930.

We see no merit in the second point raised by defendant. The general equity rule is that all persons materially interested in the case must be parties thereto, but this is subject to a number of well defined exceptions, and its application rests in the sound discretion of the Court. *Stevenson et al* v. *Austin et al*, 3 Met., 474; *Smith* v. *Williams et al*, 116 Mass., 510; *Sears* v. *Hardy*, 120 Mass., 524.

The cases distinguish between those who may properly be made parties to a suit in equity and those who must necessarily be joined. The distinction has been drawn many times and may be generally summarized as follows.

Necessary or indispensable parties are those without whom the Court will not proceed to any decree, even as to the parties before it. This class includes all persons who have an interest in the controversy of such a nature that a final decree can not be made without either affecting their interests or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. Accordingly, persons whose interests will necessarily be affected by any decree that can be rendered are necessary and indispensable parties, and the Court will not proceed to a decree without them, while parties whose interests will not be affected by the decree sought, although they may have an interest in the subject matter, are not ordinarily necessary parties, although they may sometimes be proper parties under the general rule in order to avoid a multiplicity of suits. Therefore the object rather than the subject of the suit must be looked to, and only those are necessary parties whose rights are involved in the purpose of the bill. Also the prayer for relief is important in determining the requisite parties, as one need not be made a party against whom no relief is demanded, provided his rights will not necessarily be affected. But all those against whom relief is prayed are necessary parties, and persons whose rights will be affected by the decree are necessary parties, although no relief is prayed against them.

Formal or nominal parties, sometimes termed proper parties, are those who have no interest in the controversy between the immediate litigants but who have an interest in the subject matter which may be conveniently settled in a suit and thereby prevent future litigation. Such persons may be made parties or not, at the option of the plaintiff, provided the decree can be made in their absence without prejudice to the parties before the Court, and especially may they be omitted where it is impracticable to bring them in. The criterion by which to determine when one is a mere formal or nominal party is whether or not a decree is sought against him.

It has been decided in our Court that if one of two joint promissors has neither domicile nor property in this state, a separate action may be maintained against the other. *Dennett* v. *Chick et al*, 2 Me., 191; *Rand* v. *Nutter*, 56 Me., 339.

In the instant case, the insured was a non-resident. He is described in the pleadings as a resident of Brockton, in the Commonwealth of Massachusetts, and is so referred to in briefs of both plaintiff and defendant, as well as in oral testimony and documentary exhibits. According to the rule laid down in *Laurence* v. *Rokes*, 53 Me., 110, and affirmed in *Hyams* v. *Old Dominion Company*, 113 Me., 337, 93 A., 899, the fact that he was a non-resident relieves plaintiff from joining him as a party even though, had he been a resident, it might have been necessary to do so.

As to the third defense relied upon, plaintiff argues first, that it is not made out in fact, and second, that it is not open to defendant because of the provisions of our statutes.

Sec. 180, Chap. 60, R. S. 1930, enumerates certain defenses open to the insured in cases such as this, among which lack of co-operation does not appear but fraud or collusion between the judgment creditor and the insured is included. The two defenses are not synonymous. Lack of co-operation may include fraud or collusion or may consist simply in refusal to act.

In the instant case, the defense is based on comparison between a statement made to an investigator by the insured and testimony given by him in the trial of the tort cases, which it is alleged reveals inconsistencies and contradictions only to be accounted for by wrongful intent on the part of insured. If the evidence warranted such a conclusion, fraud or collusion would be proven. The giving by the insured of intentionally false testimony, material in its nature and prejudicial in its effect, would be good ground for releasing the insurer from liability.

It may be unimportant whether such a defense is denominated lack of co-operation or more properly described as fraud. In fact, in many opinions and in the text-books, it is not infrequent to find the two defenses confused. But neither is made out simply because of slight discrepancies in statements of the insured made at different times and under different circumstances.

Such discrepancies are admissible but are not, per se, sufficient

to excuse performance of insurer's contract. *Solomon* v. *Ins. Co.*, 229 N. Y. S., 257. Lack of good faith must be proved and is not to be inferred. *Roth* v. *Casualty Co.*, 195 N. Y. S., 865; *U. S. Casualty Co.* v. *Drew*, 5 Fed. (2nd) 498. Slight differences in statements as to speed of automobile are unimportant. *Donahue* v. *Peppard* (Minn.), 248 N. W., 48. An honest error in the statement of facts or failure to disclose some collateral fact will not necessarily be held to excuse insurer. *Buckner* v. *Buckner* (Wis.), 241 N. W., 342.

It is not intended that mistakes made by the insured in giving his version of the facts would render the policy ineffectual nor that the answer should be as explicit and certain as an answer to a complaint or constitute a warranty that the facts reported would be substantiated at the trial. *Moran Bros. Co.* v. *Casualty Co.* (Wash.), 94 Pac., 106. To escape liability, the insurer must show that the variances between different statements of the insured resulted in substantial prejudice and injury. *Conroy* v. *Casualty Co.* (Pa.), 140 Atl., 905.

Considered in the light of the reported cases, in order to relieve the insurer from liability, the insured must have wilfully misinformed the company concerning essential facts or in collusion with the plaintiff attempted to defraud the company by refusing to testify to the real facts of the accident or testifying falsely concerning them. *Bassi* v. *Bassi* (Minn.), 205 N. W., 947; *Rohlf* v. *Indemnity Co.* (Ohio), 161 N. E., 232.

In *Taxicab Motor Co.* v. *Casualty Co.* (Wash.), 132 Pac., 393, it appeared that at the inquest an officer of the insured made certain statements which conflicted with his evidence at the trial. It does not appear, however, that the officer testified falsely at the inquest or that his testimony was anything more than the result of mistake. Under such circumstances, the policy would not be avoided.

The conduct of the assured in furnishing an incorrect though not intentionally false statement to the company at the time of the accident, which tended to absolve him from blame, and with which his testimony at the trial was in substantial conflict, the latter constituting virtually a confession of negligence on his part, would not furnish a defense to the insurer in the absence of evidence that

the testimony given at the trial was false. *Guerin* v. *Indemnity Ins. Co.*, 107 Conn., 649, 142 A., 268.

An examination of the record of this case shows certain unimportant variances between the statement made by the insured to the insurer's agent and his testimony given in court. We find no evidence of bad faith on his part and no more inconsistencies in the different versions which he gave than might well be accounted for by passage of time and the fact that in the first instance he was relating his story in answer to informal and probably more or less suggestive questions, while later he was testifying in a courtroom with the accompanying embarrassment incident to such an occasion.

There is nothing in the record to warrant the conclusion that the insured was guilty of fraud or collusion or of lack of co-operation. This being so, a discussion as to whether or not the latter defense is open to the insurer under the circumstances of this case and in view of our statute seems unnecessary.

Bills sustained with costs.
Decrees in accordance with this opinion.

WILLIAM MCSHANE *vs.* GEORGE A. DINGLEY.

Cumberland. Opinion, April 20, 1934.

BILLS AND NOTES. NOTICE.

That a promissory note is, by its terms, payable at any bank in a stipulated city or town, affords the holder the right to elect the bank in such place at which the instrument should be presented in order to charge the indorser.

Legally sufficient notice of dishonor may be given on a holiday. The indorser may not complain if he has received notice earlier than might, in strictness, have been required.

In the case at bar, a note payable at any bank in Portland, was, on the day it became presentable for payment, in a bank in that city, where the holder had left it for collection. This was proper presentment, though, because of a gubernatorial proclamation, during the recent banking debacle, the bank did not, on that day, open for business.

The indorser's liability having been fixed, and he made, as to the holder of the note, a principal-debtor, that status was not changed merely by being told, at a later day, for the second time, that payment of the note had not been made, nor by formal protest of the note still more recently.

On exception by defendant. An action of assumpsit to recover the sum of $1000.00 and interest, on a promissory note duly issued to the plaintiff, the defendant being the last endorser. The issue involved legality of presentment. Hearing was had before a referee, right of exceptions being reserved. The referee found for the plaintiff in the sum of $1069.67. Exception was taken by the defendant. Exception overruled. The case fully appears in the opinion.

Eugene F. Martin, for plaintiff.

Berman & Berman, for defendant.

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

DUNN, J. In the reference of this case, under a rule by the Superior Court, the right to except as to questions of law was re-

served. The referee found for the plaintiff and so reported. The defendant filed in the court of the referee's appointment, written objections to the acceptance of the report, but the objections were overruled, and the report accepted as the basis for a judgment. An exception was allowed the defendant.

There was little or no contention at the hearing before the referee as to the factual situation. Indeed, the relevant facts were virtually admitted. What was actually in issue was the law.

And now, when the exception to the acceptance of the report comes in question, the test of the value of that exception is whether, as a matter of law, such acceptance was vitally harmful to the defendant.

The action is on a promissory note made by Dingley's, Inc., to the order of the plaintiff, and indorsed in blank before delivery by three individuals, the defendant being the last indorser. The note was given March 4, 1932, for $1000, on one year, with interest. The day of maturity, March 4, 1933, fell on Saturday. Under the Negotiable Instruments Act, the note was presentable for payment on the next succeeding business day; that is, March 6, 1933. R. S., Chap. 164, Sec. 85.

The note was, by its terms, payable at any bank in Portland. This afforded the holder the right to elect the bank in that city at which the instrument should be presented in order to charge the indorser. *Kerr* v. *Dyer*, 116 Me., 403, 102 A., 178. The stipulation of the place of payment is for the accommodation of the payee. Daniel on Negotiable Instruments, Sec. 716. Choosing the Casco Mercantile Trust Company, the plaintiff left the note there, prior to March 4, 1933, for collection.

When March 4th came, the Casco Mercantile Trust Company did not open for business, nor did it on Monday, March 6th, nor on Tuesday, March 7th; the reason why will be stated presently.

On March 4, 1933, serious conditions prevailed to common knowledge in banking circles; the people were restive as they never had been under economic distress; there was apprehension of mass movements in directions which the actors would not stop to comprehend; alarming incidents succeeded themselves; the very financial structure of the State was threatened. The Governor, on his

own initiative, declared that day, and Monday, March 6, 1933, bank holidays.

On the next day, the Legislature, recording its approbation of the previous action of the Executive, essayed ratification and confirmation thereof; and, itself recognizing the existence of an emergency concerning public economy, passed an act, which the Governor approved, designating the day of the enactment of the law, that is, Tuesday, March 7, 1933, and the two days next following, banking holidays. Laws of 1933, Chap. 21. Banking being a business of public character, it is properly subject, within rational limits, to statutory regulations to protect the public welfare. *Wedesweiler* v. *Brundage*, 297 Ill., 228, 130 N. E., 520; *Sneeden* v. *City of Marion*, 64 F. (2d), 721; *Allen* v. *Prudential Trust Co.*, 242 Mass., 78, 136 N. E., 410; *Cosmopolitan Trust Co.* v. *Mitchell*, 242 Mass., 95, 136 N. E., 403.

The note remained in the bank, unpaid, until March 7, 1933. The plaintiff then repossessed it. He had, to quote the referee, "the idea of collecting a dividend from the maker." No collection, it is fair inference, was made. The referee definitely states that the note was not, at this time, presented to the maker. The payee (plaintiff) did, however, on that day, inform the indorser (defendant), orally, that the note had not been paid. On March 11, 1933, the payee again likewise informed the indorser that payment had not been made. On March 20, 1933, the note was returned to the bank for protest.

The referee held that, notwithstanding "the informal bank holidays . . . and the attempted ratification thereof," the note was properly presented for payment on Monday, March 6th, "by being in the said bank on March 4th and March 6th."

The referee also held that notice of dishonor given by plaintiff to defendant on March 7th, (one of the legislative holidays), was legally sufficient. He cited *Rosenthal* v. *Levine*, 128 Me., 447, 148 A., 675, and noted that that decision ruled this phase of the controversy.

Objections to the acceptance of the report of the referee were, in brief: (1) That custody of the note by a bank which, both on Saturday, the day of maturity, and the next succeeding business day,

was closed against business, because of the gubernatorial proclamation, was not a presentment which put the note in dishonor; (2) that, in any event, withdrawal of the note by the payee from the bank, on March 7th, was premature, and that the spoken words of the payee were therefore ineffectual to fix the liability of the indorser.

These are the matters to be adjudged. The decision of anything else is not called for by the record. The objections made no other point.

It suffices, in this case, to say that the exception does not measure to the requirement of the law. The fact that the bank was closed did not affect the sufficiency of the presentment for payment. *Berg* v. *Abbott*, 83 Pa. St., 177, 24 Am. Rep., 158; *Schlesinger* v. *Schultz*, 96 N. Y. S., 383. Notice of dishonor, though given on a holiday, is held competent. *Deblieux* v. *Bullard*, 1 Rob. (La.), 66, 36 Am. Dec., 684. The indorser may not complain if he has received notice earlier than might, in strictness, have been required. *Farmer* v. *Rand*, 16 Me., 453.

The indorser's liability having been fixed, and he made, as to the holder of the note, a principal-debtor, that status was not changed merely by being told, on March 11th, for the second time, that payment of the note had not been made, nor by formal protest of the note on its return to the bank on March 20th. *Rosenthal* v. *Levine*, supra.

In accepting the report of the referee, and ordering the entry of judgment thereon, the judge did not err.

Exception overruled.

STATE OF MAINE

vs.

T. D. PARENT, AS PRINCIPAL, AND

W. J. AYOOB AND FRANK DORSEY, AS SURETIES.

Aroostook. Opinion April 20, 1934.

SCIRE FACIAS. PLEADING AND PRACTICE. ACTIONS. R. S., CHAP. 144, SEC. 20.

Writs of scire facias are amendable in the same manner as declarations in other cases.

The omission through clerical error to include in the declaration of a writ of scire facias a portion of the original recognizance is a defect of form and amendable.

By statute no provision is made for the prisoner's personal surrender except in the case of cash bail.

The right of personal surrender, however, exists at common law, and upon such surrender, if to the proper court, the bail is discharged.

Upon such surrender the prisoner is again in the custody of the law and no longer in that of the sureties.

The contract of suretyship does not prevent the principal from exercising his rights under R. S. 1930, *Chapter* 144, *Section* 20.

The court having lawful custody, custody neither actual nor constructive remains in the sureties.

Under said Section 20, *the court has jurisdiction both of the person and of the matter. Proceedings of a court may be valid in part and void as to the residue, for the distinction must be observed between mere excess of jurisdiction and the clear absence of all the jurisdiction over such matter.*

Where the performance of the condition of a recognizance has been rendered impossible by the act of God or of the law of the obligee, the default is excused.

In the case at bar, where the respondent upon conviction in the municipal court appealed therefrom and recognized with bail for his appearance in the

appellate court, and subsequently thereto but before the sitting of the appellate court availed himself of his rights under Section 20, Chapter 144, R. S. 1930, to present himself personally before the lower court for the purpose of withdrawing his appeal and abiding by the sentence appealed from and did unconditionally withdraw his appeal, although the lower court in non-compliance with the statute did not order the respondent to comply with the original sentence but continued the case for sentence, nevertheless on said facts the sureties were discharged.

The lower court in continuing the case, when under said statute it should have ordered the respondent to comply with the original sentence, exceeded its authority, but such error did not invalidate acts performed within its jurisdictional rights, in which was included the right to receive the respondent into the custody of the law.

On report on agreed statement of facts. An action of scire facias on recognizance given by the defendant, Parent, with the defendants Ayoob and Dorsey as sureties. The question at issue involved the effect as to the sureties of the principal defendant's surrender of himself to the custody of the municipal court under the provisions of Section 20, Chapter 144, R. S. 1930. Judgment for State against defendant Parent. Judgment for defendants Ayoob and Dorsey. The case fully appears in the opinion.

George B. Barnes, for State.

O. L. Keyes,

David Solman, for defendants.

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

HUDSON, J. Report upon an agreed statement of facts. Action of scire facias on recognizance given by the defendant, Parent, as principal, with the defendants, Ayoob and Dorsey, as sureties.

Condensed, the material facts are that on November 4, 1929, in the Fort Fairfield Municipal Court in Aroostook County, the principal defendant was found guilty upon the charge of illegal possession of intoxicating liquor and was sentenced to pay a fine and costs, and to be imprisoned for the term of sixty days, and in default of payment of the fine and costs to be imprisoned six months additional. He appealed and for his appearance at the appellate court recognized with Ayoob and Dorsey as his sureties. Before

record of the case was forwarded to the higher court, and prior to its sitting, by virtue of the provisions now found in R. S. 1930, Sec. 20, Chap. 144, but then in effect, with Counsel he appeared before the municipal court and "unconditionally withdrew his appeal" and "surrendered himself to the jurisdiction of the Court," whereupon the judge of that Court "required payment of the fine and costs" and then entered upon the record the notation "continued for sentence." No new bail was given or offered.

At the following term of the appellate court, the principal and bail were defaulted, and judgment of the lower court affirmed. Mittimus and scire facias were ordered to issue.

This suit was begun March 18, 1930. Preliminarily we proceed to decide a question of pleading in relation to an amendment allowed to the declaration in this writ of scire facias.

In the appellate court, it appearing that the recognizance recited only that the respondent was "sentenced to pay a fine of $100.00 and to pay the costs of prosecution taxed at $21.37 and amounting to $121.37, and to stand committed until said fine and costs are paid," the presiding Justice, without objection, allowed it to be amended so as to show that the sentence not only provided for fine and costs, but for imprisonment.

The County Attorney then moved to amend so that the declaration would conform to the amended recognizance, and it was stipulated "that if, in the opinion of the Law Court, said motion was allowable, it should be considered that the amendment was made."

This motion is allowable, and so, in accordance with the stipulation, it shall be considered that the amendment is made. "A writ of scire facias is unquestionably amendable in the same manner as declarations in other cases." *Marsh Brothers & Co.* v. *Bellefleur*, 108 Me., 354, 356; *Beane* v. *Ingraham, et al.*, 128 Me., 462, 463. The omission through clerical error to include in the declaration a portion of the original recognizance is a defect of form and therefore by statute amendable. R. S. 1930, Sec. 11, Chap. 96.

No question as to liability of the principal is raised. Counsel for the defendants states in his brief: "The question as presented in this case is whether or not the sureties are liable upon the above state of facts." Their contention is "that he (meaning the principal) was properly before the magistrate for the withdrawal of the

appeal and that when the Judge allowed him to go without day the sureties were discharged from their obligation."

Upon sentence, appeal therefrom and the taking of the recognizance, the jurisdiction of the lower court ceased "unless the appeal be withdrawn as and in the manner authorized by statute." *Cote* v. *Cummings*, 126 Me., 330, 334; *State* v. *Houlehan*, 109 Me., 281. Without the aid of statute, it could not accept withdrawal of the appeal or receive the respondent back into custody for any purpose in connection with the case. At common law, the surrender, either personal or by the sureties, can not be made to the lower court, although the recognizance is still in its possession. *Stegars* v. *State*, 2 Blackf. (Ind.), 104; *Bird* v. *Terrell*, 128 Ga., 386, 57 S. E., 777.

Sec. 20, Chap. 144, R. S. 1930, then and now in effect, provided that: "The appellant may, at any time before such copy has been sent to the appellate court, come personally before such magistrate, who may permit him, on motion to withdraw his appeal and abide by the sentence appealed from; whereupon, he shall be ordered to comply with said sentence and the sureties taken upon the recognizance upon such appeal shall be discharged."

Two Maine cases have dealt with this statute.

In *State* v. *Houlehan*, supra, the trial court admitted a docket entry from a municipal court, purporting to show that the respondent previously in another action had been convicted on a charge of search and seizure, that he appealed, furnished sureties for his later appearance in the superior court, and that subsequently thereto the lower court nol prossed the sentence as to imprisonment and allowed the respondent to pay the fine and costs. An exception was taken to the admission of this evidence which was sustained, our Court saying: "If, then, the Judge of the Municipal Court has no power after imposition of sentence save in strict accordance with statute in matters of appeal, any entry he may make upon his docket or cause to appear as of record of an act respecting the person and case not within his statutory powers regarding the appeal is as much beyond his power as the act itself." It will be noted that the language of the Court is restrictive. It is not stated that everything that the Court does in connection with the withdrawal of the appeal is null and void. All it holds is that as

under the statute the lower court had no right to change the original sentence from fine and jail to fine only, so the docket entry showing such change was inadmissible.

In *Cote* v. *Cummings*, supra, subsequently to conviction, appeal therefrom and recognizance, the lower court suspended the imprisonment of the original sentence and placed the respondent on probation for a year. The Court held that this could not be done, "because the powers as to sentences conferred by the probation act . . . were for judicial consideration at the time the sentence was imposed" and said: "When the sentence had been imposed and the session ended, as it was ended in this case, the time for such consideration had passed and the only power left for the Judge on August 31st, when the appeal was withdrawn, was the statutory power to order compliance with the sentence which had been imposed." In that case the Court was dealing only with the matter of sentence and the words "only power" in the opinion refer only to the power of the Court as to sentence.

Neither *State* v. *Houlehan* nor *Cote* v. *Cummings* holds that the lower court before which the respondent appeared to withdraw his appeal, and to which Court he surrendered himself, did not have lawful custody of him.

"In the theory of the law, by a recognizance of bail in a criminal action the accused is committed to the custody of the sureties as to jailers of his own choosing, and in so far placed in their power that they may at any time arrest him on recognizance and surrender him to the Court." *U. S.* v. *Lee*, 170 Fed., 613, 614, 6 C. J., 952, footnote 14.

"One charged with a crime when released on bail is, as Blackstone says, delivered into the friendly custody of the surety. 2 Cooley Blackstone, 4th Ed., 1064." *Cook* v. *Harper*, 135 N. E. (Ind.), 349, 350.

By statute no provision is made for the prisoner's personal surrender, except in case of cash bail. R. S. 1930, Chap. 145, Sec. 29. The right, however, exists at common law and upon such surrender, if to the proper Court, the bail is discharged.

Only by reason of Sec. 20 aforesaid did this principal have the right to surrender himself to the lower court, and then only for the purpose of withdrawing his appeal and abiding by the original

sentence. Upon such surrender, he was again in the custody of the law and no longer in that of his sureties. They lost their control of his person; their rights as sureties ceased. Nothing in the contract of suretyship prevented him from exercising his rights under said Section 20.

The consideration moving to the sureties in their suretyship contract was that they should have the custody of the principal and when the obligee, the State, by its Court, received him into its custody, the performance of the condition in the contract was obstructed and interrupted by the act of the obligee and thereby the sureties were released from further performance of the condition.

"Upon the release of a person on bail, he is in the custody of the sureties and the consideration of the bond accruing to the sureties is his freedom from any other custody." *People* v. *McReynolds*, 102 Cal., 308, 36 Pac., 590.

"Their (the bails') undertaking is based upon the idea that the prisoner is to be in their keeping and under their control, but here the control and keepership are both placed absolutely beyond their reach by the action of the Court at the instance of the State, which now seeks to make the defendant responsible for the laches of its own officers. We know no principle of law by which this can or ought to be done. The law enforces no duty where the power to perform has been taken away or divested by the party in whose favor the obligation exists." *State* v. *Holmes*, 23 Iowa, 458, 461.

"When the Court took charge of the accused and placed him in the custody of its own officer, the power of the bail over him ceased. They had no longer any control over him, and having been deprived thereof by the act of the Court, they were no longer answerable for his appearance for any purpose whatever." *Commonwealth* v. *Coleman*, 2 Met. (Ky.), 382.

"The law does not contemplate that the surety shall be responsible for the appearance of a prisoner in the lawful custody of the law. It is to be presumed that the arrest and custody takes the place of the bail to secure appearance. The surety being discharged of liability, we know of no law which will permit the obligation to be again imposed upon him without his consent." *State* v. *Orsler*, 48 Iowa, 343.

"Here, after indictment found, the Judge issues a Bench War-

rant over his own signature and seal ordering an arrest. That arrest was made, the principal was in the custody of the sheriff and escaped. It would, as it seems to us, be an outrage to charge the original securities with this escape. He was in the lawful custody of the sheriff. The securities could not control him. He was held by the sheriff for this very crime."*Smith* v. *Kitchens*, 51 Ga., 158, 21 Am. Rep., 232.

The Court, having lawful custody, custody neither actual nor constructive remained in the sureties. The Court had this custody, not only with the right, but the statute-imposed duty, to order the respondent, his appeal having then been withdrawn unconditionally, to comply with the original sentence. The respondent complied fully with this statute but the Court did not. Had the Court performed its duty, the sureties would have been discharged. Are they to be denied their discharge, to be penalized, not for the fault of the principal nor their own, but for the fault of the Court itself?

This case is distinguishable from one where the principal is subsequently arrested on another charge, imprisoned, and later escapes, in which the sureties are still held to liability, for they contract as against such an unlawful act as willful escape.

"When the bail is given in a criminal case, the only undertaking of the State is not to deprive the surety of the custody of the principal so far as the particular offense is concerned. *Wheeler* v. *State*, 38 Tex., 173. A subsequent legal arrest of the principal for the same offense as that for which the bail was given operates to discharge the sureties." *Weever* v. *State*, 56 Iowa Apps., 394, 105 N. E., 517; *Commonwealth* v. *Skaggs*, 152 Ky., 268, 153 S. W., 422, 44 L. R. A. (N. S.), 1064. "The rule is otherwise where the subsequent arrest is for another offense. Under such circumstances the arrest does not ipso facto discharge the surety. When bail is given the State assumes no obligation not to make a subsequent arrest of the accused for other offenses." *Cook* v. *Harper*, supra.

Here the principal's enlargement was due to no unlawful act upon his own part. The State, by its Court, was responsible therefor. "Ordinarily the escape is a deliberate unlawful act on the part of the prisoner and the sureties take the risk of such acts on the part of the person bailed, but do the sureties also take the risk of

connivance in the unlawful act by the State authorities? We think not. Such a conclusion is beyond all reason, for it amounts to the proposition that the sureties take the risk that the other party to a contract may hinder or prevent performance of their obligations." *People* v. *Myers, et als.*, 8 Pac. (2d), (Cal.), 837.

To hold these sureties liable would make them responsible not only for the return of the prisoner to the custody of the law but for the faithful performance of the Court's statutory duty after such return, over which the sureties have no control. If such a Court itself is not liable to one wronged, where having jurisdiction it exceeds its rights, unless it acts in bad faith (*Rush* v. *Buckley*, 100 Me., 322, at page 331), it would be unreasonable and unjust to place responsibility upon the sureties for the error of the Court. Such responsibility they did not contract to assume.

State's Counsel, in his able brief, contends that "The sentence so imposed was therefore beyond the jurisdiction of the magistrate and the whole proceeding whereby respondent attempted to withdraw his appeal was absolutely void and of no effect." With this we can not agree. The lower court had jurisdiction both of the person and the subject matter. The subject matter, under Section 20, was the withdrawal of the appeal. "Proceedings of a court may be valid in part and void as to the residue, as where its action in some part is within its jurisdictional powers, while in other parts its action is without jurisdiction." 15 C. J., Sec. 5, page 733.

"The distinction must be observed between mere excess of jurisdiction and the clear absence of all jurisdiction over such matter." *Rush* v. *Buckley*, supra.

In this case the Judge of the lower court, having jurisdiction as above stated, exceeded his rights when he continued the case for sentence instead of ordering the respondent to comply with the original sentence. That done in excess of jurisdiction, however, did not invalidate his acts performed within his jurisdictional rights, in which was included the right to receive him into the custody of the law.

The United States Supreme Court, in deciding a case in which the Judge, having jurisdiction of the person and the subject matter, exceeded his right as to sentence, sentencing the respondent to a penitentiary when clearly there was no right so to do, said: "It

is plain that such Court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the Court keeps within the limitations prescribed by the law, customary or statutory. When the Court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void." In re Bonner, 151 U. S., 242, 256, 257.

Justice Field, in the same case, further said (see page 258): "If the Court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess." In that case the prisoner was discharged on habeas corpus on the ground that the Judge's act as to sentence was in excess of his jurisdiction; but, nevertheless, the Court decided that the proceeding was void only as to the excess and held that the respondent so discharged could be brought back into the sentencing court for sentence in accordance with the law. In this connection, the Court said: "In a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excesses committed by the court of which he complains. In such case the original court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender."

While it is not essential to the decision in this case, we do state that we see no reason why the error committed by the lower court while acting under said Section 20 could not be corrected by return of the respondent to such court for an order, as provided by statute, for compliance with the original sentence.

"It is a general principle of law that where the performance of the condition of a bond or recognizance has been rendered impossible by the act of God or of the law, or of the obligee, the default is excused. . . . There is a diversity says Brian, Ch. J., where a condition becomes impossible by the act of God, as death, and where by a third person, or stranger, and where by the obligor, and where by the obligee; the first and last are sufficient excuses of forfeiture,

but the second is not; for in such case the obligor has undertaken that he can rule and govern the stranger, and in the third case it is his own act. . . . Baron Comyn lays down the rule, that the performance of a condition shall be excused by an obstruction of the obligee, or by an interruption of the performance by him." *People* v. *Bartlett*, Hill's Reports (N. Y.), vol. 3, page 570.

"It may be stated as the general rule that where performance of the condition of the undertaking of bail is excused or rendered impossible by an act of God, of the obligee, or of the law, or where, from the last cause, the risks of the sureties are increased or their remedy against the principal affected, they are discharged; and this may take place without discharging the principal." 6 C. J., Sec. 279, page 1025.

However, "if the surrender of the principal is prevented by any fault of the surety in connection with the act of God, or of the government, or of a sentence of the law, he will not be discharged." *State* v. *McAllister*, 54 N. H., 156.

Very many cases could be cited in support of the general doctrine above stated as to discharge of sureties for impossibility of performance. They may be found collated in 3 R. C. L., Sec. 58, page 49; 6 C. J., Sec. 279, page 1025; likewise in 23 L. R. A. (N. S.), 137; 50 L. R. A. (N. S.), 255; 30 L. R. A. (N. S.), 211, in which are exhaustive notes with citations dealing with the liability of bail where a principal fails to appear through no fault of his own.

It should here be noted that our holding in this case is not in conflict with the decision in *State* v. *Leo*, 128 Me., 441. In the Leo case the impossibility of performance (death) was subsequent not only to the default of the bail but the commencement of the action of scire facias. To our knowledge, no case in Maine has decided that impossibility of performance before the time for performance, due to the act of God, or of the law, or of the obligee, does not discharge the surety.

The sureties in this case by operation of law were discharged when the principal, availing himself of his statutory right, seasonably surrendered himself into the custody of the municipal court, unconditionally withdrew his appeal, and submitted himself to the possibility of an order of compliance with the original

sentence. The acceptance of such custody was within the right and jurisdiction of the Court and its failure to order such compliance as to sentence, accompanied with its continuation of the case for sentence, contra to the statute, was simply an act in excess of its jurisdiction which did not invalidate its previous reception of the principal into its custody.

Judgment for State against defendant Parent. Judgment for defendants Ayoob and Dorsey.

STATE OF MAINE *vs.* EUGENE W. MORANG.

Kennebec. Opinion, May 2, 1934.

CRIMINAL LAW. R. S. 1930, CHAPTER 129, SECTION 31.

The offense defined and made punishable in R. S. 1930, *Chapter* 129, *Section* 31, *which makes it a felony for any person more than eighteen years of age to have carnal knowledge of the body of a female child between the ages of fourteen and sixteen years, is an offense distinct from rape.*

It is not a defense that the female child consents, nor is it necessary to establish that the intercourse was accomplished by force and without her consent.

In the case at bar, the jury had a right to consider the respondent's sudden departure to Nova Scotia and his acts in connection therewith and estimate what weight should be given them as an indication of conscious guilt.

The respondent's attempt to establish an alibi did not carry conviction to the jury. They were justified in rejecting it.

The jury were not clearly wrong in finding that it was physically possible for the attack to have been made substantially as the prosecutrix described it. If she exaggerated the amount of force used, the jury were not bound to reject her entire testimony.

Falsus in uno, falsus in omnibus is not a binding maxim. When applied to the account of an incident of this kind by a young girl, it may properly be deemed of little weight.

On all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him.

On appeal by respondent. Respondent indicted under the statute which makes it a felony for any person more than eighteen years of age to have carnal knowledge of the body of a female child between the ages of fourteen and sixteen years, was found guilty. A motion to set aside the verdict was denied, and respondent thereupon appealed. Appeal denied. Motion for a new trial overruled. Judgment for the State. The case fully appears in the opinion.

H. C. Marden, County Attorney, for State.

Berman and Berman, for respondent.

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

STURGIS, J. The respondent appeals from his conviction in the trial court on an indictment brought under the statute which makes it a felony for any person more than eighteen years of age to have carnal knowledge of the body of a female child between the ages of fourteen and sixteen years. The crime is not rape, but a distinct offense defined and made punishable in Revised Statutes, Chap. 129, Sec. 31. It is not a defense that the child consents, nor is it necessary to establish that the intercourse was accomplished by force and without her consent.

The prosecutrix testified that in the late afternoon of Thursday, April 28, 1932, as she was walking home from high school, she was overtaken by the respondent in his automobile and accepted his invitation to ride along with him. She told the jury that, when they were nearly opposite a large billboard standing back from the road and more or less surrounded by trees and bushes, the respondent suddenly drove his car in behind it, stopped the engine, and, having pushed her back into the corner of the seat, held her so she could not resist and forced her to submit to sexual intercourse.

The prosecutrix was fourteen years old. She says this was her first act of intercourse and the step-ins she wore were stained with blood. She further said that she was frightened, but made no outcry and, when the act was consummated, immediately got out of the car and walked home across the fields. She did not report the affair to her grandparents, with whom she lived, until the first of the following June when she told her grandmother what had hap-

pened and learned that she had noticed the stains on her undergarment when it came in for washing, but supposed its condition was due to natural causes. The grandmother confirms this statement and fixes the date of the discovery of the stains as the last Saturday of April, which was two days after the time of the alleged offense.

The girl states that within a week and a half after the intercourse she met the respondent in Gardner and told him she knew she was in trouble. She also went to a physician, as she says, in May or June and confirmed her pregnancy. She sought but was denied birth prevention. On January 7, 1933, following, she gave birth to a child.

The State supported its charge against the respondent further with evidence which tends to show that on May 14, 1932, which was soon after the time when the girl claims she saw him at Gardner and told him of her condition, he sold his cow, resigned his position as a deputy sheriff of the county, and fled to Nova Scotia with his wife and adopted son. The respondent admits that he suddenly decided to leave Maine and started his journey the same day. He gave no notice of his proposed resignation to the sheriff, but sent it in through his attorney without disclosing his intended departure or destination. He left a position which paid him more than thirty dollars a week and had no assurance of employment in the Provinces. Some months later, he took up blacksmithing, which was his trade, and remained there for about a year. He himself did not send any letters back into the State, but his wife carried on a correspondence for a few months with their former friends and neighbors by sending her letters to their attorney for remailing. It is evident that for a time at least the respondent's whereabouts were unknown, and the inference is warranted that this was intentional. The jury had a right to consider these facts and estimate what weight should be given them as an indication of conscious guilt. *State* v. *Lambert*, 104 Me., 394.

The girl testified she was attacked between five and five thirty in the afternoon, but does not fix the time with exactness. The respondent, who was employed at the county jail, offered evidence to show that it was his custom to get through his work at five o'clock in the afternoon, and insists that he came off duty at this time on

the day in question. His wife told the jury that she called her husband on the telephone at the jail and talked with him between five and five thirty that afternoon, but it does not appear that she consulted any timepiece and the Telephone Company has no record of the call, although calls made between the same exchanges on the next day are shown by the defense. The respondent produces no other witness who attempts to confirm his story that he remained at the jail that day after he finished work. Nor is it at all clear that either time or distance prevented him from being at the scene of the alleged attack as stated by the prosecutrix. The jury were justified in rejecting this alibi.

We are not convinced that it is physically impossible for the attack to have been made as described. Stress is laid on the fact that the girl claims she was forced to submit and it is argued that the situation of the parties prevented intercourse unless both were willing. The prosecutrix, although she resisted at first, may have finally become passive. Her claim of resistance may be entirely false. The jury, however, were undoubtedly aware, as all men know, that a young girl, when discovered in her shame, often seeks refuge in a story of unwilling submission to force. They saw her, heard her testify, and believed that the respondent could and did have intercourse with her at the time and place she named. They were not bound to reject her entire testimony because her story of the use of force seems doubtful. *Falsus in uno, falsus in omnibus* is not a binding maxim. When applied to a story of this sort, it may properly be deemed of little weight.

We are of opinion, in view of all the testimony in the case, that the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him. No exceptions having been reserved, that is the only question before the court.

Appeal denied.
Motion for a new trial overruled.
Judgment for the State.

LAURENCE C. ANDREW

vs.

GEORGE BISHOP AND

INHABITANTS OF THE TOWN OF WINDHAM.

LAURENCE C. ANDREW

vs.

W. C. FRENCH AND J. S. FRENCH AND

INHABITANTS OF THE TOWN OF WINDHAM.

Cumberland. Opinion, May 3, 1934.

LIENS. EQUITY. PLEADING AND PRACTICE.

In the absence of instructions from a debtor, who owes on several distinct indebtednesses, to which indebtedness to apply a payment, the creditor may apply such payment to any such indebtedness he chooses.

Courts now construe lien statutes liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute.

To a bill in equity seeking to enforce a lien claim, the general contractor is a proper party. If payment is claimed against him, he is a necessary party. But in a bill where no judgment is prayed for against him, and where a final decree can be rendered between the parties to the bill without radically and injuriously affecting the interest of the general contractor, or without leaving the controversy in such situation that its final determination may be inconsistent with equity and good conscience, he is not an indispensable party, and hence need not be joined.

In the case at bar, the general contractor was not an indispensable party, and his joinder in the bill in equity was not required.

The general contractor in his payment to the plaintiff, made no application of the check of $2000.00, suggested none, and it was the unquestioned right of the plaintiff to apply its proceeds, as he did, to a prior indebtedness.

On exceptions by defendant Town of Windham. Two cases in equity to recover by lien process on materialman's lien. Cases were heard by a Referee who found for the plaintiff in each case. These findings were affirmed by the sitting Justice. Exceptions were seasonably taken by the defendant town. Exceptions overruled. The cases fully appear in the opinion.

Clifford McGlauflin, for plaintiff.

Charles E. Gurney, for defendant Town of Windham.

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

BARNES, J. These two cases, tried together, arise under the law establishing a materialman's lien.

W. C. French and J. S. French, hereinafter called French Bros., in 1931 entered into a contract with the Town of Windham to build a high school building, and gave a bond for the full completion of the same.

Defendant George Bishop contracted with French Bros. to do the plastering, and furnish plastering material. He secured material and did the plastering.

Of the material that Bishop furnished, plaintiff claimed to have sold him, on open account, an amount worth $899.02. No part of this sum having been paid, plaintiff, within the time allowed by statute, perfected and filed a materialman's lien for that amount.

By his second bill plaintiff seeks to recover of the town for material furnished, on open account, to French Bros. and used in construction under the high school building contract.

French Bros. owed him, when their work ceased, for material furnished them and, as he alleged, used in the construction of the school building, and as provided and required by statute, he perfected and filed his lien claim for the sum of $5334.57.

Before the hearing a decree pro confesso was duly entered against defendant, George Bishop; a Bonding Company, surety on the French Bros. bond, was permitted to intervene as a party defendant, and a special master was appointed to take an account of the dealings and transactions between the parties to each suit and to report his findings.

All questions of law were reserved for decision by the sitting Justice, and right of exception to the master's rulings and findings were reserved by each party.

The master heard the cases, found the claim of lien duly established, and that material used in construction of the building was furnished by plaintiff to Bishop, worth $880; that the account was in no part paid and overdue, with computations of interest.

He found that material used in the building was furnished by plaintiff to French Bros., worth $5277.43, in no part paid for, with interest computations.

He found that early in November, 1931, defendant paid French Bros., on construction account, the sum of $6746.62; that French Bros. maintained a commercial account with a Portland bank, in which this sum, with another of $1000, was deposited on November 16, and that on or about November 18, plaintiff received by mail from French Bros., a check for $2000, drawn against their account in said bank, with no direction as to application of the payment. He further found that on the day when plaintiff received the check of French Bros. they owed to plaintiff, on account for merchandise sold and delivered to them, a "prior indebtedness" of more than $2000.00, and that plaintiff had applied the check of French Bros., as soon as received, to reduction of such prior indebtedness.

In his decrees the sitting Justice found for the plaintiff in the case against Bishop in the principal sum of $880.00, to which were to be added costs of suit and interest. The defending Inhabitants of the Town of Windham raised the point that French Bros. the principal contractors were not made parties defendant and were necessary parties to the maintenance of the bill. The point was overruled and exceptions preserved.

In the case against French Bros. the Justice found for the plaintiff in the sum of $5277.43, to which were to be added costs and interest.

The intervening Bonding Company and the defendant Town made claim that the $2000.00 paid to plaintiff on or about November 18 should have been applied upon the bill for material furnished on the order of French Bros. for the high school building work, so as to reduce the amount due under the lien claim by that sum, and to that extent to relieve the Bonding Company, on its liability.

The Justice overruled this contention and held that plaintiff had the right to appropriate the payment to the precedent and independent indebtedness from French Bros. to him.

To this ruling the Bonding Company and the Town reserved exceptions.

Ruling on the exceptions in inverse order, we hold that in the case before us French Bros. could have required the payment to be applied to any indebtedness from them to plaintiff, and since they admittedly gave no indication of their wish in the matter, it was the unquestioned right of plaintiff to apply the payment as he did. *Wilson* v. *Russ*, 20 Me., 421; *Plummer* v. *Erskine*, 58 Me., 59; *Phillips* v. *Moses*, 65 Me., 70; *Blake* v. *Sawyer*, 83 Me., 129.

Such being the ruling of our court it is plain that if the action had been at law the decision complained of would be sustained.

In equity it must stand, unless thereby irremediable wrong would result, a situation which can not arise, because, in its answer, the defendant Town admits possession of a greater sum than the amount involved here, "retained by reason of the failure of W. C. and J. S. French to complete said building and deliver the same to said defendant, free of all liens."

Our conclusion in the case of *Plaintiff* v. *W. C. French, J. S. French and Inhabitants of the Town of Windham* is, therefore that the exceptions be overruled.

In the case against Bishop and Town of Windham, the contention of defendants is that, for non-joinder of indispensable parties, French Bros., as defendants, judgment should be for the defendant Town.

It is perhaps usual to raise this issue by demurrer or answer; but if it is done as here the point is saved. *Morse* v. *Machias Co.*, 42 Me., 119, 129; *Evans* v. *Chism*, 18 Me., 220.

A lien for a materialman was unknown to the common law. It was given by statute, and, because such is its origin, every jurisdictional requirement must be met and all conditions precedent as prescribed by statute must be complied with, before the lienor can prevail.

It is, however, no longer true in this jurisdiction that the statute is to be construed strictly against the claimant.

As long ago as 1895 our Court said, "In determining the proper interpretation of lien statutes at this time, courts need not feel hampered by the earlier decisions. These statutes were such an innovation upon the common law of real property that for some time the courts construed them most strictly. To this day there are no such statutes in England. In this country, however, they are now general and familiar and their equity and beneficence are conceded even by land owners. Courts will now construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute." *Shaw* v. *Young*, 87 Me., 271, 32 A., 897.

In the case at bar a materialman brought suit for the purchase price of materials sold to a sub-contractor, and did not make the principal contractor a party. Is this non-joinder a fatal omission, and does the materialman, because of such omission lose his lien on the real estate improved under his contract?

On this phase of procedure under the lien statute there has been no decision in this court.

Other courts furnish a great variety in opinion, unavoidably so because each state statute has its own wording, and few are similar throughout.

Procedure in this state is outlined as follows, "The liens mentioned . . . may be preserved and enforced by bill in equity against the debtor and owner of the property affected, and all other parties interested therein, filed with the clerk of courts etc." R. S., Chap. 105, Sec. 33.

The debtor and the owner of the property must be made parties to the bill at some stage of the case: otherwise it will fail for lack of parties to give the court jurisdiction.

These must be joined, unless the owner waive his right to the assistance of the debtor, who in the simplest case is the contractor. So it is perhaps not surprising that in recital of conclusions of opinions on the general subject the reader finds a statement to the effect that the great weight of authority is that the principal or original contractor is a necessary party defendant to an action to perfect a materialman's lien and that it can not be enforced without making him a party, unless the owner waives his right to have him joined.

But such discussion leads inevitably to a consideration of the purpose of the proceeding.

However true it may be that a very important purpose is the obtaining of the lien on the particular property, yet it must be borne in mind that the fixing of the debt for the materials is the very essential of the action and that unless the debt exists and is enforceable then the ultimate purposes concerning the existence of the lien and its subsequent enforcement can never arise. But when the debtor is a subcontractor the rule as to joinder of parties may be different.

No doubt the original contractor is a proper party in any materialman's action, and under our statute any person interested in the property improved may be made a party.

But the precise question in this case is whether a materialman, who has sold to a subcontractor, must at his peril make the original contractor a party before he is entitled to judgment.

Referring to the rules upon that subject, the Supreme Court of the United States "points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly called necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow*, 17 How., 130, 15 U. S. (L. ed.), 158.

It follows, as of course, that any person against whom a judgment is prayed for must be made a party to the action. The original contractor must under some circumstances be made a party.

Hence, generally, he is a necessary party. But our statute does

not require that a personal judgment be recovered against the contractor as a prerequisite to the enforcement of the lien.

And the fact that he is the debtor does not make him an indispensable party to the action to enforce the lien. So far as the rights of the owner are concerned, the contractor is not, in the absence of a statutory requirement, a necessary party. *Caltrider* v. *Isberg*, 148 Md., 657, 130 A., 53; *Holden* v. *Mensinger*, 175 Cal., 300, 165 Pac., 950; *Becker* v. *Hopper*, 23 Wyo., 209, 147 Pac., 1085; *Brace and Hergert Mill Co.* v. *Burbank*, 87 Wash., 356, 151 Pac., 803; *American Radiator Co.* v. *Conner Plumbing & Heating Co.*, 277 Mo., 548, 211 S. W., 56; *Thompson* v. *Michelli*, La. (1933), 148, So., 287; *Hubbard* v. *Moore*, 132 Ind., 178, 31 N. E., 534.

In a state where the statutes impose the duty on the original contractor of defending any lien suit prosecuted against the owners, "this statute has been construed to mean that the original contractor should be joined as a co-defendant in an action brought by a materialman whose contract was with a subcontractor, but that such requirement is not jurisdictional, and its nonperformance will not be fatal to the judgment." *Hughes Bros. Paint Co.* v. *Prewitt*, Mo., 157, S. W., 120.

Further we have no need to speculate as to all persons interested in the "controversy," as in many jurisdictions where they are all made indispensable parties by statute.

It is urged that because our statute makes a proper party any person interested in the property affected, the original contractor is an indispensable party, and cases are cited as upholding this doctrine.

They are readily distinguishable from the case at bar, by reason of different enabling statutes, and for other reasons.

Warner v. *Yates*, 118 Tenn., 550, 102 S. W., 92, merely holds that under a statute authorizing initial process by attachment the original contractor is a necessary party because he is the party sued. To the same effect are *May and Thomas Hardware Co.* v. *McConnell*, 102 Ala., 557, 14 So., 768, and *Giant Powder Co.* v. *San Diego Flume Co.*, 78 Cal., 193, 20 Pac., 419.

In *Luttrell* v. *Knoxville, etc., Rd. Co.*, 119 Tenn., 492, 105 S. W., 565, suit was on material sold to a subcontractor, and the subcontractor was held a proper party.

Vreeland v. *Ellsworth*, 71 Iowa, 349, 32 N. W., 374, settles only the point, in that jurisdiction, that a subcontractor can not obtain a decree foreclosing a mechanic's lien without having obtained a judgment against the original contractor.

In *Jenkins Lumber Co.* v. *Cramer Bros.*, 182 Iowa, 174, 160 N. W., 42, the petition named original contractor, subcontractor and owner and showed upon its face that the original contractor was not made a party. It sought to enforce a lien on the property for material sold to the subcontractor. The Court says, if the original contractor had been made a party the only defense the owner could have interposed would have been that there was not as much due the original contractor as plaintiff was asking to have established against the property, and held that the original contractor was not a necessary party.

Union Pac. Ry. Co. v. *Davidson*, 21 Colo., 93, 39 Pac., 1095, is not a precedent here, because of a statute making a judgment in favor of a laborer, and against a subcontractor, a valid set-off, to the full amount thereof, in favor of the owner, against the original contractor, and the latter was not joined, as party defendant in the laborer's suit.

In *Granquist* v. *Western Tube Co.*, 240 Ill., 132, 88 N. E., 468, a subcontractor furnished labor and material in construction for defendant, and proceeded to establish his lien, against the owner, defendant, without joining the original contractor or another subcontractor.

The statute required that all "parties in interest" be made parties to the petition, and that parties in interest shall include "all persons who may have any legal or equitable claim to the whole or any part of the premises upon which a lien may be attempted to be enforced under the provisions thereof, or who are interested in the subject matter of the suit," a jurisdictional prerequisite.

This Court has held that "Indispensable parties to a bill in equity are those whose interests in the subject matter of the suit and the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the Court can not proceed: an indispensable party is one who has such an interest in the subject matter of the controversy, that a final decree can not be rendered be-

tween the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such situation that its final determination may be inconsistent with equity and good conscience." *Hyams* v. *Old Dominion Company*, 113 Me., 337, 93 A., 899.

If, however, the original contractor, in a materialman's bill against a subcontractor and the owner, has an interest that is separable from the interests of the defendants who are joined in his bill, he may not be an indispensable party. Cases may frequently arise in which the original contractor is a resident of a distant state and a flood of subcontractors perform practically the entire work. With the object of the statute of liens upon buildings, as it admittedly is, to afford to the materialman every reasonable aid to secure fair and full payment for the materials sold by him and used in the construction of the building, a liberal construction will not tolerate the dismissal of the bill because the original contractor was not made a party.

It is probable that in most instances it would be the owner who would suffer if any wrong were done. But when only fair and full value of the materials entering into the structure makes up the amount for which the lien is found, the owner can not be held to be a sufferer.

There may be cases in which it would be difficult for the Court to be assured, as to the materials so used, and their value. If the debtor were the original contractor a practical difficulty might arise, in his absence. But in the case at bar, a subcontractor is the debtor.

He has confessed judgment. The Court by a master took out evidence. The original contractors were parties defendant in the suit heard with this, were residents of the vicinity, and were in attendance at the hearing in this case.

Without any difficulty they could have been used as witnesses by defendant Town, if any uncertainty required their testimony as to materials used and their value.

It is not easily discernible how their non-joinder as parties affected the administration of right and justice in the case.

In the end we should be governed by the rule stated in *Hyams* v. *Old Dominion Company*, supra, "we come back to the fundamental

question, would the rights of the party, who is not before the Court, be directly affected by a decree against the parties who are before it."

In the great majority of cases holding that the original contractor is a necessary party, the governing statute made him such. In many other cases the Court found him a necessary party to avoid multiplicity of suits. Under the statutes of this state, in cases where the lien claim is brought against the owner of a building and a subcontractor, for materials furnished the subcontractor, and by him used in the building, the original contractor is not an indispensable party.

The cases are remanded to the Court below for decrees in conformity herewith, interest to be allowed to date of payment, and costs of appeal to the Law Court allowed.

Exceptions overruled.

THOMAS J. LAMEY *vs.* MAINE MORTGAGE & GUARANTY COMPANY.

Androscoggin. Opinion, May 5, 1934.

FINDINGS OF FACT. JURY.

Where issues are solely of fact, and there is credible evidence, with nothing in the record to indicate improper motive on the part of the jury, its determination will not be disturbed by the Law Court.

In the case at bar, there was sufficient evidence to warrant the jury finding that the plaintiff had title to the automobile in question, prior to the execution of the mortgage, by his vendor, to the defendant.

On general motion for new trial by defendant. An action of replevin to recover possession of an automobile, tried before a jury at the November Term, 1933, of the Superior Court for the County of Androscoggin. The jury found for the plaintiff. A general motion for a new trial was thereon filed by the defendant. The issue involved question of title, on the date of purchase, of the

automobile. Motion overruled. The case fully appears in the opinion.

Clifford and Clifford, for plaintiff.

Carl F. Getchell,

Frank T. Powers, for defendant.

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

BARNES, J. In a replevin action against the mortgagee of an automobile, plaintiff recovered a verdict, and the case comes up on defendant's motion for a new trial on the allegation that the verdict is against the law and the evidence.

It appears that on May 9, 1933, defendant took from plaintiff an automobile, as its property, by virtue of a foreclosed mortgage, given it on April 21, 1932, and purporting, according to its terms, to convèy title to the autombile replevied and three others.

By its wording the mortgage conveys title to the automobile replevied; but plaintiff claims, and offered proof to demonstrate, that on April 20, 1932, the automobile was bought by him, and that on the next day, when the mortgage was given, it was his property and not that of the mortgagor.

The transaction was regular, and in due course of business.

Four automobiles, on one railroad car, were consigned and shipped to order of consignor, Lewiston, Me., destination, Auburn, Me., notify Springer Motor Sales Inc., (Mortgagor) at Auburn.

The bill of lading, with draft for purchase price attached, was received by The First National Bank of Lewiston; the shipment arrived and went on demurrage.

A witness, Guy J. Myrand, identified as a cashier of the railroad of delivery, the M. C. R. R., and an employee of that corporation for thirty years, testified that on April 20, 1932, he cancelled the bill of lading, received and receipted for demurrage due, and delivered the automobiles to the Springer Motor Sales Inc., delivery receipt being signed for the corporation by T. Y. Springer.

Mr. Myrand testified that on each of these papers he affixed by stamp or pen the date of the transaction, April 20, 1932.

Plaintiff, a young man, was in 1932 golf professional of the Martindale Country Club, living in Lewiston. His testimony, un-

shaken on the record, is that about the middle of March of that year he began negotiations with the Springer Motor Sales Inc., through Mr. Springer for the automobile, that resulted in an agreement of sale, he to turn in a Cadillac and receive the new car, a balance in cash being agreed upon, and that then Mr. Springer took the Cadillac.

He testified that he opened the country club on Patriot's Day, April 19, 1932; that on the next day, Mrs. Lamey accompanying him, he drove to the freight yard of the M. C. R. R. and saw Mr. Springer and his men unload the car of automobiles; that Mr. Springer told him then the automobile was his; that he gave Mr. Springer a check for the agreed amount, took a written acknowledgment of sale, signed by Mr. Springer and stamped, "Received Payment Apr. 20, 1932," but left the machine to be greased and serviced; that on the next day he called and received his car, and kept it, without notice of claim of defendant or any other until the next spring.

In all this he is corroborated by his wife.

All the papers referred to were identified and made exhibits at the trial.

Against this was produced the mortgage, dated April 21, 1932, check dated Apr. 21, by which the Lewiston bank remitted to a Boston bank the amount of the draft which accompanied the bill of lading, and the testimony of the attorney for the mortgagee, in whose office the mortgage was drawn.

Mr. Springer was not called as a witness.

The issue was, who had title to the automobile on April 20, 1932?

It was an issue of fact: its determination wholly within the province of the jury.

We find in the record evidence on which a jury could decide for the plaintiff, and nothing to indicate improper motive on its part.

Motion overruled.

JOHN F. HILL *vs.* GEORGE R. FINNEMORE.

Kennebec. Opinion, May 17, 1934.

MOTOR VEHICLES. NEGLIGENCE. PLEADING AND PRACTICE. EVIDENCE. DAMAGES.

Thoughtless inattention on the highway spells negligence.

If mere inattention spells negligence, voluntarily diverted attention with a preoccupied mind manifests negligence in an even greater degree.

It is not negligence as a matter of law to attempt to cross the street where there is no cross walk, although there is a cross walk some distance away.

Where a pedestrian steps off from the curb to cross a street, has proceeded only three feet, and has not placed himself in danger of collision, but is hit by the defendant operator of an automobile, who suddenly swerves his car toward the plaintiff, and through lack of due care fails to observe the plaintiff's presence in the street, the proximate cause of the collision is not contributory negligence by the plaintiff but the negligence of the defendant, provided the plaintiff, upon discovery of his predicament, with due care then attempts to step backwards in self-protection.

A party having rested his case can not afterwards introduce further evidence except in rebuttal, unless by leave of Court. Rule of Court XXXVI.

After a defendant rests his case, and the plaintiff presents his rebuttal and rests, the defendant by reason of said Rule of Court, as a matter of right, can introduce only testimony rebutting or tending to rebut the plaintiff's rebuttal. No other testimony is open to him unless by leave of Court within the Court's judicial discretion.

A statement of the presiding Justice to plaintiff's counsel at night after adjournment of Court that the case was closed, not consented to by the defense, does not bind the defendant.

A party whose counsel cross examines a witness concerning matters of a collateral nature is bound by the answers of the witness.

The abuse of judicial discretion is open to exceptions.

Material testimony should not be excluded because offered by a plaintiff after the defendant has rested, although not in rebuttal, unless it has been kept back

by a trick and for the purpose of deceiving the defendant and affecting his case injuriously.

It is a limitation on the exercise of this discretion that it must not be exercised to the prejudice of the adverse party.

In the case at bar, the failure to observe the road in front with due care and the sudden swerving of the car in toward and collision with the plaintiff warranted the jury in finding the defendant guilty of negligence.

To have allowed the introduction of the testimony in this case, offered by the defendant after the case had been apparently closed, to the refusal of which the exception was taken, would have been very prejudicial to the plaintiff and his cause in the then justifiable absence of his witnesses.

On exceptions and general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by the plaintiff, a pedestrian, against defendant, operator of an automobile. Trial was had at the June Term, 1933, of the Superior Court for the County of Kennebec. The jury rendered a verdict for the plaintiff in the sum of $6,791.00. To the denial of defendant's motion for a directed verdict, exception was taken, and likewise to the refusal of the presiding Justice to allow defendant to introduce additional evidence, after the case had been apparently closed. A general motion for new trial was also filed, after the jury verdict. Motion and exceptions overruled. The case fully appears in the opinion.

C. A. Blackington,
Goodspeed & Fitzpatrick, for plaintiff.
F. Harold Dubord, for defendant.

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

HUDSON, J. Action on the case to recover damages for personal injuries alleged to have been caused by defendant's negligent operation of his automobile on Silver Street in the city of Waterville on the twelfth day of September, 1932. At nisi prius the plaintiff recovered a verdict of $6,791.00. The case comes forward on motion for new trial and exceptions.

The ground of exception that the trial court erred in refusing to grant the defendant's motion for a directed verdict will be considered in connection with the motion for new trial.

Motion for New Trial

Silver Street leads off westerly from Main Street at right angles. Its easterly end, where this accident happened, is in the congested business section of the city. On the southerly side of Silver Street is located Arbo's Garage, in front of which at the curb is a gas pump. The street here from curb to curb is thirty-one feet wide. At about eleven o'clock in the forenoon of this day, the plaintiff, proceeding westerly on Silver Street, stopped at this garage to purchase gas for his car, parking it by the southerly curb headed westerly and with its rear end about six feet westerly from the gas pump. He purchased the gas, tendered the garage man a bill in payment for it, and waited for his change.

The defendant, a Lieutenant of the Waterville police, accompanied by another police officer, Mr. Colby, was returning from an official visit farther west on Silver Street, the defendant himself driving a Plymouth coupe owned by the City, to which coupe was attached a siren. This coupe hit the plaintiff while he was at some point in the street in front of the garage, the exact location of the impact, with reference to the curb and the rear end of his parked car, being in dispute, and caused the injuries for which damages are sought.

The parties' versions of the happenings are impossible of reconciliation.

The plaintiff's account of the accident, briefly stated, is, that while standing "about five or six feet back of his car, or back of the gas pump," he saw John Ware on the other side of the street, whereupon he called to him and "started to cross the street to speak to him." At this place there was no crosswalk nor any for quite some distance in either direction. In answer to the question of his attorney to "tell the jury in your own words what you did," he said, "I looked toward Main Street and saw there was no traffic in the street and then I stepped out off from the entrance to the garage and I looked by my car. As I stepped down my first

step, there was nothing in sight and on the second step I saw this car coming rapidly toward me and I stopped that second step and made a jump to get back but he was coming at such a high rate of speed and I observed instantly that the driver had no idea of my presence there — he was looking directly the other way; — and before I could jump from there he had swerved right into where I was."

In corroboration the plaintiff produced two eye witnesses, Simpson and Dulac, who, at the time, were diagonally across the street in front of the Vigue Block, which is northeasterly of Arbo's Garage. Nothing in the case discloses any relationship to the parties, bias or prejudice upon the part of these witnesses. The gist of Mr. Simpson's testimony is that he saw the police car coming at a fast rate of speed, thirty to thirty-five miles an hour, farther down on Silver Street, and he said: "I noticed this man coming out of the garage, coming off of the sidewalk. And as I saw that second step as he turned away that coupe came in toward him and then hit him and then swerved off into the street." He also observed that the defendant was looking northerly just before the accident, not in the direction of the plaintiff.

The other corroborating witness, Mr. Dulac, close by Mr. Simpson, testified: "I saw that car" (meaning the defendant's) "kind of swerve in a little toward the curb; and then I saw this man go in the air," and later, "and there was another car here and when they got by that car it come around it and sort of come right in toward the south, the sidewalk;" also that the defendant was driving at least twenty-five miles an hour and that the plaintiff when hit was about ten feet back of his car and three feet out from the curb.

In denial of the plaintiff's contentions, the defendant insists that the accident was attributable to no negligence upon his part. He says that at a point on Silver Street, approximately one hundred sixty-five feet westerly of the gas pump, he brought the coupe to a dead stop on account of an A & P truck that was entering Silver Street from Charles Street, and then proceeded along to the point of collision at a speed from fifteen to eighteen miles per hour. He testified: "I saw a car parked headed the wrong way on our right. . . . And as we got abreast of the car this party stepped right out, one step right in front of us, and before we could realize what had

happened we struck him" and that he did not see him at all before he stepped out from behind his automobile. Furthermore, he claims that he was looking ahead, although he admitted that he had observed a blue sedan car when just beyond Charles Street and made some remark in regard to it to his companion, Mr. Colby. To quote his testimony, he said: "It had been all simonized and shone like a mirror. It attracted my attention." This blue sedan was in front of the bakery on the opposite side of Silver Street from the gas pump. He did not claim that he sounded the siren on his car and he denied that he swerved his car to the right. His statements were corroborated by Mr. Colby.

The plaintiff contends that the defendant operated his car negligently in several respects. First, that the rate of speed employed was negligent, considering the place where the car was being operated, congestion of traffic, and the time of day; second, that he did not use his siren and give proper warning of his approach at that place; third, that he was inattentive, did not look straight ahead, and gave no attention whatever to the traffic; and, fourth, that he negligently swerved to the right and struck the plaintiff. The defendant, denying these contentions, claimed, in addition, that the proximate cause of the accident was contributory negligence upon the part of the plaintiff himself in suddenly stepping out from behind his car, unexpectedly leaving a place of safety, and going in front of the defendant's car when it was too late for the defendant to check its progress in time to avoid striking him.

A very important question of fact in the case was the place where the plaintiff left the curb and stepped into the street with relation to the rear of his parked car. As to this, the evidence was in dispute. The plaintiff and his witnesses said it was some ten to fifteen feet back from the car; the defendant and his witness, Colby, just behind the car. Another important fact for determination by the jury was the plaintiff's exact location when hit with relation to the curb from which he had stepped. The plaintiff contended that he was exactly upon a white parking line, approximately three feet from the curb. The defendant, on the contrary, said he was farther out into the street. Question: "How far had he stepped out behind the right side of his car when you struck him?" Defendant's answer: "Oh, I think just about one good step."

The evidence as to what the plaintiff did to see if there were any traffic as he took those steps out into the street came only from the plaintiff and his witnesses. It was that the plaintiff looked toward Main Street and saw no car approaching, saw nothing in sight as he took his first step, although he looked, and on the second step saw the defendant's car coming rapidly toward him, whereupon he attempted to step backward but was hit in so doing when the defendant swerved his car into him.

The jury, by its verdict, must have found the defendant guilty of negligence on at least some one of the above contentions and have found the plaintiff guiltless of contributory negligence.

In passing upon this motion for a new trial, we must determine whether or not the jury's verdict is manifestly and palpably against the evidence. If it is not, the verdict must stand, even though the Court itself might have arrived at a different result. *Chenery* v. *Russell*, *Russell* v. *Chenery*, 132 Me., 130, and cases therein cited on page 134. A careful study of the record convinces the Court that there was sufficient credible evidence to justify the jury in finding negligence upon the part of the defendant, in this regard at least; that without the exercise of due care to observe the road in front of him, negligently he swerved his car in toward and collided with the plaintiff. "Thoughtless inattention on the highway, as elsewhere in life, spells negligence." *Callaghan* v. *Bridges Sons, Inc.*, 128 Me., 346, 349; *Rouse* v. *Scott*, 132 Me., 22, 24.

The jury no doubt believed that not only was he inattentive to his driving in not looking ahead, but that his mind was otherwise concentrated on the "shiny" sedan on the north side of the street, which, he admits, "attracted his attention."

If mere inattention spells negligence, voluntarily diverted attention with a preoccupied mind manifests negligence in an even greater degree. Thus is explained the fact, and no doubt the jury found it to be a fact, that in passing the plaintiff's parked car he swerved his car to within about three feet of the southerly curb. If the jury found as a fact that the plaintiff when hit was from ten to fifteen feet back of the parked car, it was entirely possible for this to occur without the defendant's car touching the plaintiff's car in passing.

In this case, the swerving itself indicates strongly lack of proper guidance of the car by the ordinarily careful and prudent driver. No doubt it did result from inattention or from diversion of the mind, for no excuse is offered for turning the wheels of this car toward the plaintiff when there was plenty of room in the street for safe passing without any collision whatsoever.

Contributory Negligence

Was the plaintiff himself in the exercise of due care as he proceeded outward from the curb? Several Maine cases have dealt with the duty of care that rests upon such pedestrian. In the latest of these cases, *Smith* v. *Joe's Sanitary Market, Inc.*, decided December 23, 1933, and now reported only in 169 A., 900, the Court sustained direction of a verdict for the defendant where the plaintiff "jumped as if to cross the street directly into the path of the truck and was immediately hit."

In *Cooper & Company* v. *Can Company*, 130 Me., 76, the Court held that a verdict in favor of a plaintiff who "stepped into the path of the swiftly moving car" could not stand because of "utter lack of due care."

In that case from *Simeone* v. *Lindsay*, 22 Del., 224, 65 A., 778, our Court quoted with approval this language: "If a person walks into a danger that the observance of due care would have enabled him to avoid and is thereby injured, he would be guilty of contributory negligence."

Justice Bassett, in *Clancey* v. *Power & Light Company*, 128 Me., 274, on page 278, said: "A pedestrian about to cross a street must use the care and prudence of a prudent man under like circumstances, having in mind his own safety. The law does not undertake further to define the standard. It does not undertake to say 'how often he must look or precisely how far or when or from where.' . . . Failure to look or listen may be strong evidence of negligence. . . . Mere looking is not sufficient. One is bound to see what is obviously to be seen." Compare *Shaw* v. *Bolton*, 122 Me., 232; *Sturtevant* v. *Ouelette*, 126 Me., 558; *Blanchette* v. *Railway*, 126 Me., 40.

One is not guilty of negligence as a matter of law in attempting to cross a street where there is no cross walk, although there is a

cross walk some distance away. *Page* v. *Moulton*, 127 Me., 80, 81; *Clancey* v. *Power & Light Co.*, supra.

"Sidewalks are for the exclusive use of pedestrians but the remaining portion of the highway is not for the exclusive use of vehicles. In the absence of statutory or municipal regulations affecting the question, the pedestrian has equal rights in the street with the operator of an automobile." *Cole* v. *Wilson*, 127 Me., 316, 319.

In the case at bar, the jury may well have found from credible evidence in the case that the plaintiff, at the time he was hit by the defendant's automobile, was out in the street only a distance of approximately three feet from the curb and from ten to fifteen feet back of his car; that, being in that position, he had not placed himself at a point of danger; did not jump out in front of the defendant's car, and that the sole cause of the accident was the fact that the defendant negligently swerved his coupe to the right until it there collided with the plaintiff. The finding of such facts clearly distinguishes this case from the cases above cited.

It is true that the plaintiff's own evidence shows that in looking westerly on Silver Street he saw the defendant's car approaching, but, the plaintiff then being only from one to two steps from the curb, with his own car between him and the oncoming car, the jury again might well have found that he had no reason to believe that the defendant would alter his course and run into him. As soon as the plaintiff saw the defendant commence to swerve his car toward him, credible evidence there was in the case to have warranted the jury in believing that the plaintiff with due care then attempted to step backwards in self-protection. This Court can not hold that the jury committed any manifest or palpable error in finding either negligence of the defendant as the proximate cause of the plaintiff's injuries or that the plaintiff himself was guiltless of contributory negligence. The Court below did not err in refusing to direct a verdict for the defendant.

Damages

Another ground for a new trial urged by the defendant is "because the damages are excessive." The verdict returned, as above stated, was for $6,791.00. The evidence as to the extent of plain-

tiff's injuries and their effect upon him came from the plaintiff himself and his witnesses, Dr. Hill, a specialist, and Dr. Poulin, his family physician, a general practitioner. No medical testimony was offered by the defense.

It appears in the record that up to the time of the trial in June, 1933, the plaintiff had not been able to do any work. In the automobile business as a salesman, forty-seven years old, with eighteen years experience, he claimed that his prior average weekly earnings were approximately $75.00. His expenses incurred at the hospital for medical attendance and treatment, charges of a man in his service in the woods while attempting a more speedy recovery, totalled about $250.00. His ability to earn in the future is problematical, depending on time of recovery, if recovery is accomplished, and its extent. Before the accident he enjoyed perfect health.

Dr. Poulin, the attending physician at the time of the accident, in description of his then condition, said: "His face and head were covered with blood and he was pale and looked quite weak. He had a contused lacerated wound on the right side of the scalp and also a contusion of the right shoulder and the left leg below the shin." He was not then fully conscious. The head contusion was from two to two and a half inches and required closing with sutures. The doctor testified that the plaintiff received "a severe injury to his brain, a severe shock to the brain" and that subsequently he made complaints right along as to nervousness, crying spells and dizziness, which, it is true, were subjective symptoms but consistent with brain injury. He considered him unable to work, and said he acted entirely differently after the accident; that he is "despondent, don't seem to have any courage; he is nervous." Because the plaintiff's symptoms of which he was complaining, headaches and dizziness, did not clear up, Dr. Poulin had him examined by the specialist, Dr. Hill.

Dr. Hill's first examination of him was on October 12th, one month after the accident. According to the specialist, he then complained of headaches and dizziness. He found that the plaintiff then had edema of the brain and that "the field of that left eye was contracted in toward the center" so that there was "a contraction of his field of vision on the left side."

He saw the plaintiff next on October 18th. At that time "the field had returned to normal," but nevertheless he stated that his examination indicated "there had been an injury to the brain." The edema had cleared up, but, he said, "The edema even if cleared up might leave some permanent injury to the brain cells or it may leave naturally or last an indefinite length of time, affecting him in a general nervous instability following the injury." Subjective symptoms of "general disability in the main, dizziness and headaches" were not inconsistent with the injury he received. He could not predict how long the plaintiff would be affected in the future. Finally, he testified that the symptoms complained of, in his judgment, were due to "the injury to the brain."

There was considerable evidence as to pain and suffering.

With reference to damages in this form of action, our Court, in *Conroy* v. *Reed*, 132 Me., 162, 166, has very recently said: "We are fully aware that as a general rule in the trial of civil cases the assessment of damages is for the jury and the parties are entitled to their judgment upon that issue. When it appears, however, that the jury have disregarded the testimony or acted under some bias, prejudice or improper influence with the result that the damages awarded are either excessive or inadequate, then it is the duty of the Court to set aside the verdict." And in that case the Court set aside the verdict because of inadequacy.

Whether or not the verdict in this case is excessive, in our judgment, depends on what the future holds in store for the plaintiff as a result of the brain injury he received. Questions for answer by the jury related to the extent of that brain injury, its effects and their reasonably probable duration. If the plaintiff's brain is still affected, although subjective symptoms only are now discoverable, and as a result, in the future he is to be subject to frequent headaches and spells of dizziness and suffer from attacks of despondency and melancholia, and be unable to resume his work, the verdict was not excessive. If, even for an indefinite length of time, the plaintiff is so to be afflicted, that particular kind of an affliction which may reasonably be expected not only to deprive him of his future earning capacity but to destroy his peace of mind, his future happiness and contentment of living, is not over-

compensated by this verdict. What constituted fair compensation to reimburse this plaintiff for the injuries he received proximately as a result of the defendant's tortious act was for the jurors, who had before them the plaintiff, whom they could observe, as well as the witnesses to whose testimony they could give such weight as they thought reasonably should be given. Nothing appears in the record to show that the jury "disregarded the testimony or acted under some bias, prejudice, or improper influence." Neither was there any evidence to justify the jury in believing that the plaintiff testified falsely in regard to his injuries, their effect upon him and his mental condition.

The motion for a new trial can not be granted on the ground that "the damages are excessive."

Exceptions

The first exception, as to the overruling of the defendant's motion for a directed verdict, has already been considered in connection with the motion.

The defendant excepts also to the ruling of the Court at the end of the trial refusing to allow three defense witnesses to testify, namely, John Ware, Gabrial Joseph and the defendant himself.

A careful study of the evidence and the long colloquy between the Court and counsel, conducted in the absence of the jury, warrants the finding of these facts with relation to this exception.

The plaintiff introduced his evidence and rested; the defendant likewise. The plaintiff himself then took the stand in rebuttal. On re-cross examination he denied that he had called John Ware to Court that day; that he had seen him in the Court House during the day, although he thought he had seen him in the attorneys' room. He said he did not know whether his attorney had called Ware there or not; that he himself had had no conversation with Ware that day, and that, to his knowledge, he was not there in connection with his case, for personally he did not request him to come, and that, as a matter of fact, he had never asked him to come as a witness.

At the end of this re-cross examination, the Court "adjourned to 9:30 Wednesday, June 14, 1933." The record of the case before

adjournment does not disclose either that the plaintiff had anything further to introduce in rebuttal or that the defendant wished to introduce any evidence in sur-rebuttal.

The next morning the attorney for the defense announced to the Court that he had "some more testimony in rebuttal." To this the plaintiff objected, saying: "I understood that the testimony was all closed and I have let all my witnesses go." Then followed the long colloquy above referred to, by which it appeared that the defendant sought to introduce evidence tending to prove the following facts:

1. By John Ware that "he was summoned here by the plaintiff." (He sought also "to inquire of him regarding the information which he may have in connection with the accident.")

2. By the defendant himself "the exact location of the catch basin, the purpose of this being indirectly to contradict the testimony of the plaintiff himself that he did not park the car close to the tank because he wished to go beyond the catch basin." Also by the defendant that "when standing in the doorway of the Vigue Block or on the sidewalk of the Vigue Block and looking westerly on Silver Street the vision is obscured by any automobile that is parked westerly of the Vigue Block on the northerly side of Silver Street."

3. By Gabrial Joseph that "he was standing by or in a parked automobile on the north side of Silver Street somewhere opposite Arbo's Garage but that he did not see the accident but did see Mr. Hill lying in the road after the blow." This was offered "in contradiction of Mr. Hill himself as to where he was when he was struck and also in contradiction of both Mr. Dulac and Mr. Simpson as to where his body was after the blow."

Also by Mr. Joseph "the location of the Finnemore car after the accident" in rebuttal of the testimony of Simpson and Dulac.

The colloquy discloses that the defendant's attorney knew that Ware was in the attorney's room the day before and in the Chief Justice's office in the Court House, although he made no effort then to have him appear as a witness. Before adjournment that night neither counsel informed the Court that he had other testimony to offer the next morning. Upon adjournment counsel for the plaintiff, "still holding his witnesses" until he should find out

whether they would be needed the next morning or not, conferred with the Court and was informed that the case was closed, whereupon he remarked to the Court: "I am glad because I can let my witnesses go" and they were finally excused and were not present in court the next morning.

In denial of the request to introduce the above testimony, the Trial Judge said: "The Court always endeavors to admit testimony for the purpose of bringing about justice. But it must, of course, be guided by legal principles and rules of procedure in trying cases. From examination of the testimony that the defendant desires to offer at this time, I do not feel that the cause of justice requires it and I do believe that it would not be in accordance with the rules of procedure of our Court."

The trial court, no doubt, in referring to "guidance by legal principles and rules of procedure" had particularly in mind Rule of Court XXXVI, which provides: "A party having rested his case can not afterwards introduce further evidence, except in rebuttal, unless by leave of Court." "Rules of Court" lawfully established "have the force of law and are binding upon the Court, as well as upon parties to an action, and can not be dispensed with, to suit the circumstances of any particular case." *Cunningham* v. *Long*, 125 Me., 494, 496; *Fox* v. *Conway Fire Ins. Co.*, 53 Me., 107; *Nickerson* v. *Nickerson*, 36 Me., 417; *Mayberry* v. *Morse*, 43 Me., 176.

After the defendant had rested his case, the plaintiff presented his rebuttal and rested, following which the defendant, by reason of said Rule of Court, as a matter of right, could have introduced only testimony rebutting or tending to rebut the plaintiff's rebuttal. No other testimony was open to him "unless by leave of Court" within its judicial discretion. *Emery* v. *Fisher*, 128 Me., 124, 125, and citations therein. That was the situation that morning when these men were offered as witnesses. Inasmuch as the record up to that time did not show that both parties had finally rested, the case was still open, not closed, for further introduction of evidence, if legally receivable. The statement of the Court after adjournment to plaintiff's counsel that the case was closed, not made in Court nor consented to by the defense, did not bind the defendant.

Two questions, then, arise for answer:

First: Did the proffered testimony of these witnesses rebut or tend to rebut the plaintiff's rebuttal testimony so as to make it admissible as a matter of right? A careful examination convinces us that it did not. If anything, it contradicted or tended to contradict the plaintiff's evidence in chief and so should have been presented by the defendant as a part of his evidence in chief.

Second: This evidence not being admissible as a matter of right, had the Court the right in the exercise of its discretion to admit it? Our answer is yes, excepting as to that part of Mr. Ware's proffered testimony offered to contradict Mr. Hill's statement that he had not summoned him as a witness. This was inadmissible because the defendant was bound by Mr. Hill's answer on this collateral matter. *State* v. *Benner*, 64 Me., 267, 287; *State* v. *Priest*, 117 Me., 223, 230; *Bessey* v. *Herring*, 121 Me., 539.

In *Hathaway et als* v. *Williams*, 105 Me., 565, our Court held that exceptions do not lie to the exclusion of non-rebutting evidence offered by a plaintiff in rebuttal after the close of the defendant's evidence. In that opinion, the Court quoted this language from *Cushing* v. *Billings*, 2 Cush., 158, 160: "The orderly course of proceeding requires that the party, whose business it is to go forward, should bring out the strength of his proof, in the first instance; but it is competent for the judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence. This depends on the circumstances of each particular case, and falls within the absolute discretion of the judge, to be exercised or not as he thinks proper." "Rule XXXIX, Sup. Jud. Court." The present Rule XXXVI was then Rule XXXIX.

Again, in *Sweeney* v. *Cumberland County Power & Light Co.*, 114 Me., 367, it is held that after a party has rested his case he can not afterwards introduce further evidence except in rebuttal, unless by leave of Court, and that testimony in rebuttal must be confined to new matter brought out in his adversary's case and is not admissible unless by leave of Court if it merely tends to corroborate the facts brought out as part of his own case in chief and is merely cumulative in respect thereto.

In spite of the said quotation from the Massachusetts Court in *Hathaway* v. *Williams*, supra, in the later *Sweeney Case*, 114 Me., on page 371, our Court says: "It is doubtful if exceptions would

lie *unless error amounting to abuse of judicial discretion is manifest.*"

Did the presiding Justice abuse his discretion in not permitting the introduction of this testimony?

As to judicial discretion with reference to the continuance of a case, we quote from *Charlesworth* v. *American Express Co.*, 117 Me., 219, on page 221: "The term judicial discretion does not mean the arbitrary will and pleasure of the Judge who exercises it. It must be sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion. Incidents attending the progress of a trial are necessarily addressed to the discretion of the Court. 'That discretion is not to be exercised arbitrarily but to be guided and controlled, in view of all the facts, by the law and justice of the case subject only to such rules of public policy as have been wisely established for the common good.' *York & Cumberland R. R. Co.* v. *Clark*, 45 Me., 151, 145." See also *Hersey* v. *Weeman*, 120 Me., 256, 262; *Fournier-Hutchins* v. *Tea Company*, 128 Me., 393, 403.

In *Rioux* v. *Portland Water District*, decided January 17, 1934, now reported in 170 A., page 63, on page 64, in dealing with the discretion of the Court to order a mistrial in a case, it is said: "When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion cannot be refuted by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law. . . . It is abuse of judicial discretion which is open to exceptions."

"It will be presumed that the ruling of a Judge receiving or rejecting evidence was right unless the exceptions show affirmatively it was wrong." *Sweeney* v. *Cumberland County Power & Light Co.*, supra; *Parmenter* v. *Coburn*, 6 Gray, 509, 510; Bowers' Judicial Discretion of Trial Courts, Section 17, page 32.

"The party complaining of the abuse has the burden of showing

it. . . . The reason usually advanced for the declaration and application of this rule is that the trial tribunal has superior advantages for knowing the exigencies of the case under which the order attacked has been made, has seen the parties, observed the witnesses, followed the minutia of the trial as it developed, and can know better than an appellate court what will and what will not further the cause of justice in the case before it." Bowers' Judicial Discretion of Trial Courts, *supra*, Section 18, page 33.

The defendant utterly fails in this case to show that the trial court abused its discretion in its said ruling. While it is true that the facts sought to be introduced were not permitted to be presented to the jury, for this the defendant is himself responsible.

Reference has already been made to a part of the Ware testimony.

As to his other proffered testimony, Ware was available and known so to be, by the defense, at the time the evidence of the defense in chief was put in, to which it properly belonged. It is noted that counsel for the defense frankly stated that he had no knowledge of what Mr. Ware's testimony would be. It does not appear, therefore, that by the exclusion of this testimony the defendant is prejudiced.

As to the defendant's proffered testimony with relation to the location of the catch basin, and possibility of vision from the front of the Vigue Block, this properly was a part of his defense in chief. Likewise Joseph's testimony.

Some of this testimony was cumulative, of only indirect bearing on the issues in the case, and all of it was available for use at the proper time for its introduction, at which time it was as well known to the defendant as later when offered and excluded. The defendant had not discovered new witnesses with previously unknown evidence.

"There is no abuse of discretion in refusing to reopen a case for the admission of merely cumulative evidence, evidence to refute other evidence immaterial to any issue, or evidence the existence and materiality of which were known to the party offering it before the close of the case and which it does not appear that he could not have produced before the close of the case." 4 C. J., page 821, and cases cited therein.

Defendant in his brief cites and relies on the following language in 4 C. J., page 817: "The principal rule for the exercise of this discretion, as has been said by an eminent author, is that material testimony should not be excluded because offered by the plaintiff after the defendant has rested, although not in rebuttal, unless it has been kept back by a trick and for the purpose of deceiving the defendant and affecting his case injuriously." Directly in point here, however, is the very next sentence, namely: "It is, of course, a limitation on the exercise of this discretion that it must not be exercised to the prejudice of the adverse party." The plaintiff's witnesses had been excused by permission of the Court and were not in Court when this testimony was offered. The presiding Justice may very well have thought that to allow the introduction then of this testimony, all of which could have been offered the day before, when, if at all, it should have been, would have been very prejudicial to the plaintiff and his cause in the absence of his witnesses.

The long colloquy, comprising eleven pages of the printed record, evinces the very earnest desire upon the part of this presiding Justice to deal with this matter not only fully informed of the situation but with a real desire to give to each litigant his full measure of justice. The reason for his decision he succinctly states to be because he did not feel that the "cause of justice required it" or "it would be in accordance with the rules and procedure of our Court."

In conclusion, we do not hesitate to say that the Justice not only did not abuse his discretion but exercised it wisely, in accordance with the law, and "in the furtherance of justice."

Motion and exceptions overruled.

JOSIAH W. REED ET ALII

vs.

CENTRAL MAINE POWER COMPANY.

Sagadahoc. Opinion, May 19, 1934.

PLEADING AND PRACTICE. DAMAGES. JURIES. NEW TRIAL. EXCEPTIONS.

R. S., CHAPTER 109, SECTIONS 9, 11.

Asserted grounds for a new trial which are not argued, must be treated as abandoned.

A permission given by law, may be lost by abusing it.

Instructions must be examined with relation to each other, and as an entirety. Loose expressions or simple inaccuracies, in separation from context, will be disregarded, when, as a whole, instructions not only contain an entire, fair, and correct statement of the law, but are free from any misleading influence.

The general rule is that the legal limit of information upon which a jury may base their action, is facts truly found, so far as humanly possible, from a fair preponderance of the evidence. Yet, in weighing and applying evidence, jurymen may invoke their everyday experience. They need not lay aside the general information acquired and known to them, as intelligent members of the community. They may examine the case committed to them in the light of their common observation of what it involves; and have the right to draw all reasonable deductions from the evidence. While they may not validly render a verdict on the particular knowledge of individual jurors, they may, in making up their verdict, rightfully be influenced by their general knowledge and experience of like subjects, as well as by the testimony and opinion of witnesses.

Where, on examination of the evidence independent of that admitted over objection, and the full charge, it is apparent that the jury was not misled, or the result influentially affected by the objected evidence, or by any erroneous ruling, or misdirection, exceptions will not be sustained.

In the case at bar, on the complete record, though in every respect there had been strict accuracy, no other verdict than that returned could have rightfully been found.

For wrongs or injuries, as those done the plaintiffs, legislative purpose is that there shall be full damages, in contradistinction to the recompense ordinarily recovered in trespass quare clausum.

On exceptions and general motion for new trial by defendant. An action of trespass brought under Sections 9 and 11, of Chapter 109, R. S. Plantiffs sought damages for the alleged illegal cutting, by the defendant, of shade and ornamental trees on their premises in Woolwich. Defendant claimed right under a legal permit from the Town of Woolwich. Trial was had at the October Term, 1933, of the Superior Court for the County of Sagadahoc. The jury rendered a verdict for the plaintiffs for $25.00 damages to the trees outside the dooryard, and $496.00 damage to the trees in the dooryard; which being respectively doubled and trebled under the Statute, resulted in a total verdict of $1538.00. To the doubling and trebling of damages defendant excepted, also to certain instructions, and refusals to instruct by the presiding Justice, and after the jury verdict filed a general motion for new trial. Motion overruled. Exceptions overruled. The case fully appears in the opinion.

Goodspeed and Fitzpatrick, for plaintiffs.

McLean, Fogg & Southard,

Nathaniel W. Wilson, for defendant.

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

DUNN, J. This action is based on Revised Statutes, Chap. 109, Secs. 9 and 11.

The plaintiffs are owners of land in the town of Woolwich, bounded in part by a highway. The defendant corporation, a utility discharging a public service in owning and operating a plant, the product of which it distributes to customers for electric lighting, set poles and fixtures for the support of electrical wires upon, along, and over such highway, in front of the house on the abutting premises. At that time, (December, 1931), the house was untenanted. There is testimony that it had been occupied during summer seasons in recent years.

Plaintiffs claim damages, in different counts in the declaration, against defendant as a trespasser, for entering their close without license or authority, well beyond the exterior line of the street location, and (1) severing from ornamental trees in the dooryard, to wit, from two hickories and an elm, certain branches and limbs; (2) for cutting down twenty-nine pine and oak trees, growing within the close but outside the dooryard.

The acts are alleged to have been committed wilfully and knowingly.

Defendant pleaded the general issue, and, by brief statement, set up in justification a permit granted it by the selectmen of the town, to construct and maintain the line of posts and wires. R. S., Chap. 68, Sec. 28, as amended by Laws of 1931, Chap. 205.

The jury found specially, in answer to questions by the trial judge, facts which brought the action within the statute. R. S., (Chap. 109), supra. Thereupon, conformably to instruction, the jury determined in the instance of each trespass, "actual damages." For damage to ornamental trees, the award was $496.00; for the other trees, $25.00.

On ruling the applicability of the statutory provisions, on the authority of which the respective counts had been drawn, the judge trebled damages under the first count, and doubled the award under the second, thus entitling the plaintiffs to $1,538.00. Such procedure is not without precedent. *Quimby* v. *Carter*, 20 Me., 218; *Black* v. *Mace*, 66 Me., 49.

The defense brings the case forward on general motion and exceptions. But one ground of the motion, namely, that the damages are excessive, was argued at the bar. The inclusion of the brief goes no further. Asserted grounds for a new trial which are not argued, must be treated as abandoned.

The decision of the controversy on the merits is plainly right.

The permit, to advert to it anew, was confined to road limits. Even if the selectmen had authority to grant the right to enter on plaintiffs' land, they had not done so; their permit only gave right on the highway, and did not essay, inferentially or otherwise, any interference with adjoining estates, nor attempt to abrogate any general rule of law. A permission given, as was this, by the law,

may be lost by abusing it. Cooley on Torts, Vol. 2, Sec. 252, citing Six Carpenters' Case, 8 Co., 290; s.c., 1 Smith, L. C., 216.

For private wrongs or injuries, as those done the plaintiffs, legislative purpose is that there be full damages, in contradistinction to the recompense ordinarily recoverable in trespass quare clausum. The statute has been held remedial and not penal. *Black* v. *Mace,* supra.

The jury were allowed, as a part of the trial, to view the premises. They saw such physical objects as were properly pointed out to them, and so got a mental picture of the locus. In a land damage case, a view constitutes a special kind of evidence. *Shepherd* v. *Camden,* 82 Me., 535, 20 A., 91. See, too, *Wakefield* v. *Boston and Maine Railroad,* 63 Me., 385; and, incidentally, *State* v. *Slorah,* 118 Me., 203, 214, 106 A., 768.

Actual damages are sustained by record evidence. Consideration by the jurors of the result of their observation at the view, may have tended to strengthen evidential support. *Shepherd* v. *Camden,* supra. Independent of this, the damages are not, in a legal sense, too great.

Of the ten exceptions, one concerning an instruction as to damages, is strongly advanced as uncovering reversible error.

The judge, at one point in his charge to the jury, instructed: "and on the other hand if you in your good judgment agree with one opinion expressed here or from experience know that this property, although worn out perhaps as a farm, . . . still has a real marketable value for a summer home, and that that value has been distinctly lessened by reason of such loss as has been sustained of shade and ornamental trees by the cutting or mutilation as it is claimed of the various trees, and that that has made a distinct difference, then you will decide, and you have a right to decide, the difference for any purpose which that property might in reason and with reasonableness be appropriated."

The next following instruction was: "You have heard the testimony upon that point. You have heard the testimony of some man, experienced, who says it is available. You have heard the testimony of another man on the other side who perhaps has questioned that and who has said . . . it will sell for just as much today as it would

before the cutting was done, and that taking into account its value or its feasibility for sale as a summer home. That is left for you to determine."

Before the instruction of which defendant complains, the judge, in instructing as to the essential law of the case, had defined: "and you have seen the premises and you have heard all the testimony, and you are men of good judgment, and it is for you to say under the evidence here, if you find that there was damage unlawfully caused, what was the difference in the fair market price of that property before and after the cutting."

It would seem, from the bill of exceptions, that the understanding of counsel for defendant, of the purport of the instruction under review, was that the jury could rely upon personal knowledge concerning the adaptability of plaintiffs' place for a summer home, without reference to the evidence submitted by the parties. Counsel emphasize that the jury may have so understood it. Taken by itself, the instruction is perhaps susceptible of a double sense.

Instructions must, however, be examined with relation to one another, and as an entirety.

"A single proposition in the charge, standing alone, might be open to objection, but taken in connection with other parts of the charge, and as it might have been understood by the jury, was not exceptionable." *Hunnewell* v. *Hobart*, 40 Me., 28, 31. Loose expressions, or simple inaccuracies, in separation from context, will be disregarded when, as a whole, instructions not only contain an entire, fair, and correct statement of the law, but are free from any misleading influence. *French* v. *Stanley*, 21 Me., 512.

A study of the charge suggests that the judge intended saying that, in ascertaining the extent of actionable loss occasioned, the jury was not bound to disregard entirely their own experience with respect to the elements which combined to make up the value of the land. *Head* v. *Hargrave*, 105 U. S., 45, 26 Law ed., 1028; The Conqueror, 166 U. S., 110, 41 Law ed., 937.

The general rule is that the legal limit of information upon which a jury may base their action, is facts truly found, so far as humanly possible, from a fair preponderance of the evidence. Yet, in weighing and applying evidence, jurymen may invoke their

everyday experience. *Lunney* v. *Shapleigh*, 112 Me., 172, 90 A., 496. They need not lay aside the general information acquired and known to them, as intelligent members of the community. They may examine the case committed to them in the light of their common observation of what it involves; and have the right to draw all reasonable deductions from the evidence. While they may not validly render a verdict on the particular knowledge of individual jurors, they may, in making up their verdict, rightfully be influenced by their general knowledge and experience of like subjects, as well as by the testimony and opinion of witnesses. *Patterson* v. *Boston*, 20 Pick., 159, 166; *Murdock* v. *Sumner*, 22 Pick., 156, 158; *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63, 65; *Head* v. *Hargrave*, supra.

Of the other exceptions, that going to trebling one, and doubling the other, jury award of damages, has already been indicated meritless. *Quimby* v. *Carter*, supra; *Black* v. *Mace*, supra. Four of the remaining exceptions relate to instructions given by the judge to the jury; three to refusals to give requested instructions, except as modified, or as had been given; and the last to the admission of testimony. The point of none of these approximates, in worth, that first of mention in this opinion.

"It is our duty, in deciding on the exceptions, to look to the whole evidence, and not disturb the verdict when the facts proved," furnish a substantial support therefor. *Farrar* v. *Merrill*, 1 Me., 17, 20.

On the complete record, though in every respect there had been strict accuracy, no other verdict than that returned could rightfully have been found. Where, on examination of the evidence independent of that admitted over objection, and the full charge, it is apparent that the jury was not misled, or the result influentially affected by the objected evidence, or by any erroneous ruling, or misdirection, exceptions will not be sustained. *Farrar* v. *Merrill*, supra; *French* v. *Stanley*, supra; *Noyes* v. *Shepherd*, 30 Me., 173; *Stephenson* v. *Thayer*, 63 Me., 143; *Look* v. *Norton*, 94 Me., 547, 48 A., 117; *Elliott* v. *Sawyer*, 107 Me., 195, 77 A., 782; *Gordon* v. *Conley*, 107 Me., 286, 78 A., 365; *Mencher* v. *Waterman*, 125

Me., 178, 132 A., 132; *Gilman* v. *Bailey Carriage Co., Inc.*, 127 Me., 91, 141 A., 321; *Dufour* v. *Stebbins*, 128 Me., 133, 145 A., 893.

Motion overruled.
Exceptions overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS.

STATE OF MAINE *vs.* HARRY POOLE.

Penobscot County. Decided February 16, 1933. The respondent was indicted with one Lois M. Byers for adultery alleged to have been committed at Lincoln in the County of Penobscot. The state had the burden of proving that the respondent had had sexual intercourse with the said Lois M. Byers within the County of Penobscot at a time when he was lawfully married to someone else. The respondent's admission was the only evidence that at the time of the commission of the offense he had a wife then alive. The presiding Justice properly ruled that this was insufficient to prove the marriage as against Lois M. Byers, and he directed a verdict of not guilty as to her. After conviction of the other respondent a motion for a new trial was filed which was overruled by the presiding Justice, and the case is before us on an appeal from such ruling.

The evidence consists of admissions by the respondent to Dr. McNamara of the fact of his marriage. He also stated, after the act of adultery was alleged to have been committed, that he was about to apply for a divorce. Such evidence is sufficient to constitute prima facie proof of his marriage status. *State* v. *Libby*, 44 Me., 469. The silence of the respondent to the assertions made to him both by Dr. McNamara and by Lois M. Byers that the respondent was responsible for her pregnancy, together with the other proven facts, is evidence from which the jury were justified in finding that there had been sexual intercourse between him and her. It is likewise clear from an examination of the evidence that

the jury were warranted in finding that the offense was committed within the County of Penobscot. Appeal dismissed. Judgment for the State. *James D. Maxwell*, County Attorney, for the State. *Daniel I. Gould*, for respondent.

DOROTHY I. CONE, PRO AMI *vs.* LLOYD ALFRED BALDWIN.

WALTER A. CONE *vs.* LLOYD ALFRED BALDWIN.

Penobscot County. Decided February 23, 1933. These cases tried together before a jury come forward on general motion and exceptions. They involve very serious injuries sustained by a child between three and four years of age, who, while crossing the highway, was struck by an automobile owned and driven by defendant.

While the exceptions were not specifically waived, they were not argued before us and need not be considered. Nor need we waste time in discussing the amount of either verdict. If the findings of the jury as to liability were justified, the assessment of damages was not unreasonable. The only question with which we are concerned is whether or not an examination of the record discloses sufficient evidence to support the verdict, viewing the testimony as favorably to plaintiff as fair reasoning permits.

The disputed issue was defendant's negligence. To prove this, plaintiffs relied entirely upon admissions alleged to have been made by him. The testimony concerning the admissions is neither as clear, convincing nor satisfactory as is desirable. If it were a matter for our independent decision, we should hesitate to say that it satisfied the burden of proof. But the credibility of witnesses is for the jury. It is the final arbiter of questions of fact. Within its province its authority is supreme and its decisions can not be disturbed so long as they are based upon evidence, are not entirely unreasonable, and are consistent with established or admitted facts.

In the instant case there is a line of reasoning, supported by testimony, which justifies the finding below. We can not say that the verdict is clearly wrong. There were two routes to follow. The jury selected one and travelling by it reached its conclusion. Even

though the other appeals to us as more likely to be the broad highway of truth, we can not substitute our judgment for that of the legally constituted triers of fact. Motion and exceptions overruled. *A. S. Crawford, Jr.*, for plaintiffs. *George E. Thompson, Frank W. Ball*, for defendant.

EDWARD FARWELL *vs.* ARTHUR S. DAWES.

JOSEPH FARWELL *vs.* ARTHUR S. DAWES.

ARTHUR S. DAWES *vs.* JOSEPH FARWELL AND EDWARD FARWELL.

Penobscot County. Decided April 12, 1933. The plaintiff, Edward S. Farwell, by his father as next friend, sues Arthur S. Dawes for damages for personal injuries resulting from an automobile collision.

The father sues to recover for expenses incurred in the treatment of his son's injuries and for the damage to his automobile which was being driven by the son. The defendant, Dawes, brings a cross action against both father and son to recover for the damage to his automobile truck and the contents thereof. In the cross action a verdict was directed for the father. The jury found for the son, Edward, in the cross action and for both plaintiffs in the other two actions. Motions for new trials were filed by Dawes.

The plaintiff, Edward Farwell, about one-thirty in the morning, was driving in a northerly direction on South Main Street in Brewer. The road was straight and free from traffic. The only evidence of his speed is his own testimony and he says that he was going about twenty-five miles an hour. The defendant, Dawes', truck was parked in his driveway with its rear end toward the street. While he was backing his car into the highway and about as its rear wheels had reached the concrete, the Farwell car struck it in the rear. Farwell's testimony is that the truck suddenly appeared from the driveway directly in front of him. Dawes' testimony is that he backed his truck slowly out of the driveway, looked south and seeing no car turned his head to the north when the collision occurred.

Whether Dawes in backing his car into the highway was negligent and whether Farwell was in the exercise of due care were clearly questions for the jury. The verdicts are not manifestly wrong and should not be disturbed. Motions overruled. *Albert C. Blanchard*, for Farwells. *Frank Foster, Thompson & Ball*, for Dawes.

G. D. TRUNDY *vs.* DOROTHY A. FOURNIER.

Androscoggin County. Decided May 10, 1933. The plaintiff sued his niece for feed and care of two horses, in his lifetime the property of plaintiff's brother, the father of the niece.

More than ten years ago the brother was committed to a hospital for the insane; plaintiff was appointed his guardian and took possession of the horses.

The brother died, October 25, 1929, and defendant was appointed administratrix of his estate at the December term of Probate Court, 1929, in Androscoggin County.

On June 10, 1930, plaintiff wrote defendant as follows: "Two horses belonging to the estate of the late Charles H. Trundy (the brother) are in my possession upon my premises and I am feeding, sheltering and caring for them.

"I am willing to do this until it becomes convenient for you as administratrix of your father's estate to take them into your possession but I wish it plainly understood by you that from and after this date I shall charge the estate of the late Charles H. Trundy a reasonable amount for such care, feeding and sheltering and shall claim a lien on said horses therefor, under the statute. Sincerely yours, G. D. Trundy."

On the same day counsel for the niece wrote the counsel for plaintiff the following reply letter: "This will acknowledge receipt of your letter of June 10th enclosing a copy of a letter to Mrs. Dorothy A. Fournier (the niece). As I understand the account, Mr. Trundy is to retain the horses as charged to him in the inven-

tory, and is to settle by way of money balance. In other words, he is not to settle in goods, but in money.

"I thank you for the courtesy of your letter, and remain Very truly yours."

There is no further evidence in the record of negotiation or communication between the parties, but on May 26, 1932, defendant sent an agent to plaintiff, who demanded and received the horses.

On August 3, 1932, plaintiff sued defendant on an implied promise to pay the fair value of the feed, shelter and care of the horses from June 10, 1930, to May 26, 1932, claiming in his writ $100.00 a year on account of each horse.

At trial, the jury returned a verdict for $286.50, and defendant comes to this Court, on the usual motion for a new trial.

After her appointment as administratrix of her father's estate it was the duty of defendant to take possession of all chattels belonging to the estate. It is presumed that the law governing the finding of an implied promise to pay was given to the jury, as well as that making a person liable individually for a contract made while serving as administrator and not authorized.

With such instructions the jury might well find the defendant liable.

The damages are not excessive, apparently $1.70 a week for feed, shelter and care of a horse. Motion overruled. *Pulsifer & Ludden*, for plaintiff. *Frank T. Powers, George C. Wing, Jr.*, for defendant.

W. A. Allen Company *vs.* Hermenegile Tremblay.

Cumberland County. Decided May 24, 1933. Exceptions by plaintiff, who contracted with defendant to furnish certain materials, in connection with the erection of a building, for which he was to receive the sum of $2,600. The materials were furnished and the full contract price paid, together with an additional sum of $105.57 on account of certain extras agreed upon between the parties. Plaintiff claimed that there was due him for other items in connection with the transaction the sum of $180.53. At the close

of plaintiff's evidence, the presiding Justice ordered a verdict for the defendant.

Two issues were raised—first, whether the items claimed as extras were included in the contract or not; and second, whether, if not so included, they were ordered by defendant. The contract was in writing and contained a provision that any extra work which might arise during the contract would be undertaken only on defendant's order.

There was evidence tending to show that the items in dispute were extras and also that they were furnished by order of defendant. Both questions were for the jury. The presiding Justice erred in directing a verdict. Exceptions sustained. *Lauren M. Sanborn, Ralph M. Ingalls,* for plaintiff. *James H. Carroll,* for defendant.

EUDASIE PELLETIER, ADMX. OF ESTATE OF WILLIAM PELLETIER

vs.

CHESTER A. MORRIS ET AL.

York County. Decided August 16, 1933. The plaintiff in this case is the duly qualified administratrix of William Pelletier, her son, who was killed in an automobile accident on April 30, 1932. The action is brought under the provision of R. S. 1930, Chap. 101, Secs. 9-10. The deceased was a passenger in a car operated by one Albert Neveux which was being driven in a northerly direction on the Limerick Road so called. The defendants' car was proceeding on the same road in a southerly direction. It was being driven by the defendant Mary Morris, the wife of Chester A. Morris who is joined as defendant and is himself charged with directing and controlling the operation of the car. After a verdict for the defendants the plaintiff has filed a motion for a new trial.

The accident took place at a curve. The contention of the plaintiff is that, as the car in which the deceased was riding rounded this curve, the defendants were driving on the wrong side of the road, and that Neveux was forced to swerve to the left to avoid the

Morris car. Miss Lynch, a passenger in the defendants' car, who has a suit pending against Morris, states in her deposition that the Morris car just prior to the accident was in the middle of the road. The plaintiff calls attention to the fact that Mrs. Morris was an inexperienced driver, and contends that the accident occurred because of her want of skill. Neveux admits that just prior to the collision in an effort to prevent the accident he pulled his car to the left side of the highway, and there was evidence to warrant the jury in finding that the collision took place on Mrs. Morris' side of the road. Neither Mr. or Mrs. Morris were permitted to testify as the Court held that the provisions of R. S. 1930, Chap. 96, Sec. 119, barred them as witnesses. There was much conflicting testimony as to the position of the cars after the accident.

We have no doubt that the issue in this case was for the jury and that it was their province to determine from all the testimony the vital question as to the defendants' negligence. In accordance with the well established rule announced by this Court on many occasions their decision is final. Motion overruled. *Louis B. Lausier, William P. Donahue*, for plaintiff. *Willard & Willard*, for defendant.

GREGOR ZOIDIS ET ALS *vs.* DON T. BREEN ET AL.

Penobscot County. Decided March 7, 1934. This case came forward on report.

The questions in controversy in this action being purely of fact, the case is remanded to the Superior Court for determination. Report discharged. *Butterfield & Weatherbee*, for plaintiffs. *Arthur L. Thayer*, for defendants.

LEO B. DUTHIE *vs.* A. F. COOK ET AL.

Aroostook County. Decided April 6, 1934. This case comes forward on exceptions to the ruling of a single Justice sustaining

demurrer to bill in equity. The allegations contained in the bill present no cause of action. The ruling below is manifestly correct. Exceptions overruled. *Joseph E. Hall*, for plaintiff. *Albert F. Cook*, for defendant.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, MARCH 20, 1933, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

THE SENATE

Augusta, March 20, 1933.

WHEREAS it appears to the Senate of the 86th Legislature that the following are important questions of law and the occasion a solemn one, and

WHEREAS a bill has been introduced into the Senate upon which the report of a duly constituted joint standing committee is being awaited providing for the creation of a constitutional convention to pass on the proposed 21st Amendment to the Constitution of the United States, and

WHEREAS questions have arisen as to the constitutionality of certain of the provisions contained in said Act and as to whether or not the referendum provisions contained in Article 1 of the Constitution of Maine apply thereto, and

WHEREAS it is of the utmost importance in the opinion of the Senate that an act to provide for a convention to pass on said amendment if it is to be enacted shall meet the requirements of the Constitution of the United States, and of the Constitution of the State of Maine,

ORDERED That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

FIRST.

Section one of an act entitled "An Act to Provide for a Convention to Pass on the Proposed 21st Amendment to the Constitution of the United States" (Legislative Document 801) provides that the date of an election to be held for the purpose of selecting delegates to a convention to pass on said amendment shall be fixed by the governor by proclamation and section six of said act provides that the election shall be by ballot "separate from any ballot to be used at the same election." Several acts and resolves also pending before the 86th Legislature call for a special election to pass on constitutional questions or on legislative acts which special election according to the terms of said acts and resolves will be held on the second Monday in September, 1933.

Question No. 1.

Can the governor, by proclamation under the terms of said act, fix as the date of said special election the second Monday of September, 1933, when an election is to be held in accordance with a legislative act or if a referendum is invoked under the provisions of article XXXI of the Constitution on any bill or resolve duly enacted or finally passed by the 86th Legislature and approved by the governor and a special referendum election held thereon, can the governor, under the terms of said act, provide for said special election to be held on the same date as such referendum election?

SECOND.

The recitals contained in section three of said act provide that the results of the special election therein provided shall be "ascertained and certified in the same manner as in the case of the election of presidential electors."

Question No. 2.

In canvassing the returns of such special election what right, power, authority and duty have the governor and council to investigate and pass upon questions of fraud, irregularities and illegal practices in the conduct of the election?

Question No. 3.

If the governor and council, in the performance of their bipartite function, are unable to agree on the election of a full quota of delegates to the convention provided for by said act, is there a minimum number or quota of delegates who, after convening with certificates of election issued to them, will have authority to organize the convention therein provided and in accordance with the provisions of section nine thereof determine the election and qualification of candidates to fill the places left vacant through want of concurrent action by the governor and council and if less than a full quota may so convene what is the minimum number?

Question No. 4.

If the governor and council have authority in canvassing the returns to inquire into questions of fraud, irregularity and illegal practices in the conduct of the election, what duty is imposed upon them to reject individual ballots or to disregard the vote in election precincts where fraud, irregularity or illegal practice in the conduct of the election is shown?

Question No. 5.

In the event of the failure of concurrent action on the part of the governor and council as to the finding of fraud, irregularity or illegal practices in the conduct of an election, are the ballots found by either the governor or the council to be fraudulent to be counted or rejected and are the returns presented in a precinct where fraud, irregularity or illegal practice in the conduct of the election is found by one branch of the bipartite board and not concurred in by the other to be accepted or rejected?

THIRD.

Under the terms of said act all the delegates to the convention provided for therein are to be elected at large in the entire state.

Question No. 6.

Does the provision of article V of the Constitution of the United States that amendments thereto shall be valid "when ratified by the

legislatures of three-fourths of the several states or by conventions in three-fourths thereof as the one or the other mode of ratification may be proposed by the Congress" permit the ratification of an amendment submitted by the Congress to convention in the several states to be passed upon by referendum?

Question No. 7.

If the provisions of article V of said federal constitution do not permit an amendment to said constitution to be ratified by referendum vote, is it permissible for the state under the terms of said article V to organize a convention wherein the delegates entitled to participate therein are all to be elected in the state at large?

FOURTH.

Section five of said act provides for a system of nominations which excludes from groups to be designated on the ballot as provided by section six thereof as either "for ratification" or "against ratification" all electors in excess of twenty-one in each case and provides in addition that the nomination of candidates running as "unpledged" shall be restricted to the same number.

Question No. 8.

Is it permissible, under the Constitution of the United States of America or under the provisions of the Constitution of the State of Maine, for the Legislature to authorize the convening of a constitutional convention which deprives any elector in the state from the opportunity of having his name voted upon at an election called for the purpose of selecting delegates to such a convention?

Question No. 9.

If it is not permissible for the Legislature to bar by arbitrary provision all candidates for election to such a convention beyond an established minimum number, is the Legislature free to establish two systems of nomination, one of which will provide for a given number of candidates on any arbitrary or certified basis and the second, because of the imposition of an unreasonable requirement, will in effect forestall any elector from using its provisions?

FIFTH.

Under the terms of section six the ballot provided for said special election is arranged in such manner that an elector may vote with a single cross for the entire group of candidates appearing on the ballot as "for ratification" or "against ratification" or "unpledged," and it is provided that no ballot shall be held void because any cross-mark used in voting such ballot is irregular in character.

Question No. 10.

Must a convention assembling in a state to pass upon an amendment to the Constitution of the United States and submitted by vote of the Congress to the action of conventions in the several states be a deliberative convention?

Question No. 11.

Is it permissible, under the terms of the Constitution, to provide for the election of delegates according to a group system or a party system so that the elector by a single cross may vote for a number of delegates equal to the total number entitled to seats therein?

SIXTH.

The provisions of article XXXI of the Constitution provide that no act or joint resolution of the Legislature with certain exceptions not herein of importance, shall take effect until ninety days after the recess of the Legislature passing it and that upon written petition of not less than ten thousand electors properly filed it shall not take effect until after ratification by a majority of the electors on a proper submission of the same to such electors.

Question No. 12.

Do the provisions of article XXXI of the Constitution apply to an act of the Legislature providing for a convention to pass upon an amendment to the Constitution of the United States sub-

mitted by action of the Congress to conventions in the several states?

IN SENATE
March 20, 1933
Read and Passed
Royden V. Brown
Secretary.

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by Senate Order of March 20, 1933, respectfully submit the following answers.

QUESTION 1.

Can the governor, by proclamation under the terms of said act, fix as the date of said special election the second Monday of September, 1933, when an election is to be held in accordance with a legislative act or if a referendum is invoked under the provisions of article XXXI of the Constitution on any bill or resolve duly enacted or finally passed by the 86th Legislature and approved by the governor and a special referendum election held thereon, can the governor, under the terms of said act, provide for said special election to be held on the same date as such referendum election?

QUESTION 2.

In canvassing the returns of such special election what right, power, authority and duty have the governor and council to investigate and pass upon questions of fraud, irregularities and illegal practices in the conduct of the election?

QUESTION 4.

If the governor and council have authority in canvassing the returns to inquire into questions of fraud, irregularity and illegal practices in the conduct of the election, what duty is imposed upon them to reject individual ballots or to disregard the vote in elec-

tion precincts where fraud, irregularity or illegal practice in the conduct of the election is shown?

ANSWER 1 — 2 — 4.

The Justices may, at the request of the Governor, the Executive Council, or both, advise as to the power, duty and authority vested in the executive branch of the government; but not on the request of the Legislature or either branch thereof.

QUESTION 3.

If the governor and council, in the performance of their bipartite function, are unable to agree on the election of a full quota of delegates to the convention provided for by said act, is there a minimum number or quota of delegates who, after convening with certificates of election issued to them, will have authority to organize the convention therein provided and in accordance with the provisions of section nine thereof determine the election and qualification of candidates to fill the places left vacant through want of concurrent action by the governor and council and if less than a full quota may so convene what is the minimum number?

QUESTION 5.

In the event of the failure of concurrent action on the part of the governor and council as to the finding of fraud, irregularity or illegal practices in the conduct of an election, are the ballots found by either the governor or the council to be fraudulent to be counted or rejected and are the returns presented in a precinct where fraud, irregularity or illegal practice in the conduct of the election is found by one branch of the bipartite board and not concurred in by the other to be accepted or rejected?

ANSWER 3 — 5.

These questions involve matters to be decided by the convention, which has sole power and authority to act upon them.

QUESTION 6.

Does the provision of article V of the Constitution of the United

States that amendments thereto shall be valid "when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof as the one or the other mode of ratification may be proposed by the Congress" permit the ratification of an amendment submitted by the Congress to convention in the several states to be passed upon by referendum?

ANSWER 6.

An amendment to the Constitution of the United States is valid only when ratified in accordance with the provisions of Article V thereof. This does not provide for ratification by referendum vote and such procedure would be invalid.

QUESTION 7.

If the provisions of article V of said federal constitution do not permit an amendment to said constitution to be ratified by referendum vote, is it permissible for the state under the terms of said article V to organize a convention wherein the delegates entitled to participate therein are all to be elected in the state at large?

ANSWER 7.

There are no statutory or constitutional provisions, either Federal or State, which dictate the manner in which delegates shall be elected. Nor do we find judicial definition of the legislative prerogatives. The only guide is the practice which has been followed in the past with respect to constitutional conventions.

The members of a convention such as is contemplated by Article V of the Constitution of the United States are representatives of the people, chosen by the duly qualified electors to perform a legislative duty. The principal distinction between a convention and a legislature is that the former is called for a specific purpose, the latter for general purposes. Although a convention is summoned by the legislature, it derives its power from the sovereign people. It has, accordingly, been the practice to have as delegates those fairly representing the political subdivisions of the State. The Continental Congress summoned the different colonies "to call a full and free representation of the people" for the purpose of

organizing their governments. This demand was answered by the summoning in every colony of delegates fairly apportioned according to population and location. The Federal Constitution was ratified by conventions called by the legislatures of the several states and organized in a similar manner. The Act of Separation by which Maine became a state provided for a convention which, with other duties, was required to draft a constitution. The delegates were chosen from the several towns within the District.

It is evident, therefore, that in every constitutional convention of which we have knowledge, delegates have been chosen, not at large, but from the various localities within the state. By this method the requirement has been met that the members of the body selected to make modifications in the fundamental law should fairly represent the people whom they serve.

In view of the foregoing, we do not deem it permissible for the State, under the terms of Article V of the Federal Constitution, to organize a convention wherein the delegates entitled to participate are all elected at large.

QUESTION 8.

Is it permissible, under the Constitution of the United States of America or under the provisions of the Constitution of the State of Maine, for the Legislature to authorize the convening of a constitutional convention which deprives any elector in the state from the opportunity of having his name voted upon at an election called for the purpose of selecting delegates to such a convention?

ANSWER 8.

The Legislature has the right to make reasonable requirements relative to the nomination of candidates and may prescribe proper restrictions so that those elected as delegates shall be qualified to do the work which they are called on to perform. Subject to these limitations, any elector is entitled to have his name voted on as a delegate.

QUESTION 9.

If it is not permissible for the Legislature to bar by arbitrary

provision all candidates for election to such a convention beyond an established minimum number, is the Legislature free to establish two systems of nomination, one of which will provide for a given number of candidates on any arbitrary or certified basis and the second, because of the imposition of an unreasonable requirement, will in effect forestall any elector from using its provisions?

ANSWER 9.

We answer this question in the negative.

QUESTION 10.

Must a convention assembling in a state to pass upon an amendment to the Constitution of the United States and submitted by vote of the Congress to the action of conventions in the several states be a deliberative convention?

ANSWER 10.

A convention is a body or assembly representative of all the people of the state. The convention must be free to exercise the essential and characteristic function of rational deliberation. This question is, therefore, answered in the affirmative.

QUESTION 11.

Is it permissible, under the terms of the Constitution, to provide for the election of delegates according to a group system or a party system so that the elector by a single cross may vote for a number of delegates equal to the total number entitled to seats therein?

ANSWER 11.

We answer this question in the negative.

QUESTION 12.

Do the provisions of article XXXI of the Constitution apply to an act of the Legislature providing for a convention to pass upon an amendment to the Constitution of the United States submitted by action of the Congress to conventions in the several states?

ANSWER 12.

We answer this question in the affirmative.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER

Dated March 27th, 1933.

MEMORANDUM: Mr. Justice Farrington is unable to act because of illness.

W. R. PATTANGALL

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME COURT OF MAINE, MARCH 20, 1933, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

THE SENATE

Augusta, March 20, 1933.

WHEREAS: It appears to the Senate of the 86th Legislature that the following are important questions of law and the occasion a solemn one, and

WHEREAS: A bill has been enacted by the 86th Legislature suspending the operation of the law providing for the assessment of a tax of one mill on all property within the State for highway purposes and further providing for the distribution of certain indirect revenues of the State in highway work, and

WHEREAS: In the opinion of the Legislature the necessity for making said Act immediately operative was so acute that the emergency clause was attached thereto, and

WHEREAS: Questions have arisen as to the constitutionality of certain of the provisions contained in said Act and as to the sufficiency of the emergency clause attached thereto, and

WHEREAS: If said Act is unconstitutional public necessity requires that a new bill shall be enacted to carry into effect the will of the people of the State of Maine as expressed by their representatives in Legislature assembled,

ORDERED: That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

FIRST.

Under the terms of Article LII of the Constitution of Maine amending Section 17 of Article IX of said Constitution as heretofore amended, it is provided that bonds may be issued by the State, the proceeds of which shall be "devoted solely to the construction of the present system of State highways."

Under the terms of the act passed by the 86th Legislature and already signed by the Governor, designated an "Act to Create and Allocate a General Highway Fund for State Aid and Third Class Highway Construction, and to Temporarily Suspend Certain Statutes," it is provided, by the terms of Section 8 thereof, that authority is vested in the State Highway Commission "to use highway loan funds and general highway funds to meet outstanding contract obligations including obligations or expenditures of towns incurred by them in anticipation of aid for state aid or 3rd class highway construction projects."

Question No. 1.

Does the provision contained in said Section 8 that the State Highway Commission may use highway loan funds to meet outstanding contract obligations incurred in anticipation of aid for state aid or 3rd class highway construction projects contravene the 17th section of Article IX of the Constitution as amended by said Article LII?

Question No. 2.

If the provision contained in Section 8 of said Act does contravene the Constitution and becomes void because of such contravention, does the unconstitutionality of said Section or any particular provision thereof make the entire Act and all the provisions thereof unconstitutional?

SECOND.

The emergency preamble attached to said Act reads as follows:

"EMERGENCY PREAMBLE. Whereas, many people are out of work throughout the state, thus placing a heavy burden upon many local communities, and

Whereas, an early beginning on the road program will help to relieve this situation to a large degree, and

Whereas, many town meetings will be held shortly at which action should then be taken to take proper advantage of the conditions of this bill, and

Whereas, in the judgment of the legislature these facts create an emergency within the meaning of section 16 of Article XXXI of the constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety, now, therefore,"

An examination of the operation of the Act will disclose in the opinion of the Senate that the effect of the suspension of the operation of the law providing for the imposition of a tax of one mill for highway purposes is to reduce rather than to increase the funds available for highway construction. In addition, it is manifest in view of the existing law which provides that the fiscal years of the State close on June 30th, that said legislative Act cannot in accordance with its terms "take effect when approved," but that its actual operation will commence at the opening of the next fiscal year on July 1, 1933.

Question No. 3.

Under the circumstances above set forth, is the emergency clause attached to said Act and hereinbefore quoted sufficient to prevent the operation of the referendum provision contained in said Article XXXI of the Constitution of the State of Maine?

Question No. 4.

Does the requirement of Article XXXI of the Constitution providing that emergency legislation "shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety" restrict the operation of such emergency clause to those cases where an emergency in fact exists, and is receited, or is it sufficient notwithstanding the recital in the Constitution that "the facts constituting an emergency shall be expressed in the preamble of the act" if the Legislature merely recites any set of circumstances and concludes with the declaration that "in the judgment of the legislature these facts create an

emergency within the meaning of section 16 of Article XXXI of the Constitution of Maine, and require the following legislation as immediately necessary for the preservation of the public peace, health and safety?"

In Senate
March 20, 1933
Read and passed
ROYDEN V. BROWN,
Secretary.

TO THE HONORABLE SENATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answers to the questions propounded to us, bearing date of March 20, 1933, relating to highway loan funds.

QUESTION.

Does the provision contained in said Section 8 that the State Highway Commission may use highway loan funds to meet outstanding contract obligations incurred in anticipation of aid for state aid or 3rd class highway construction projects contravene the 17th section of Article IX of the Constitution as amended by said Article LII?

ANSWER.

We answer this question in the affirmative.

QUESTION.

If the provision contained in Section 8 of said Act does contravene the Constitution and becomes void because of such contravention, does the unconstitutionality of said Section or any particular provision thereof make the entire Act and all the provisions thereof unconstitutional?

ANSWER.

When legislative provisions are so related in substance and object that it is impossible to suppose the statute would have been enacted except as an entirety, if one portion offends the Constitution, the whole must fall. That part of Section 8 of the Act, to

which the inquiry of the Senate relates, being stricken out, the remaining portion of the legislation appears incomplete and incapable of being executed in accordance with apparent intent. The Act is unconstitutional.

These answers make it unnecessary to consider the third and fourth questions.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER

Dated March 22nd, 1933.

MEMORANDUM: Mr. Justice Farrington is unable to act because of illness.

W. R. PATTANGALL

QUESTION SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, NOVEMBER 14, 1933, WITH THE ANSWER OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, November 14, 1933.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article VI, Section 3, I, Louis J. Brann, Governor of Maine, respectfully submit the following statement of facts, and question, and ask the opinion of the Justices of the Supreme Judicial Court thereon:

STATEMENT.

The Merrill Trust Company of Bangor, at a meeting of its stockholders held on November 10, 1933, adopted a plan of reorganization prepared with the approval of the Reconstruction Finance Corporation and Federal Reserve Board at Washington, which requires the granting of two special charters by the Legislature of Maine, which are herewith presented, both charters having been enacted by the Senate and House of Representatives as Emergency Legislation, and now are in my hands as Governor for my approval and signature, in accordance with the provisions of Article IV, Section 2, of the Constitution of Maine.

Question.

Are these charters valid and constitutional legislation within the meaning of Article IV, Section 14, of the Constitution of Maine?

Respectfully submitted,
LOUIS J. BRANN
Governor of Maine.

By the Governor:
ROBINSON C. TOBEY
Secretary of State.

To His Excellency, Louis J. Brann, Governor of Maine:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the question propounded to us, bearing date of November 14, 1933, in connection with the granting of two special charters by the Legislature to the Merrill Trust Company of Bangor.

Question.

Are these charters valid and constitutional legislation within the meaning of Article IV, Section 14, of the Constitution of Maine?

Answer.

We answer the above question in the affirmative.

Very respectfully,
WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER

Dated November 14th, 1933.

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, DECEMBER 7, 1933, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

IN SENATE

December 6, 1933.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

WHEREAS, it appears to the Senate of the 86th Legislature that the following is an important question of law and the occasion a solemn one; and

WHEREAS, bills are before the Senate for consideration providing for the creation of school districts and water districts which carry emergency clauses and, for explanation of the emergency, set forth the need of immediately obtaining federal aid or grants which may be lost if immediate action is not taken and the setting forth that immediate re-employment of needy citizens is of the utmost importance, and setting forth in the cases of the school districts, the overcrowded condition of the schools as being a menace to the health of the children; and setting forth in the cases of water districts the danger from the lack of adequate fire protection and proper sanitation; and

WHEREAS, questions have arisen as to the constitutionality of these acts because of the possible infringement of the right to home rule for municipalities,

ORDERED, That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

Question No. 1.

Does the bill now before the 86th Legislature, entitled "An Act to Incorporate the Town of Orono School District," H. P. 24, L. D. 39, constitute an infringement of the right to home rule for municipalities as is contemplated in Section 16 of Article IV of the Constitution contained in Article XXXI of the amendments thereof?

Question No. 2.

If said act constitutes such an infringement, has the Legislature the power and authority to pass such a bill under the emergency clause in the form of an enabling act to become effective only by vote of the people within such municipality?

Presented by Senator Blaisdell of Hancock.

In Senate December 7, 1933
Passed.

A true copy
Attest:
ROYDEN V. BROWN
Secretary of the Senate.

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by Senate Order of December 6, 1933, respectfully submit the following answers.

QUESTION 1.

Does the bill now before the 86th Legislature, entitled "An Act to Incorporate the Town of Orono School District," H. P. 24, L. D. 39, constitute an infringement of the right to home rule for municipalities as is contemplated in Section 16 of Article IV of the Constitution contained in Article XXXI of the amendments thereof?

QUESTION 2.

If said act constitutes such an infringement, has the Legislature the power and authority to pass such a bill under the emergency clause in the form of an enabling act to become effective only by vote of the people within such municipality?

ANSWER 1—2.

We are of the opinion that it is not within the scope of our duty to answer these questions, in view of the fact that the bill to which they refer, in its present form, could not accomplish its desired purpose, irrespective of the propositions involved in the interrogatories submitted. A careful analysis of its provisions forces the conclusion that its passage without amendment, whether the emergency clause was included or not, would result only in the enactment of a measure, the usefulness of which would be destroyed by its inherent legal defects and insufficiency.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

Dated December 15, 1933.

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, DECEMBER 7, 1933, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

IN SENATE

December 7, 1933.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

WHEREAS, it appears to the Senate of the 86th Legislature that the following are important questions of law and the occasion a solemn one, and

WHEREAS, a bill was enacted by the 86th Legislature amending Sections 1, 3 and 6 of Chapter 137 of the Revised Statutes of 1930, and

WHEREAS, the amendment to said Section 1 of said Chapter 137 therein contained would strike out the word 'fit" in the third line of said section to make the test of the illegal possession of any wort or mash the possession of the same "for distillation," and

WHEREAS, the amendment therein contained to said Section 3 would have the effect of eliminating from the statutes all penalties for the transportation of liquor within the state except where liquor so transported was intended for illegal sale within the state, and

WHEREAS, the amendment therein contained to said Section 6 would repeal all arbitrary definitions of intoxicating liquor, and

WHEREAS, under the provisions of Article XXXI of the Constitution of Maine the operation of said act was suspended and the same will be required by the force of said Constitution to be submitted to the voters of the State of Maine for approval or rejection hereafter, and

WHEREAS said Section 6 was in effect amended or modified by the enactment of an act entitled "An Act Relating to Malt Bev-

erages and to Derive Revenue from the Manufacture and Sale Thereof" by said 86th Legislature, and

WHEREAS there has been introduced at the present special session of the 86th Legislature an act entitled "An Act to Amend Chapter 137 of the Revised Statutes by Repealing Those Portions Designed for the Enforcement of Federal Prohibition," which act is now pending for enactment and seeks to amend said Sections 1, 3 and 6 of said chapter;

ORDERED, that the Justices of the Supreme Judicial Court are hereby requested to give to the Senate according to the provisions of the Constitution on this behalf their opinion on the following questions, to wit:

Question No. 1.

Has the Legislature the authority while the operation of a law enacted by it is suspended under the provisions of Article XXXI of the Constitution to amend or further amend the same?

Question No. 2.

Will the act hereinbefore referred to, passed at the regular session of the 86th Legislature and suspended through the operation of Article XXXI of the Constitution, have the effect on the date it becomes effective under said Article XXXI, if it is ratified by a majority of the electors, of superseding or amending any change in a section of the statutes affected by said act of superseding the action of the Legislature at the present special session?

Question No. 3.

Can the requirement of Article XXXI of the Constitution that an act passed by the Legislature on which the referendum is invoked or submitted to the people for ratification be set aside by an act to be passed at this session repealing the law in question?

Question No. 4.

Can the question required to be submitted to the people under the operation of said Article XXXI of the Constitution be modified by the Legislature or by any official of the state so as to change the issue to be presented in accordance with legislative action sub-

sequent to the passage of the original act and intervening before the date of its submission to the people?

Question No. 5.

Has the ratification of the Twenty-first Amendment to the Constitution of the United States operated automatically to repeal the legislation heretofore enacted by Congress passed to enforce the provisions of the Eighteenth Amendment to the Constitution?

Question No. 6.

If the adoption of the Twenty-first Amendment to the Constitution of the United States has operated to automatically repeal the Volstead Act, has that repeal operated to make the provisions of Section 3 of Chapter 137 of the Revised Statutes of the State of Maine absolute, or has said section been repealed or modified?

Question No. 7.

Has the Legislature the power, in the absence of a provision in the Constitution of the United States depriving intoxicating liquor of its status as property, to pass a law which will make it a penal offense to own or to transport intoxicating liquor within the State regardless of the question as to whether or not the same is intended for unlawful sale?

In Senate December 7, 1933
Passed.

A true copy
Attest:
ROYDEN V. BROWN
Secretary of the Senate.

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by Senate Order of December 7, 1933, respectfully submit the following answers.

QUESTION 1.

Has the Legislature the authority while the operation of a law

enacted by it is suspended under the provisions of Article XXXI of the Constitution to amend or further amend the same?

ANSWER 1.

Article XXXI of the Constitution of Maine provides that:

"Upon written petition of not less than ten thousand electors, addressed to the governor and filed in the office of the secretary of state within ninety days after the recess of the legislature, requesting that one or more acts, bills, resolves or resolutions, or part or parts thereof passed by the legislature, but not then in effect by reason of the provisions of the preceding section, be referred to the people, such acts, bills, resolves, or resolutions or part or parts thereof as are specified in such petition shall not take effect until thirty days after the governor shall have announced by public proclamation that the same have been ratified by a majority of the electors voting thereon at a general or special election. As soon as it appears that the effect of any act, bill, resolve, or resolution or part or parts thereof has been suspended by petition in manner aforesaid, the governor by public proclamation shall give notice thereof and of the time when such measure is to be voted on by the people. . . ."

By reference to the Public Laws of 1933, we find that the enactment referred to in the preamble to these questions appears therein as Chapter 226 and is entitled "An Act Relating to the Transportation of Intoxicating Liquor." The operation of this act was suspended by petition in accordance with the provisions of Article XXXI of the Constitution and so proclaimed by the Governor of Maine, but no opportunity has yet been accorded to the electorate to approve or reject it. It has not, therefore, become effective nor has it been finally rendered invalid. The right of the voters to pass upon the act is absolute. It can not be abridged by further action of the Legislature.

QUESTION 2.

Will the act hereinbefore referred to, passed at the regular session of the 86th Legislature and suspended through the operation of Article XXXI of the Constitution, have the effect on the date

it becomes effective under said Article XXXI, if it is ratified by a majority of the electors, of superseding or amending any change in a section of the statutes affected by said act of superseding the action of the Legislature at the present special session?

ANSWER 2.

Should this Legislature enact a law inconsistent with the provisions of Chapter 226, P. L. 1933, and the latter act should be subsequently accepted by popular vote, it would become effective notwithstanding any act passed by the Legislature in the meantime.

QUESTION 3.

Can the requirement of Article XXXI of the Constitution that an act passed by the Legislature on which the referendum is invoked or submitted to the people for ratification be set aside by an act to be passed at this session repealing the law in question?

ANSWER 3.

After the referendum has been invoked and until the voters have acted thereunder, the subject matter of the referred bill is withdrawn from further consideration of the Legislature. It can neither amend nor repeal the act during that period.

QUESTION 4.

Can the question required to be submitted to the people under the operation of said Article XXXI of the Constitution be modified by the Legislature or by any official of the state so as to change the issue to be presented in accordance with legislative action subsequent to the passage of the original act and intervening before the date of its submission to the people?

ANSWER 4.

We answer this question in the negative.

QUESTION 5.

Has the ratification of the Twenty-first Amendment to the Constitution of the United States operated automatically to repeal

the legislation heretofore enacted by Congress passed to enforce the provisions of the Eighteenth Amendment to the Constitution?

ANSWER 5.

The ratification of the Twenty-first Amendment to the Constitution of the United States repealed the Eighteenth Amendment thereof and automatically rendered inoperative such statutes or parts thereof as conflict with the Twenty-first Amendment or are unauthorized by its provisions.

QUESTION 6.

If the adoption of the Twenty-first Amendment to the Constitution of the United States has operated to automatically repeal the Volstead Act, has that repeal operated to make the provisions of Section 3 of Chapter 137 of the Revised Statutes of the State of Maine absolute, or has said section been repealed or modified?

ANSWER 6.

In view of our answer to Question 3, we do not deem it necessary to answer this question.

QUESTION 7.

Has the Legislature the power, in the absence of a provision in the Constitution of the United States depriving intoxicating liquor of its status as property, to pass a law which will make it a penal offense to own or to transport intoxicating liquor within the State regardless of the question as to whether or not the same is intended for unlawful sale?

ANSWER 7.

We answer this question in the affirmative. The State has the right, not for the benefit of the individual, but for the best interest of society, to enact laws prohibiting the manufacture, sale, transportation, or possession of intoxicating liquor within its borders, regardless of whether or not it is intended for unlawful sale. This right is inherent, having its basis in the police power, and a necessary attribute of government. It does not depend upon the authority either of the State or the Federal Constitution.

The Supreme Court of the United States said, "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. . . . We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge." *Crane* v. *Campbell*, 245 U. S. Rep., 304.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

Dated December 15, 1933.

QUESTIONS SUBMITTED BY THE SENATE OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, DECEMBER 7, 1933, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

IN SENATE

December 7, 1933.

TO THE HONORABLE JUSTICES OF THE SUPREME JUDICIAL COURT:

WHEREAS, it appears to the Senate of the 86th Legislature that the following are important questions of law and the occasion a solemn one, and

WHEREAS, a Resolve has been introduced into the Senate entitled "Resolve Proposing Modification of the 26th Amendment to the Constitution Relating to Intoxicating Liquors by Repealing the Amendment as it Now Stands and Substituting in Place Thereof a New Amendment," proposing a modification of the 26th Amendment to the Constitution of Maine which now prohibits the sale of intoxicating liquors except for certain specified purposes, and

WHEREAS, the modification so proposed will be submitted to the electors, if said resolve is finally passed, on the second Monday in September next, and

WHEREAS, said modification, if it becomes a part of the Constitution will permit the sale of certain beverages now prohibited, and

WHEREAS, in anticipation of the adoption of said Amendment a bill has been introduced into the Senate entitled "An Act Regulating the Sale of Alcoholic Beverages," under the terms of which Act machinery is definitely set up to regulate the sale of such presently prohibited beverages, which act according to its terms is to be

submitted to the electors for adoption or rejection concurrently with the aforesaid Resolve:

ORDERED: That the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

FIRST.

Is it within the power of the Legislature to pass an act authorizing the sale of beverages contrary to the express provision of the Constitution as it now stands, to become effective on condition that a change in the Constitution proposed by the Legislature concurrently with the passage of such act and submitted to the electors for adoption shall be so adopted?

SECOND.

If such an enactment is not within the power of the Legislature, is it within the power of the Legislature to pass an enabling act submitting to the electors for their adoption or rejection, concurrently with their adoption or rejection of a Constitutional Amendment which will eliminate the prohibition against such legislation, a similar act to be effective only in case both act and amendment are so adopted?

Presented by Senator Murchie of Washington.

In Senate December 7, 1933
Passed.

A true copy
Attest:
ROYDEN V. BROWN
Secretary of the Senate.

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by Senate Order of December 7, 1933, respectfully submit the following answers.

QUESTION 1.

Is it within the power of the Legislature to pass an act authorizing the sale of beverages contrary to the express provision of the Constitution as it now stands, to become effective on condition that a change in the Constitution proposed by the Legislature concurrently with the passage of such act and submitted to the electors for adoption shall be so adopted?

ANSWER 1.

Article XXVI of the Amendments to the Constitution of Maine embodies the existing policy of the State in regard to the manufacture and sale of intoxicating liquors within its limits. The manufacture of intoxicating liquors, (not including cider), and selling, or keeping such liquors for sale, are, in the words of the article, "forever prohibited." Then follows, in brief, this exception: "Intoxicating liquors may be sold, under such regulations as the Legislature may provide, "for medicinal and mechanical purposes and the arts." A provision with reference to selling cider is not of instant relevance. The amendment makes it compulsory upon the Legislature to "enact laws with suitable penalties for the suppression of the manufacture, sale and keeping for sale of intoxicating liquors," with the aforesaid exception.

The Constitutional Amendment limits or restrains legislative power. In other words, the adoption of the amendment took away powers, otherwise possessed by the Legislature, upon the subject of intoxicating liquors. Legislative power is measured by limitation, not by grant. Such power is absolute and all embracing except as expressly, or by necessary implication, restricted by the Constitution.

As respects authorizing the selling of intoxicating liquors, the Legislature can only make laws regulating the details of the purposes which the amendment specifies; that is to say, "for medicinal and mechanical purposes and the arts." In other respects, there is, by necessary implication, absolute and complete inhibition on legislative action. The language is that of exclusion. Where, as here, the Legislature is subservient to a constitutional prohibition, there may not be the enactment of legislation, even conditionally.

The question, whether the present Legislature may authorize

the sale of intoxicating liquors as beverages, when and after an amendment to the Constitution shall make such sales permissible, is answered in the negative.

QUESTION 2.

If such an enactment is not within the power of the Legislature, is it within the power of the Legislature to pass an enabling act submitting to the electors for their adoption or rejection, concurrently with their adoption or rejection of a Constitutional Amendment which will eliminate the prohibition against such legislation, a similar act to be effective only in case both act and amendment are so adopted?

ANSWER 2.

Unless and until changed by formal amendment, present provisions of the Constitution bind not only the Legislature but the people. This question is, therefore, answered in the negative.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

Dated December 15, 1933.

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, APRIL 20, 1934, WITH THE ANSWER OF THE JUSTICES THEREON

STATE OF MAINE

EXECUTIVE DEPARTMENT

Augusta, Maine, April 20, 1934.

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 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 1933 passed an act entitled: "An Act Relating to the Measurement of Lobsters" which appears in the Laws of Maine of 1933 (Special Session) as Chapter 294. This act was approved by the Governor on the 16th day of December, 1933.

The Legislature adjourned on December 20th, 1933. Within ninety days of the date of said adjournment, certain petitions intended to come within the provisions of Article IV of the Constitution, as amended by the Amendment adopted September 14, 1908, known as the Initiative and Referendum Amendment, were filed in the office of the Secretary of State, addressed to the Governor, requesting that the act hereinbefore referred to be referred to the people of Maine to be voted on.

These petitions bore the names of more than ten thousand petitioners, to wit: Ten thousand, eight hundred and sixty-two.

The questions submitted affect said act, and your opinion upon such questions will determine whether said act is in effect or should be referred by me as Governor to the people.

Certain objections have been made to the sufficiency of certain of the petitions, and in order that I may determine whether or not to count certain of said signatures to said petitions so filed in the office of the Secretary of State, and to refer to the people of Maine to be voted on, the act in question, I desire your opinion as to the sufficiency of certain of said petitions, and whether or not the names thereon should be counted in determining that ten thousand electors have petitioned in accordance with the Constitution.

Question No. 1.

(A) In certain cases it appears that the verifying petitioner did not sign the petition as a petitioner which he verifies, but did sign some other valid petition. In such case shall the names on the petition verified be counted?

(B) Would it affect the counting of names on petitions described if the verifying petitioner, although failing to sign the petition as a petitioner which he verified, signed a similar petition as a petitioner in his own city or town, such latter petition being properly certified by the town or city clerk?

Very respectfully,

LOUIS J. BRANN
Governor.

TO HIS EXCELLENCY, LOUIS J. BRANN, GOVERNOR OF MAINE:

The undersigned Justices of the Supreme Judicial Court have the honor to submit the following answer to the questions propounded to us, bearing date of April 20, 1934, in connection with a proposed referendum of an act entitled "An Act Relating to the Measurement of Lobsters," which appears in the Laws of Maine of 1933 (Special Session) as Chapter 294, and which was approved by the Governor on the 16th day of December, 1933.

QUESTION.

(A) In certain cases it appears that the verifying petitioner did not sign the petition as a petitioner which he verifies, but did sign some other valid petition. In such case shall the names on the petition verified be counted?

(B) Would it affect the counting of names on petitions described if the verifying petitioner, although failing to sign the petition as a petitioner which he verified, signed a similar petition as a petitioner in his own city or town, such latter petition being properly certified by the town or city clerk?

ANSWER.

The questions submitted are fully discussed in the Opinion of the Justices, 116 Maine, 557, direct reference being made to the answers to Question 3 at pages 573-4, to Question 16 at pages 585-6, and to Question 17 at page 586. We reaffirm the position then taken by the Justices.

Each petition constitutes a separate document and must be verified by a petition whose name appears thereon and who can verify but one petition. The provisions of Article XXXI of the Constitution are plain and definite and admit of no construction that will permit the questions to be answered other than in the negative.

Very respectfully,

WILLIAM R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
SIDNEY ST. F. THAXTER
JAMES H. HUDSON

Dated April 23, 1934.

RULES OF COURT

STATE OF MAINE

SUPERIOR COURT February 26, 1934.

All of the Justices of the Superior Court concurring, the following Rule of Court is established.

Rule 43 of the Revised Rules of the Supreme Judicial and Superior Courts, 129 Maine, 519, is amended so as to read as follows:

The second day of each term of the court for any county is fixed as the stated day on which final action may be had on petitions for naturalization as provided by Federal law, except that the third day of the September term for Piscataquis County, the fourth day of the September term for Franklin County, the third day of the October term for York County, the fourth day of the October term for Waldo County, the third day of the November term for Penobscot County, the fourth day of the November term for Lincoln County, the fifth day of the November term for Knox County, the third day of the April term for Kennebec County, the fourth day of the April term for Penobscot County, the third day of the May term for Somerset County, the eighth day of the March term for Oxford County, and the fourth day of the June term for Washington County are so designated.

W. R. PATTANGALL,
Chief Justice, Supreme Judicial Court.

WARREN COFFIN PHILBROOK

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA, SEPTEMBER 19, 1933, IN MEMORY OF

HONORABLE WARREN COFFIN PHILBROOK

LATE ACTIVE RETIRED JUSTICE OF THE SUPREME JUDICIAL COURT

Born November 30, 1857. Died May 31, 1933.

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

HON. L. T. CARLETON, SENIOR, President of the Kennebec Bar Association, addressed the Court as follows:

MAY IT PLEASE THE COURT:

I have been instructed by the Kennebec Bar Association to ask this Honorable Court for permission for a committee of the association to present to the Court some resolutions, and submit some remarks upon the life, character, and attainments of WARREN C. PHILBROOK, a long time member of the Kennebec Bar Association and an associate justice of the Supreme Judicial Court of the State of Maine, who has recently departed this life.

MAY IT PLEASE THE COURT:

Before calling upon the chairman of the committee I wish to submit a few remarks as my personal tribute to Judge PHILBROOK. It was my good fortune to be personally, and somewhat intimately, acquainted with Judge PHILBROOK for more than fifty years and especially before he was elevated to the Bench of our highest tribunal in this state. I knew him when he was admitted to the Bar to practice law in this state. By his life of public service, his devotion to duty, he earned for himself the well merited respect,

friendship, and affectionate esteem, not only of his intimate associates, but of a host of friends throughout the state.

As a lawyer he was very much respected by his fellow lawyers for his fidelity to his clients, his courtesy to the Bench and Bar, and his zeal as an officer of the Court in advocating substantial justice based upon common sense and right.

I feel like saying, in all sincerity, that as a man, as a citizen, as a lawyer, and a judge of our highest tribunal, the Supreme Judicial Court of the State of Maine, he was noble in life, actuated by the highest and most honorable motives, true to his convictions, and every trust imposed upon him, and uncompromising in what he believed to be right.

While he understood the frailties and weaknesses of his fellows, he did not criticize or condemn.

I feel that in his going a great heart and a noble soul has crossed the river. His colleagues will miss his mature and reliable counsel; and those within the charmed circle of his personal friendship will miss the warm and wholesome influence of his gentle nature, and through the years will never forget him.

I feel that the words of the immortal poet aptly apply to Judge PHILBROOK.

> His life was gentle
> And the elements so mixed in him
> That nature might stand up and say
> To all the world "This was a man."

HON. JOHN E. NELSON, of the Kennebec Bar Association, then spoke presenting resolutions of that association.

MAY IT PLEASE THE COURT:

It is altogether fitting that this Honorable Court should pause today in the midst of its labors to pay tribute to a distinguished son of Maine, a former member of this Court, whose notable career of public service is ended, whose body now rests in the soil of that city in which he delighted to dwell, the city which loved and honored him, and whose spirit has passed on into the high fellowship of those other former beloved members of this association whose faces look down upon us today from these walls.

On May 31st, last, our friend and brother, Justice WARREN C. PHILBROOK, died at his home in Waterville, at the age of seventy-five years, thus ending a long and honorable life, greatly and nobly lived. Here in this court room where so often in the past he presided with dignity and ability, and where, with an understanding and sympathetic heart, he so wisely tempered justice with mercy, we members of the Kennebec Bar Association have gathered to record his passing, to give expression to the high regard and loving esteem in which we held him, and to make acknowledgement of the splendid contribution his life and character have made to our state.

The intimate facts of his life and career are so fully known to his contemporaries and especially to the members of this association as to render a recital of them hardly necessary. Born in Sedgwick, Maine; fitted at Coburn Classical Institute; graduated at Colby College of which institution he was long a valued trustee; a loved teacher in the Waterville High School; a successful lawyer; judge of the municipal court of Waterville; mayor of that city for two terms; member of the Maine House of Representatives; chairman of the Republican State Committee; Grand Commander of the Grand Commandery of Maine; attorney general of our state; and a justice of our Supreme Judicial Court from April, 1913, to his retirement in November, 1928.

This in brief is the record of accomplishment of the friend whose memory we honor here today, a record wrought in association with other strong characters, covering a half century of the social, political and legal life of Maine, a record that speaks more eloquently than words of those qualities of heart and mind that called him ever to high and higher service and responsibility.

Judge PHILBROOK acted well his part in life and was worthy of its every honor. He loved and kept the faith with his family, his friends, his profession, and the ideals of America. Throughout his long public career he followed the path of duty, outlined clearly and unmistakably to him by a conscience ever responsive to the noblest impulses of true manhood. Honest, courageous, broad-minded, sympathetic, he was always ready to assume more than his share of the responsibilities of friendship, of fraternityship, and of citizenship. In him we recognized purity of purpose, exalted

ideals, and a will to serve. An eloquent speaker, his presence lent dignity and interest to every occasion. Just in his dealings, simple and delightful in his contacts with his fellowmen, his courtesy knew no rank or class, his friendships, no creed or race or color. Patience, humor, fraternity, loyalty, justice, and devotion were his outstanding characteristics.

Someone has said: "The soul would have no rainbow, had the eye no tears." A friend, an able and honored judge, a true servant of the people, crowned with good works, in the fullness of years, has passed to his reward.

"So be my passing,
My task accomplished and the long day done,
My wages taken, and in my heart
Some late lark singing,
Let me be gathered to the quiet west,
The sundown, splendid and serene."

On behalf of the Kennebec Bar Association I present the following resolutions, and move their unanimous adoption:

RESOLVED: That in the death of WARREN C. PHILBROOK, retired active associated justice of the Supreme Judicial Court of Maine, there has gone from us a loyal friend, a faithful public official, a just and learned judge, a Christian gentleman, revered by his friends, beloved by his neighbors, and honored by his fellow citizens; that we honor him for what he did, and yet more for what he was; that we rejoice that he lived and wrought and left behind him the memory of a character worthy of all emulation; that in his passing we recognize an irreparable loss to this association, and to the bench and bar and citizenship of Maine.

RESOLVED: That these resolutions be presented to this Court with the request that they be entered on the records thereof, and that a copy of the same, duly attested, be sent to his bereaved widow.

Dated at Augusta, Maine,
this 19th day of September, 1933

JOHN E. NELSON
CARROLL N. PERKINS
GEORGE W. HESELTON
Committee on Resolutions.

HARVEY D. EATON, ESQ., then spoke as follows:

Judge PHILBROOK was the last of that brilliant array of lawyers who were practicing in Waterville when I went there in 1891. The list included Edmund F. Webb, Reuben Foster, Simon S. Brown, William T. Haines and Charles F. Johnson. These were strong and masterful men, every one of whom had wide and powerful influence.

But first and foremost and always they were lawyers. Among them WARREN C. PHILBROOK was making himself known and felt and in the end was the only one to achieve a position as a member of this ancient and august tribunal which today pauses in its duties to pay honor to his memory.

As a young lawyer he early won the respect of these men and all men by careful and industrious labor and the force and vigor with which he presented his conclusions.

But in Waterville he was much beside being a lawyer. He took a keen and active interest in the civic life about him and for fifty years was an important and always honorable part thereof.

As principal of the high school, president of the Board of Trade, judge of the Municipal Court, representative in the Legislature, mayor of the city, and trustee of Colby College, he carried important local responsibility for practically all his lifetime.

A marked characteristic was that in every position he gave more and more valuable and more satisfactory service than had been expected of him. His whole life was a steady progress to more and better achievement. We of Waterville, who have enjoyed his service and companionship for a full half century, mourn not only the passing of an able lawyer and judge but also a kindly, genial and upright citizen whose time and talents were freely and liberally given in all good works.

HON. EDWARD F. MERRILL, President of the Maine State Bar Association, then addressed the Court.

MAY IT PLEASE THE COURT:

In behalf of the Maine State Bar Association it is a privilege to be permitted to join in these memorial exercises for him whom today we seek to honor.

In taking part in these exercises, however, I like to feel that I

am doing so, not only in my official capacity, but as a sincere friend of many years standing, who knew him and who had come into close touch with him in his many and varied activities, both social and professional.

To give a resume of his life is no part of my duties on this occasion. On the other hand, from the relations which I have had with him and the opportunities to observe his many activities, I feel that my part should be that of paying tribute to his sterling qualities as a loyal citizen, a zealous attorney and a judge of integrity and ability.

One of the outstanding characteristics of Judge PHILBROOK'S life was painstaking industry and a careful attention to detail.

At the Bar he prepared his cases with great care and with such regard for the minor points that he was a master of the facts, and knowledge of his cases enabled him to present them in a logical and orderly manner, this coupled with his natural and zealous manner made his presentation to the jury both forceful and effective.

As a judge, these same qualities, coupled with patient and untiring industry, made of him a man whose ability was recognized and whose presence on the Bench is missed.

His great objective was to be right. His insistence that others, especially the attorneys, do things right, while sometimes irksome, when viewed in retrospect, was a quality for which he deserves the highest commendation. He never held others to a higher degree of perfection as to detail than he set for himself.

His opinions, found in almost twenty volumes of the Maine Reports, are models of good English, clearly expressed thought and sound law. They will perpetuate his memory through the ages as long as the common law endures.

As a jurist he respected the law as it is, and never ventured into untried paths or uncharted seas. He believed that the law, to be an efficient guide for conduct, must rest upon principles capable of being known in advance of action, that the citizen might rely thereon and shape his conduct in accordance therewith.

He believed with the late Chief Justice Emery who said: "Stability is of first importance to the people and the courts. With an unstable court, however pure its justices, the government is after all one of men and not of laws." To preserve this stability he searched

the precedents with painstaking care and industry and by his opinions ever sought to declare the law in accordance with principles of unquestioned authority.

Withal he was a friendly man, a good neighbor and a loyal friend. Especially was he fond of younger people and delighted in their company. He was as courteous to a little child as to the highest lady in the land. Denied children of his own, he lavished affection upon his wife, and the tender care and solicitude for her welfare which were expressed in his daily conduct was so beautiful a thing that it has made a lasting impression upon all who were privileged to witness it.

He was beloved by the citizens of his native city, he was active in civic affairs.

He took an active part in partizan politics and was honored by his party, becoming chairman of the State Committee.

He was mayor of his city, judge of its municipal court and represented it in the legislature.

He was first an assistant, and later attorney general, of the state. He was appointed to the Bench April 9, 1913, and served as an active member of the court until his resignation November 29th, 1928. On the same day he was appointed an active retired justice, which position he continued to hold until his death.

His life is an example of what may be attained by honesty, integrity and industry.

He died honored and mourned by all who knew him. His memory we cherish and the Maine State Bar Association will ever remember him as one of our members who attained distinction and was ever faithful to the traditions of our profession.

Hon. James H. Hudson, then Justice of the Superior Court, next addressed the Court.

May it please the Court:

A decade ago, on an occasion like this, our late beloved Chief Justice Cornish uttered these true and beautiful words: "Blessed be memory. When those who have walked and worked with us in the daily stress of life vanish from our side and we look to the milestones stretching into the future along the way which we must

travel alone, then we bless the Giver of all good gifts for the precious boon of memory, for the power to look back over the road that we have travelled together and to recall face and figure and thoughts and purposes and sympathies and acts, to feel again the cordial handclasp and to live again the hours that were filled with happiness." 124 Me., 530.

Another, writing in a late college journal, said, "Memory is a gallery . . . holding the pictures of yesterday."

WARREN C. PHILBROOK is no longer with us, but of him we all have blessed memories, which will remain with us to the end of our days.

I deem it an honor to have the privilege today to place before you some of the pictures of Justice PHILBROOK that I have in my memory gallery.

My earliest picture of him was taken in my college days at Colby, his alma mater, of which he was a faithful trustee for many years. He then, though a comparatively young man, had been winning his way most successfully in the profession of law and in political office. Yet, possessed of a beautiful voice, well trained, and a musician of much merit, he found time, and willingly spent it, in coaching our musical clubs in college. As a member of such a club, I then first made his acquaintance. This picture then portrays him, not as a lawyer or judge, but as a man who though busily engaged with matters of financial value to himself would devote a generous portion of his time, without compensation, to be with and to help in a most kindly way the student in college. Always was he fond of young people and associated with them as much as was his opportunity, living in a college town. Many a young person had good reason to be thankful for contacts and associations with Judge PHILBROOK.

My second picture of him was taken later in his life, when he was in his prime as a lawyer and I had started in to practice law with my father, Henry Hudson.

Attorney PHILBROOK came to Piscataquis County several times and tried important cases with us as his adversaries. Some of these cases involved the right of the state to recover public lots in townships that on incorporation had been reserved for school and ministerial purposes; cases requiring much preparation in facts,

research of titles, investigation of possessions and study of law.

Later in 1909 he assisted Brother J. S. Williams, of Guilford, in the case of Pond vs. Douglass (106 Me., 85) in which we were for the defense. This action was brought to recover a lot of land that for many years had been occupied as a site for a meeting house in Guilford. It involved the law as to a base, determinable or qualified fee with a possibility of reverter, and had much of legal difficulty in it. We lost and the land reverted to the heirs of the original grantor. How likely we are not to forget the cases we lose. However, we almost won this case, for Judge Whitehouse, who wrote the opinion, told me afterwards that first an opinion was written giving us the decision, which later was recalled and a new one written upon the discovery and examination of the case of North vs. Graham cited by him in his second opinion and handed down by the Illinois Supreme Court during the pending of our case.

Thus I had first hand opportunity to observe Brother PHILBROOK as a trial lawyer in court.

My second picture of him then was taken in the court room, and reveals him as an able trial lawyer with his cases well prepared both in fact and in law, and possessed of the ability forcefully and eloquently to present his client's cause to the court and jury.

My third memory picture of him is as he sat on the Bench at Nisi Prius. As judge he often came to my home county and I tried many cases before him, both civil and criminal. A fairer judge never graced the Bench. He had no favorites. Of no consequence to him was it who counsel were, nor their clients, their religion or politics, their poverty or wealth. Sometimes we thought he was stern. No levity would he tolerate. Whispered conversation by attorneys within the bar he frowned upon. Any court room disturbance was swiftly and sufficiently rebuked. Nothing should interfere with the orderly progress of the trial or divert the attention of the jurors from the evidence as presented. Thus did he preside with dignity and utmost impartiality.

But out of the court room, that sacred door closed, he was a most social and companionable man. No severity then. He loved people, and was a most gracious gentleman. His friends were legion.

I never forgot, nor will, a most kindly though undeserved word he said to me at the end of a case I had tried before him. It has been a help to me ever since. Always did he want to help someone.

And now I unveil my fourth and last memory picture of Justice PHILBROOK taken as he sat in the law court.

Appointed to the Supreme Judicial Court April 9, 1913, on the resignation of Chief Justice Whitehouse, he became associated with a very able bench of judges in Justices Savage, Spear, Cornish, King, Bird, Haley and Hanson, all now deceased.

Justice Savage was appointed Chief Justice on the same day Justice PHILBROOK received his appointment. From time to time Justice PHILBROOK advanced in his position on the Bench until he became senior associate justice.

I had occasion many times to argue cases before him and his associates, and I noted that he invariably listened most patiently and alertly to every argument whether it be good or bad. His opinions, however, many in number, are able and show logic and vast knowledge of law.

This final picture of him in the court of last resort in this state portrays him as preëminently a judge, who would have right prevail over wrong. Technicalities of law he would not let pervert justice.

In his eulogy at the funeral of Justice PHILBROOK, Dean Marriner of Colby College pertinently and truly said: "Justice was foremost in the matters for which Judge PHILBROOK stood. In his profession he dispensed it freely. Justice to him was an enduring thing because he saw majesty in the law which he so highly respected."

In his last recorded opinion as active retired justice (see Jackson vs. Burnham, 129 Me., 349) his closing words were, "Neither justice nor legal principles involved in this case can allow such conclusion."

Thus my final memory picture of him in law court work reveals him as the impartial, honest and upright judge, who never would have any case determined, unless it were decided not only in accord with legal principles but even then so as to accomplish complete justice.

Blessed be the memory of such a man.

FRANKLIN W. JOHNSON, LL.D., President of Colby College, then spoke as follows:

Having attended a number of meetings of the sons and daughters of Maine, now residents of other states, I have observed a tendency to laud the achievements of those who have migrated from our borders and a certain air of condescension toward those who have remained behind. We have every reason for pride in the long list of former Maine men and women who have won distinction in other states, but we do well to fix our attention now and then upon those who have maintained our own institutions and have contributed to the ongoing life of our own state.

Of these WARREN COFFIN PHILBROOK was a typical and outstanding example. Born in a small rural town, educated in our schools, and for a time a teacher in them, trained for his profession in the office of able practitioners of the law, as was the custom at that time, he passed through the offices of municipal judge and attorney general, and by virtue of his own ability and character, finally reached the Bench of the highest court of the state.

Judge PHILBROOK was a good citizen. His active participation in politics was motivated not by the desire for personal gain. He saw in public office an opportunity for community service. He was twice elected mayor of Waterville and served two terms as a member of the legislature, in one of which he was speaker of the House of Representatives. In these offices his absolute fairness won the respect of all without regard to party affiliations.

He came to Waterville as a schoolboy at Coburn Classical Institute, and from that time until his death, save for one year in which he was a teacher in the Farmington Normal School, he was closely identified with the life of the city. He was graduated from Colby College in 1882 and was throughout his life a loyal alumnus of the college. In 1910 he received the degree of Doctor of Laws. He was for many years a trustee. As President of the college, I have valued his advice and have been strengthened by his sympathetic understanding.

I remember very well the first time I met him. In my student days I was a member of the Glee Club. WARREN PHILBROOK, a young lawyer of the town, volunteered to train us. His wonderful tenor

voice thrilled me, but as I look back upon the many rehearsals under his direction, I recall most vividly the punctilious care and boundless patience with which he taught us to sing the songs that made up the repertoire of the glee club of those days. These I later came to know were among his most marked characteristics. As our director he served without remuneration, and his satisfaction over our public performances could not have been great. But we were the Colby Glee Club, and he loved his college and was interested in young men.

In later years I have known him better. As President of the Colby Alumni Association, as a trustee, as a fellow Mason and Rotarian, I have been in frequent and intimate relations with him. My admiration and affection for him have grown with the years. And this, I think, has been the experience of all who have known him. His natural dignity was not repellent and did not prevent close and understanding relations with men of every sort, who counted him among their friends.

Officially, I bring today an expression of the loss which Colby College has suffered by his death. Personally, I bring the loving tribute of a friend.

At the request of the Chief Justice, Senior Associate Justice DUNN, then responded for the Court.

GENTLEMEN OF THE BAR:

The Honorable WARREN C. PHILBROOK was appointed a Justice of this Court on the ninth day of April, 1913. He continued in active membership until the twenty-ninth day of November, 1928, and thence, on retirement, subject to special call, until his death at his home in Waterville, on the thirty-first day of May, 1933. He was, when he died, in the seventy-sixth year of his age, having been born in Sedgwick on the thirtieth day of November, 1857.

The sentiments expressed in your resolution and addresses are deeply appreciated. The tributes of respect paid by you to the memory of Mr. Justice PHILBROOK are graceful, discriminating and just.

Of his early history, the bent of his mind, his career at the Bar, the service rendered by him in legislative and executive capacities,

of salient personal facts, of traits and characteristics, and the scope and range of his ability, you have feelingly spoken in high commendations, in which we are happy to concur. Nothing need be added to what you have said in eulogy. Even in the view of his character as a judge, little may supplement your delineations. His record was excellent in all branches of judicial service. Every duty devolving upon him was conscientiously performed. His faculties were comprehensive in their action, had relation and purpose, and were as manifest in official as in private station. He was essentially a gentleman. He was kind and courteous; dignity and decorum marked his daily walk. A serious man, of punctilious integrity, he was incapable of dissimulation; he never basked in a reflected glory, nor did an act which he thought could possibly be deemed objectionable. His soul abhorred sin, and its sordidness and squalor. He met the troubles and trials of life unflinchingly, and fought out its battles in a manly and creditable way. He did not allow the memory of a dark thing to exclude that of good things. His sympathy went out to those who were starting on the road of human affairs.

He realized that, in our system of government, the judiciary is supreme within its sphere, and, in coordination with other governmental departments, competent to encounter and resolve the problems of a people.

His fame is merited; the future will neither shadow nor lower its level. He was a worthy colleague of the magistrates living and dead, who have contributed to the creation and establishment of our jurisprudence, and the history of the law of Maine. He has written, in the opinions he has delivered, his own chronicle, beyond the reach of praise or detraction.

Absolute as was his domination on the Bench, his devotion to morality, his love of right and justice, were always controlling. He was steadfast in his adherence to high ideals.

The memorial of the Bar will be recorded.

In testimony of Judge PHILBROOK's worth, in tribute and respect to his memory, the Court will now adjourn.

FRANK GEORGE FARRINGTON

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA, SEPTEMBER 19, 1933, IN MEMORY OF

HONORABLE FRANK GEORGE FARRINGTON

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born September 11, 1872. Died September 3, 1933.

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

HON. L. T. CARLETON, Senior, President of the Kennebec Bar Association, addressed the Court as follows:

MAY IT PLEASE THE COURT:

Before calling upon the committee of the Bar Association appointed to submit to the Court some resolutions and remarks upon the life, character, and attainments of FRANK G. FARRINGTON, late an associate justice of this Court and a member of the Bar Association of Kennebec County, I wish to be permitted to submit a few remarks as my personal tribute to Judge FARRINGTON in whose honor these services are being held.

We are told in the sacred scriptures, "That it is appointed unto all men once to die." Hence it follows that the living know that they must die. And again we are told that, "The days of our years are three score years and ten. And if by reason of strength they be four score years, yet is their strength labor and sorrow for it is soon cut off, and we fly away."

Why it is that the young, the respected, and highly useful are called away in the very prime of life and at the height of a useful and honorable life passeth all our understanding.

Such is the case of our beloved brother, Judge FARRINGTON, in whose honor these services are being held. When I recall that there is not a single judge or member of the Bar in this county living today that was alive on that thirteenth day of August, 1874, the day I was admitted to the Bar in this county, and but a very few in the state, if any, I am strangely impressed.

Mr. Justice FARRINGTON, a student, a school teacher, a lawyer, Speaker of the House of Representatives, President of the Senate, leader of his party for years, an associate justice of the Supreme Judicial Court of the State of Maine, a lovable man, and good citizen, husband and father, is but a brief outline of his busy and useful life. Someone has said that, "The progress of nations depends upon the men who walk in cool furrows amid the rustling corn; upon the man on whose face is glowing the blazing fires of great furnaces; upon the men who delve in mines; upon the man who fills the wintry air with the musical ringing of his axe, but not least of all upon an honest conscientious judge."

But I am reminded that it is written that, "There is no death. The stars go down but they arise on another shore." Judge FARRINGTON could always win or lose a race with perfect self control. He was always a *man* in a world of men.

I like to think of life always as a journey over a broad highway. We start out when the road is wet from last night's rain, accompanied by the young always walking and struggling and fighting for the crest which is above us, but when we reach it there comes the call of another crest. The road is narrowing now. The companions of our journey are fewer than they were when we started. Along the road there are meadows where dreams come true. Judge FARRINGTON found them. And there are fields where the four-leaf clovers grow. They are the prizes of this life. Judge FARRINGTON found them often. Finally there comes the call of the last crest. It is the call that comes from beyond the stars. It comes to some early in life. It comes to others, as it did in the case of Judge FARRINGTON, while the sun is still high in the heavens. But it always comes and we slip our anchors and sail away over unknown seas to

the "Beautiful Isle of Somewhere" where anchored lie the craft of those of our friends who have gone before. If all those for whom Judge FARRINGTON did a kindly act during his journey through life should drop a flower on his grave he would sleep beneath a wilderness of roses.

May the winds of winter blow soft where he lies. May the snows of winter lie light on his grave, and over his last resting place may the birds sing their sweetest songs during the long, long days to come. Good bye, my friend—good bye.

SANFORD L. FOGG, ESQ., of the Kennebec Bar Association, then spoke presenting resolutions of that association.

MAY IT PLEASE THE COURT:

It is with great sorrow that the Kennebec Bar Association makes formal announcement of the death of FRANK GEORGE FARRINGTON, late associate justice of the Superior Judicial Court of Maine, which occurred at his home in Augusta on September 3, 1933, at the age of sixty years.

He was born in Augusta on September 11, 1872, and Augusta was his home for the most part of his somewhat eventful life.

As a boy he attended the public schools and early showed indications of that thorough and studious application which became so evident in his later years. He graduated from Cony High School in 1890 and from Bowdoin College in 1894; and through all the years his loyalty to Cony High and "Bowdoin" was constant and supreme.

After graduation he engaged in educational work, for five years serving as principal of the Machias High School from 1894 to 1896, and holding the same position in Skowhegan High School from 1897 to 1899.

Perhaps by reason of his justifiable ambition, as well as a feeling that he was equipped for a wider and more diversified field of endeavor, his thoughts turned to the law and during his last year at Skowhegan he read law in the office of Amos K. Butler, and upon returning to Augusta in 1900 he continued his law study in the office of the late Chief Justice Leslie C. Cornish, and during the same year he entered Harvard Law School where he studied two

years and was admitted to the Maine Bar at Augusta in 1902. Until his appointment to the Supreme Judicial Court of Maine, November 16, 1928, he practiced law successfully in his native city of Augusta, and was active and influential in the public and civic affairs of his city and state.

He was especially interested in all the educational problems of Augusta and was a valuable and efficient member of the Board of Education from 1907 to 1917.

He was for several years a worthy and able member of the Board of Overseers of Bowdoin, and in 1929 received from the college the honorary degree of Doctor of Laws.

He served in the State Legislature as the representative of Augusta during the years 1917 to 1920 and in 1919 was elected Speaker of the House of Representatives. He represented the county of Kennebec as senator during the years 1921 to 1924, and in 1923 was elected President of the Maine Senate.

In 1924, he was a candidate in the Republican primaries for the office of Governor of Maine. On the face of the returns he was declared elected. It appearing from a further investigation of the ballots that his opponent was in fact elected by a slight margin, instead of making a contest Justice FARRINGTON relinquished his claim to the office. That this was a generous and patriotic act of the highest order admits of no dispute. That he might have secured the nomination by a more extended and complete investigation, is a question that never has and never will be settled in the minds of many persons. However, Justice FARRINGTON was a man of that rare type who was willing at all times to sacrifice his own personal interests and ambition for the good, not only of his party, but of the whole state of Maine. He gracefully withdrew and his opponent was declared the nominee and was elected Governor.

At that time Justice FARRINGTON retired apparently from public life, and it was his whole ambition to devote himself to the practice of law and restore, or at least retain, his financial position which had severely suffered from his many years devotion to the public welfare.

He was not permitted, however, to long pursue this peaceful course. Governor Brewster, in November, 1928, nominated him as justice of the Supreme Judicial Court. Almost simultaneously he

was stricken with what proved to be a nearly fatal illness. For many weeks his life hung by only a thread. He recovered, however, and at that time was admonished by his physician that in order to prolong his days he would need to lead a careful life refraining from unusual and strenuous activity.

Justice FARRINGTON was then confronted with the problem of resigning his office, and pursuing perhaps many years of uneventful practice, or to enter upon the judicial service of the state. A man like Justice FARRINGTON, with his keen sense of public duty, could make but one choice. He received the official oath of office and entered upon the duties of a justice of the Supreme Judicial Court of Maine. He fulfilled those duties with all of the honesty, energy, zeal and ability which he had given to previous tasks. For three years and one month he did a tremendous amount of judicial work and was everywhere recognized as one of the most useful, most trusted and most reliable members of the Court.

In May, 1932, he was again stricken with an illness from which he never recovered. The end came peacefully on the third day of September, 1933.

A mere recital of his life perhaps is the best portrayal of his character. It is no disparagement to say that he might not be classed as brilliant. It is only common honesty to say that he was of more than ordinary ability, and by his industry, intelligent application to duty and high sense of integrity, placed himself among the foremost citizens of the state.

As a lawyer, none was more zealous, protecting the rights of his clients than he. None recognized more keenly the responsible duties of the office of a counsellor at law than FRANK FARRINGTON.

As a public official he recognized no party lines. His duty to his city, his county and his state, were paramount above his own personal desires, opinions or inclinations. A finer, cleaner, or more honest representative of the whole people in the legislature than he could not be found. It is, we think, beyond question that as a judge he shortened his days by his zeal, energy and application following evidence and law to the remotest depth to find the truth that a just and honest verdict might be rendered.

It oftentimes seemed that the words of Webster spoken in the Dartmouth College case were always present in his mind,—

"Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors in this edifice with usefulness and distinction, whoever clears its foundation, strengthens its pillars, adorns its entablatures or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society."

Of his private life, no one need speak. He was the ideal type of a loving and devoted husband, and a loving and conscientious father. He loved his native city and gave many hours of his best time and thought to its interests.

Recognizing the important part he played in the affairs of the community in which he lived, and the state at large, the members of the Kennebec Bar Association desire to record their deep sense of loss in the death of Justice FARRINGTON, and to give expression to their high regard and appreciation of his character and public service.

We admired him for his high Christian ideals, for his outstanding honesty and integrity, for his high attainments as a lawyer, for his attachment to the profession, and for his clear, conservative and learned administration of his judicial office.

We loved him for his devoted friendship, for his kindness, and for his courtesy, wisdom and impartiality as a judge.

We respectfully offer the following resolutions:

RESOLVED: That in the death of Justice FRANK GEORGE FARRINGTON, the Bench and Bar of Maine have suffered a great loss; the state a citizen who with fidelity performed his part in public life, who worked for good government and served the best interests of the community in which he lived. His influence will long be felt and his personality will be remembered and his memory cherished.

RESOLVED: That we rejoice that his was a life so fine and ennobling and so outstandingly Christian that its passing swallows up death in victory, and smothers grief with hope.

RESOLVED: That these resolutions be presented to this Court with the request that they be entered upon and become a part of the records of this Court, and a copy of the same, attested by the Clerk of Courts, be sent to his bereaved family.

SANFORD L. FOGG
CHARLES A. KNIGHT
ERNEST L. MCLEAN
For Kennebec Bar Association.

HERBERT E. LOCKE, ESQ., then addressed the Court.

MAY IT PLEASE THE COURT:

I offer the tribute of the younger men—a tribute to the warm-hearted friendliness and upright citizenship of our older brother. For Judge FARRINGTON was our older brother always, first as a lawyer, later as a judge.

The distinguished accomplishments of Justice FARRINGTON have been reviewed. We are not unmindful of them. We rejoice in his life of fruitful public service.

But he gave so much more. A helpful word to the high school boy from one who understood and loved boys. A sympathetic bit of advice to the college lad seeking to find his way to a life of usefulness. An encouraging word or deed for the young lawyer. A thoughtful solution of the problem of a neighbor or fellow citizen. For these will his memory be cherished by hundreds of grateful friends for years to come.

On a morning in August, 1915, FRANK FARRINGTON took from his files a case, enclosed it in an envelope, wrote a letter. Next morning a young man who had passed his Bar examinations, was to take his oath before this Court the next month, and was nervously hoping for a first case on which to work, received it. That case got very careful, although not too skillful, attention. I know, because I was the young man. The act was kind. More,—it was spontaneously thoughtful. There were many such acts in his life.

A profound sense of his responsibility by a lawyer is highly desirable for the client, although somewhat uncomfortable for the practitioner. No attorney I have known possessed a more lively

sense of his duty than did FRANK FARRINGTON. Those of us who have been associated with him know how he worked and worried while our client slept.

Consistently with his natural friendliness, he abhorred that atmosphere of personal friction and irritation which sometimes appears in the advocate's trial of a cause. Consequently, he often associated others with him in trial work.

But he was not lacking in courage. Whoever mistook his distaste of contentiousness for a sense of fear soon discovered his own error. Modest and friendly he was, but courageous as well.

Bringing to the Bench a thorough grasp of the science of the law and a sympathetic understanding of his fellowmen, Justice FARRINGTON was eminently successful in his service there. We lawyers seem at times to practice on the law, to attempt to make it serve us for the case in hand, to divert its searching finger as it points to the weak point in our case. The Court more truly "practices" the law, as without bias or favoritism it applies the X-ray of law to the facts presented. It was in this true practice of the law that FRANK FARRINGTON was most happy. That he should enjoy, and achieve success in, his work as a justice of our Supreme Court was to be expected.

That the Builder should call his life's task done so soon brings a distinct loss to our state, and profound sorrow to us all.

But, Your Honors, may I speak for a moment of the outstanding virtue of FRANK FARRINGTON's life and career as I have always thought: his sense of public spirit and good citizenship.

He preached it. It is the incident if not the theme of many of his addresses and public utterances.

He practiced it. No great and good cause failed to have his enthusiastic and earnest support. No worthy project in the sphere of his influence but had his help. Proper education of our youth is the indispensable foundation stone of our structure of civilization. The success of our schools was a vital interest to Justice FARRINGTON throughout his life. It is fitting that a fine school building in his city of Augusta was erected years ago bearing his name. The cause of World Peace, the advancement of religious teachings, the observance of our Constitution and laws, were matters of personal

concern to him. The calendar of worthwhile activities having his aid is well night all-inclusive.

He taught and lived good citizenship.

May it please the Court, we mourn with you the loss of an able judge, a touchingly thoughtful friend. Yet we find comfort in reflection on the life of purposeful good citizenship he has laid before us. We turn to our daily work with a renewed sense of our responsibilities, hopeful that we may reflect on others something of the light his acquaintance and friendship bestowed upon us.

HON. EDWARD F. MERRILL, President of the Maine State Bar Association, next spoke as follows:

MAY IT PLEASE THE COURT:

For the second time today I am called upon in my capacity as the official head of the Maine State Bar Association to pay tribute to the memory of a distinguished citizen and a member of this Court, who has recently passed on.

To me, Mr. Justice FARRINGTON was more than a brother attorney, more than a justice of this Court, he was an intimate and personal friend of almost forty years standing.

In 1896 he came to Skowhegan as principal of our high school, which I entered that year, and he continued as its master during the three years I attended the institution. The following summer he acted as my private tutor, with such efficiency that he enabled me to save a full year of preparatory work. As an instructor he was unexcelled, and in my own experience, never equalled.

There is something about the relationship of teacher and pupil that differs from all others. In the case of Judge FARRINGTON, he engendered a love, affection and respect in the minds and hearts of his pupils that has persisted through life. To him his pupils were his boys and girls, and his regard, affection and interest in their lives endured to the end.

This same feeling of regard and esteem permeated our whole townspeople, and although Judge FARRINGTON left Skowhegan thirty-four years ago, we have always considered him as one of our very own.

I know that I voice the sentiment of every former pupil, as well as of every citizen of Skowhegan, in paying tribute to his memory.

The outstanding characteristics of Judge FARRINGTON's life were a fine sense of honor and honesty, coupled with the courage and persistency, to stand and fight for what he considered to be the right.

When President of the Senate, it was common knowledge that he entertained ambitions to become Governor. His answer to critics, who were circulating the rumor that his position enabled him to avoid taking a decisive stand on controversial subjects was characteristic. With absolute fearlessness, and shattering every precedent, he directed the Secretary of the Senate to call his name on every roll call, so that his position on every question might be a matter of public record that all might read. That action on his part gives a picture of the man. He not only acted in accordance with the right as he saw it, but he did it in a manner that left no doubt as to where he stood.

Nature endowed him with a fine body and mind; God, in whom he firmly believed, implanted in him the attributes of honor, integrity, and truth, and the urge for service.

Unselfishly he gave himself to every good cause and he gained the love, respect and affection of all who knew him.

Political preferment came to him and he served the state, not only as a representative and a senator, but was chosen Speaker of the House of Representatives and President of the Senate.

The governorship was within his grasp, but he refused to do anything which could be construed as accepting the benefit of questionable acts on the part of too zealous partizans. Some attributed his passivity to lack of courage, but his friends knew it to be from a sense of honor too fine to be sensed by the unthinking.

His reward came, for his successful opponent appointed him to this Court, an honor, to the lawyer, even above that of being Chief Executive of this great state.

The appointment of Judge FARRINGTON to the Bench was received with a popular approval rarely experienced. The people of Maine had full confidence in his ability and integrity. Their faith was not misplaced.

Although Judge FARRINGTON had not had wide experience as a

trial lawyer, he set about his new task with industry and perseverance.

Endowed with a good mind, trained by the best of education, both classical and legal, in the few years that he was on the Bench he became a valued and respected member of this Court. His opinions are clear and enlightening, and will rank with those of the ablest of our judges. His untimely end is a distinct loss to the Bench, to the Bar, and to this state. To us who knew and loved him, his loss is even greater, for we have lost a friend.

Notwithstanding the high offices he has held, notwithstanding his position on the Bench, I venture the opinion that by all who knew him he will be remembered, not as a legislator, not as a judge, but as a *man*, who deserved and held the respect of all.

KENNETH C. M. SILLS, LL.D., President of Bowdoin College, next addressed the Court.

It is an honor and a privilege to be asked to take part in these memorial exercises. I must speak as a mere layman who never saw FRANK FARRINGTON on the Bench and who would not be competent to dwell on his legal and judicial services. My tribute is to the man himself, the man behind the justice's gown, and the man as he was known particularly to a college community. No one who knew him could fail to tell of his athletic prowess and of his interest in athletics. The qualities that distinguished him as a player were the qualities of a fine sportsman, satisfaction without pride or gloating in victory, equanimity in defeat, always ready to abide by the motto of his college—"Fair play and may the best man win." It was his athletic prowess combined with his own generous temper that caused him to be chosen by his class as popular man in 1894, and I doubt if his judicial honors brought him more personal satisfaction than did the election of his son thirty-three years later to be the popular man of his class, a coincidence unique in Bowdoin records. But FRANK FARRINGTON always remembered the sage remark of Theodore Roosevelt to the members of a victorious Harvard football team—"Young men, it is a fine thing for you to be members of this fine team; but it will be sad if twenty years from now that is your chief distinction." Being a good student he be-

came a good teacher and it is not inconceivable that the high ethical standards of his life and the properly didactic quality of his later demeanor owed much to his experience in the master's chair.

When on an occasion like this one attempts to interpret for others something of the personal impression made, the task calls for affection and appreciation rather than a cool analysis. Whenever I think of FRANK FARRINGTON a Latin phrase from the old Roman poet Ennius keeps running through my mind:

"*Ille vir haud magna cum re, sed plenus fidei*"

Even in this learned assembly I venture to put that phrase into English, difficult as it is to do so. It means a man of no great worldly wealth but rich in the confidence of his fellow men. There was something of old-fashioned antique virtue in our friend. In the first place, as Dr. MacWhorter brought out so clearly in the beautiful prayer at the funeral services, loyalty was the guiding star of his conduct. The late Professor Josiah Royce of Harvard has an admirable essay entitled *Loyalty to the local.* He there emphasizes the truth that loyalty begins at home and that the man who is loyal to his own community, to his church, to his college, to his state, to his country, necessarily increases the circumference of his loyalties, as a stone thrown in a pond makes ever widening circles. FRANK FARRINGTON, as you all must know, was one of the most loyal souls that ever lived. I have seen that loyalty to one institution, Bowdoin College, manifested in official meetings of the governing boards, in his interest in undergraduates, in personal conferences, at football games, and it was a loyalty that never wavered whether in defeat or victory. I think his feeling for the city of Augusta was of somewhat the same substance and I know that his loyalty to the State of Maine was unquestioned. It was not altogether the loyalty of "my country right or wrong"; though at times it almost approached that standard, it was the loyalty of an affectionate heart untouched by the cynicism and critical spirit of the times.

Then, if I may say so, FRANK FARRINGTON seemed old fashioned in his goodness. Everywhere he went he was recognized as an earnest sincere Christian man. Whatever others may have thought, to him his church was necessary to engender the right qualities of

conduct and to console and to inspire. Sometimes it was said that in his public life on occasion he had not been sufficiently aggressive, not sufficiently on guard in defense of his rights. I wonder sometimes if in his own soul the serenity of acceptance did not bring more solace than would a contest where he would be obliged to use weapons foreign to his nature. However that may be, he was throughout his life a good man, and goodness united with principle is somewhat rare.

Now these qualities when placed at the service of the state, whether in the legislature or on the Bench were of great value; for the common people recognize that a man like that inevitably brings into his public office confidence and trust. Here in the State of Maine we have been in the large fortunate in the personnel of our public officials, doubly fortunate in the personnel of the membership of the Supreme Judicial Court. It is meet that a representative of the citizenry of the state should unite with members of his own profession and with his associates on the bench in this tribute of affection. When all is said and done, human institutions depend upon human beings and a good and loyal man is a source of confidence and power as the memory of his life is an inspiration. It is more than that. It is part and parcel of our life and of the life that comes after us.

Hon. Arthur Chapman, Justice of the Superior Court, next spoke as follows:

May it please your Honors:

The death of a justice of this Court requires more than passing notice, and I submit that it is a beautiful and solemn custom for the Court to pause in its deliberations, and with the members of the Bar, and with the members of the other Courts pay a tribute of respect to the memory of the departed members and give earnest thought to those qualities which made them worthy of their high position.

It becomes my duty to speak of Judge Farrington. I shall attempt no eulogy. The words at my command are not suited to that purpose. I wish simply to give some expression to the affection, the almost reverence in which I hold his memory.

I shall be commendatory. No other course would be possible in a discussion of his life. Perhaps the finest tribute to him would be the reading of a detailed account of his life, were the same possible. Certainly no act would need to be concealed or excused.

In these surroundings, within these walls where he practiced his profession for so many years, within the shadow of the State House where he served his state as well, standing as I am, before the Bench at which he presided, it might seem that my thoughts would center upon his professional and public careers, but the picture that is in my mind is a more personal one. I think of him as the friend of my boyhood days and of all the intervening years. He honored me with his friendship for nearly half a century, a friendship that never waned or lessened, but rather grew stronger as the years passed. I am proud of that friendship though I would not have it understood that his friendship for me was at all exclusive. I know that within the sound of my voice are many who cherish the same memories that I cherish.

I first knew FRANK FARRINGTON when we entered Bowdoin College. He immediately became the friend of every man in his class and every man in his class was his friend. He was prominent in scholarship, in athletics and in the other activities of college life. His classmates passed judgment upon him when they elected him popular man, the highest honor that can come to a Bowdoin man. It meant that he was the best loved and most respected man in his class.

During his college days as during all his life, he had deep religious convictions and he was true to these convictions in his daily life. Likewise he observed strictly those rules of personal deportment which he believed to be correct, yet he had the faculty of making and maintaining friendships with every type of individual. He never imposed his convictions upon others and he was too tolerant and broadminded to think himself better than any of his fellows.

He was fond of athletics and, endowed with unusual physical powers, was a splendid athlete. He never missed an opportunity to witness an athletic contest and at such contests he fought the game through as strenuously as the contestants. He wanted to win but

never lost his sense of fair play nor was there anyone who was more generous to his opponent. He carried this spirit into the affairs of his life. The practice of his profession and his public career brought him many battles, but he never took an unfair advantage of his adversary. He wanted no victory that was not rightfully his. He had many successes, too well known to require enumeration. The final step in his career was his appointment to the Supreme Court, and it was a most popular and fitting choice. His integrity, his broad human understanding, his mental capacity and the fullness of his learning qualified him for an illustrious career on the Bench. How well he fulfilled his duties during the short time that he was permitted to occupy that position no one knows better than your Honors, and had it been given to serve his normal term, we may believe that his record would have furnished one of the bright pages of this Court.

His passing was a sad event to the friends who loved him and to the state which he served, but we may be consoled in the knowledge that the world is better because he has lived.

The record of his private and public lives furnish a record which is rarely attained. In his private life he was clean, wholesome and manly. His public life was useful, able, honest and honorable. The memory of that life will long endure on this earth, and it seems to me that in the great beyond, to which our friend has gone, there must be a record of such a life, and at the bottom of the page I can see written "With this man I am well pleased."

Response for the Court by Chief Justice WILLIAM R. PATTANGALL:

MEMBERS OF THE KENNEBEC BAR:

For the fourth time in five years we meet to do reverent honor to the memory of a justice of this Court who was also a member of the Kennebec County Bar. During that brief period Justices Spear, Bassett, Philbrook and FARRINGTON completed their earthly labors and passed into the mysteries of eternity.

Within the three preceding years, you mourned the loss of Chief Justice Cornish, of Judge Charles F. Johnson of the Federal Court

of Appeals, and of Judge Fred Emery Beane of the Superior Court. The hand of death has borne heavily upon your membership.

Of all of those who have preceded us in the final journey no one was more beloved than Justice FARRINGTON. His service on the Bench was all too brief but long enough to ensure his fame as a jurist while this state endures; his career as a lawyer marked him as the peer of his associates; his standing as a citizen placed him in the first rank and his characteristics as a man moved the respect and affection of all who knew him.

My association with him extended over many years. We became friends during his school teaching days and our friendship continued throughout the entire period that he practiced law but it was only after he entered upon his judicial duties that our relations became intimate. From that time on we were in daily, almost hourly contact and opportunity came to me to closely observe the qualities of heart and mind and soul which distinguished him.

One needed to know him well to fully appreciate him. There was nothing superficial about him. Essentially modest, devoid of any trace of artificiality, indulging in no pose, without a trace of affectation, plain, sincere, honest, a practical idealist, he was a man whom any one might be proud to call a friend.

He was possessed of untiring industry and imbued with a love of research. His mind was that of a scientist. He took nothing for granted and overlooked nothing in working out the correct solution of the problems he undertook to solve. He was able to view related facts in a proper perspective, to apply to them carefully studied legal principles based on tested precedent enlightened by sound and intelligent reasoning and to express the result in plain and expressive language.

But it was neither his mental grasp nor his peculiar fitness for judicial work that most attracted me. It was his character. He was fundamentally sound. He rang true. He responded to every test. He was honest. Honest in the broadest sense of the word, honest with himself, honest with all mankind, morally honest, spiritually honest, intellectually honest. It required no effort on his part to do the right thing. He did it instinctively. He was

never tempted to act arbitrarily or unjustly because he had the power to do so. He was incapable of deceit or double dealing.

He was broadminded and tolerant. A strong man, he looked with charity on the weaknesses of others and found excuses for them which he would never have made for himself. His patience was exhaustless, his constant effort to render service to those about him.

He was loyal; loyal to himself, his family, his associates, his community, loyal to the highest ideals of his profession and his faith. A treacherous thought never found lodgment in his mind.

He was courageous. Broad as was his tolerance, kindly as was his nature, he could do battle with the full strength of his body, mind and soul for the truth as he saw it, for what he believed to be the cause of justice and right.

And because he was honest and loyal and brave, thousands of his fellow citizens followed his leadership, admired, respected, loved and trusted him. He was worthy of it all. Every preferment that came to him was earned and deserved.

His life was a success. Not alone because he acquired eminence in his profession, not alone because his public career was long and honorable, but most of all because he lived the kind of life and was the kind of man that those who place the strongest emphasis on the never changing fundamentals upon which human progress depends may properly point to him as one worthy of imitation, one in whose pathway it is safe to walk, one whose guidance can but lead to peace and rest and happiness.

The years of my companionship with him will ever remain a bright spot in my life. The fact that they were all too short and few, a source of poignant regret. I shall ever hold him in reverent and affectionate esteem.

Your resolutions are gratefully received by the Court and ordered spread upon its records. As a further respect to his memory and that of Justice Philbrook this Court will now adjourn until ten a.m. Monday, September 25th.

INDEX

ABUSE OF PROCESS.

ACTIONS.

The power conferred by the statute requires an exercise of judgment and discretion which must be exercised by the persons on whom the law has placed the power and authority to act. It can not be delegated.

The right of a municipality to bring suit upon the bonds of its tax collectors comes from the general power conferred on cities and towns to sue and be sued as bodies corporate. R. S., Chap. 5, Sec. 1.

Biddeford v. *Cleary*, 116.

Section 27, Chapter 96, R. S. 1930, provides that "The action of assumpsit shall lie in any case in which either an action of debt or an action of covenant is now maintainable. Under the plea of non assumpsit, the defenses available under the plea of general issue in either of said actions shall be available."

Investment Co. v. *Rumery Co.*, 176.

Illegality of a plaintiff is no bar to his recovery for an injury, unless his illegality is a cause directly contributing to the injury.

The right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobedience in no way contributed to the injury.

Kimball's Case, 193.

No party may be denied a day in court unless a judgment on the merits, in an action for the same cause between the same parties, has been rendered.

The result of a former trial, in which the plaintiff was not a party, neither acts as an estoppel against him nor otherwise acts as a bar to his action.

Christian v. *Pomeroy*, 209.

The Death-Liability Act affords and measures a remedy for certain designated persons, where none existed at common law. The test of the right to maintain the action is the right of the injured person to have maintained an action had death not ensued.

At common law, in actions of tort for negligence, the plaintiff has to prove, by a fair preponderance of all the evidence, not only that defendant was negligent, and harm without other agency resulting, but also to negative contributory negligence. Absence of proof of any of these elements precludes a recovery. Under the Death-Liability statute if contributory negligence is relied upon as a defense, it must be pleaded and proved by the defendant; otherwise that statute did not undertake to change the substantive law of negligence. If a plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff may not prevail.

Field v. *Webber*, 236.

ADMISSIONS.

AFFIDAVITS.

An ex-parte affidavit differs from a deposition in that the adverse party does not have notice or opportunity to cross-examine. To raise such an affidavit to the plane of evidence, strict compliance with legislative prescription is indispensable.

The certification by the clerk, of his belief that the notarial signature is genuine, though it states the reason for such belief, is not explicit in character. To be effectual, the certificate should recite, as a fact, the genuineness of the signature.

Dyar Sales & Machinery Company v. *Mininni*, 79.

ALIENATION OF AFFECTIONS.

Although a parent may not with hostile, wicked or malicious intent alienate the affections of her married son, yet she may advise that the marriage relation be broken up if, on reasonable grounds, she believes that a further continuance of it tends to injure the health or destroy the peace of mind of the child so that he would be justified in leaving.

The parent may in such a case persuade the child and may use proper and reasonable arguments to that end.

And though it turn out that the parent acted on mistaken premises or false information, or that her advice and interference may have proved unfortunate, still, if she acts in good faith for the child's good upon reasonable grounds of belief, she is not liable for damages for the separation which results.

Malice is not presumed. It must be proved.

Under special circumstances, the same rule applies in actions for alienation of affections against brothers and sisters.

But if in an action by a wife, there is evidence upon which the jury would have a right to find that a parent, or brothers and sisters who stand "in loco parentis," have actively interfered to cause a son and brother to abandon the wife, and have deprived her of his affections and the comfort and solace of his society, and have done this through hatred or malice towards the wife and not for the purpose of affording a proper protection to the husband and furthering his true welfare, the case is for the jury and, if the facts so in evidence are deemed proved, recovery must be granted.

Block v. *Block et als*, 202.

AMENDMENT.

An amendment to an ordinance as finally stated controls the amendatory words. An act or ordinance providing that a prior act or ordinance shall be amended "so as to read as follows" repeals by necessary implication all of the section sought to be amended which is not reënacted.

Millett v. *Hayes*, 12.

ATTACHMENTS.

AUTOMOBILES.

BAIL.

BANKRUPTCY.

In bankruptcy proceedings, to establish a preferential transfer the trustee must establish five separate propositions. First, the debtor at the time of transfer must have been insolvent, that is with insufficiency of property, at a fair valuation to pay his debts. Second, there must have been a transfer of his property. Third, the transfer must have been within four months prior to his bankruptcy proceedings. Fourth, the effect of the transfer must have been to enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class. Fifth, the preferred creditor must have known this or had reasonable cause to believe it. Failure to prove any of the above facts will preclude a recovery.

Keefe v. *Pepperell Trust Co.*, 123.

BANKS AND BANKING.

When in proceedings under Chap. 93, Public Laws 1933, known as the "Emergency Banking Act," the Court elects to liquidate a trust company through a conservator and does not appoint a receiver or trustee, except as the statute otherwise expressly provides, the conservator is governed by the general rules applicable to receivers of trust and banking companies.

Such a conservator is a ministerial officer of the Supreme Judicial Court and is subject at all times and in all matters to the direction and control of the Court, which is the source of his authority and to which he is bound to render strict obedience.

The conservator's power and right to enforce the statutory liability of the stockholders, expressly conferred by the "Emergency Banking Act" and defined by reference in the general law applicable to receivers appearing as R. S., Chap. 57, Sec. 93, is subject to the same limitations.

Under R. S., Chap. 57, Sec. 93, the stockholders in a trust and banking company in this State are "individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such corporation, to a sum equal to the amount of the par value of the shares owned by each in addition to the amount invested in said shares."

The liability which the stockholders of the corporation assume when they become shareholders, accrues when the Court having jurisdiction of the proceeding properly decrees that a resort to the statutory liability of the shareholders is necessary, and fixes the amount thereof.

The statutory liability of the stockholders is no part of the corporate assets.

It can be enforced only for the benefit of the creditors by the receiver of the corporation or a conservator having the powers of a receiver.

The moneys which come into the possession of the receiver or conservator as the proceeds from the collection of the liability of stockholders are available for and must be applied ratably to all contracts, debts and engagements of such corporation and, while not in a legal sense assets of the corporation,

In addition to these general circumstances, there are various special circumstances which may excuse delay. Inevitable or unavoidable accident not attributable to the fault of the holder that makes performance impracticable or impossible, "by which is intended that class of accidents, casualties or circumstances which render it morally or physically impossible to make such presentment."

By the great weight of authority, the holder of a check is held to a high degree of care in protecting the maker from loss by reason of the closing of the bank against which the check is drawn. The rule appears to be based on sound grounds from every standpoint—legal, equitable and moral. The maker, when he deposits money to meet a check which he has mailed to his creditor, has a right to expect the recipient of the check to act promptly in presenting it for payment. There is little that the debtor can do to protect himself after the check leaves his hands. He must rely on his creditor to observe the rule which the law merchant made familiar to business men generations before the Negotiable Instruments Law was enacted. He has every right to expect that the law will be complied with and that he will not be subjected to danger of loss because of avoidable delay in presenting his check for payment.

Viles v. *Warren Co.*, 277.

BASTARDY.

The right of a town to be heard in the matter of a settlement between parties to a bastardy action is defined and limited by the provisions of Sec. 8, Chap. 111, R. S. 1930.

After settlement is made and final judgment entered, a town may not, at a subsequent term of court as a matter of right, demand the restoration of the case to the docket in order to enable it to file objections to the settlement, no fraud or collusion being alleged.

In such a case, the town must act seasonably or forfeit its right to object.

Cook v. *Cook*, 119.

Where the only evidence of the complainant is that respondent begot her with child on the twenty-seventh day of February, 1932, and where the evidence of the respondent is a general denial accompanied with evidence that a normal child was born within seven months, that the complainant had symptoms of pregnancy before the time when the complainant claimed that the child was conceived, with evidence of admission by the complainant that she was herself pregnant before that time, the complainant has failed to sustain the burden of proof that the respondent was responsible for her condition.

Drake v. *Lewis*, 326.

BILLS AND NOTES.

A negotiable note given for a simple contract debt is *prima facie* deemed a payment or satisfaction thereof, but the rule is otherwise when its application would impair security held by the creditor.

The rule that a binding extension of time given to a principal discharges his surety has no application when the extension complained of consists of a mere continuance of a pending case from term to term.

Leavitt v. *Steel Co.*, 76.

Under the Negotiable Instruments Act, the presumption of liability on the part of the maker, whose signature appears on the note is complete, and the proof sufficient, until it is attacked and overthrown by convincing evidence.

Evidence to overthrow a mere presumption need not be more than slight, but it must be evidence of probative weight.

The burden of proving the signature not genuine or authorized, as well as lack of consideration for the promise to pay, is on the defense when the note, apparently regular, is introduced.

Eisenman v. *Austen, Ex'r*, 214.

The general rule governing the question of reasonable time for presentation of checks for payment is well established. If the bank on which the check is drawn and the payee are in the same place, the check should be presented during banking hours of the first secular day following its receipt; if in different places, it should be deposited in the mail in like time. Special circumstances may excuse delay in either case, but in their absence the rule is absolute.

Delay in presentation for payment of checks and other negotiable instruments is excused by (1) inevitable accident or overwhelming calamity; (2) prevalence of a malignant disease which suspends the ordinary operations of business; (3) the presence of political circumstances amounting to a virtual interruption and an obstruction of the ordinary negotiations of trade; (4) the breaking out of war between the country of the maker and that of the holder; the occupation of the country where the parties live, or where the note is payable, by a public enemy, which suspends commercial intercourse; (6) public and positive interdictions and prohibitions of the State which obstruct or suspend commerce and intercourse; (7) the utter impracticability of finding the maker or ascertaining his place of residence.

In addition to these general circumstances, there are various special circumstances which may excuse delay. Inevitable or unavoidable accident not attributable to the fault of the holder that makes performance impracticable or impossible, "by which is intended that class of accidents, casualties or circumstances which render it morally or physically impossible to make such presentment."

By the great weight of authority, the holder of a check is held to a high degree of care in protecting the maker from loss by reason of the closing of the bank against which the check is drawn. The rule appears to be based on sound grounds from every standpoint—legal, equitable and moral. The maker, when he deposits money to meet a check which he has mailed to his creditor, has a right to expect the recipient of the check to act promptly in presenting it for payment. There is little that the debtor can do to protect himself after the check leaves his hands. He must rely on his creditor to observe the rule which the law merchant made familiar to business men generations before the Negotiable Instruments Law was enacted. He has every right to expect that the law will be complied with and that he will not be subjected to danger of loss because of avoidable delay in presenting his check for payment.

Viles v. *Warren Co.*, 277.

That a promissory note is, by its terms, payable at any bank in a stipulated city or town, affords the holder the right to elect the bank in such place at which the instrument should be presented in order to charge the indorser.

Legally sufficient notice of dishonor may be given on a holiday. The indorser may not complain if he has received notice earlier than might, in strictness, have been required.

McShane v. *Dingley*, 429.

BOUNDARIES.

The legislature alone has authority to establish and to change the boundaries of towns. The authority of commissioners appointed to ascertain and determine town lines in dispute is limited to fixing the line which the legislature has designated.

The finding of the commissioners is final both as to law and fact. Where, however, it is clear that the commissioners went beyond the authority given them by the statute, and instead of trying to determine the line as called for by the legislature, established one obviously at variance with it, it is the duty of the Court to sustain objections duly made to their action.

Fayette v. *Readfield*, 328.

BURDEN OF PROOF.

The driver of an automobile turning across a way upon which he is driving to enter a way intersecting from the opposite side, must pass to the right of the intersection of the medial lines of the ways as required by R. S., Chap. 29, Sec. 74.

Failure to obey this rule of the road is *prima facie* proof of negligence.

Such a violation of the law does not absolutely establish liability, but creates a presumption which, nothing else appearing, is sufficient to sustain the burden on the plaintiff of proving the defendant's negligence.

The plaintiff in an action on the case for negligence not only has the burden of establishing the negligence of the defendant, but also his own due care.

Rouse v. *Scott,* 22.

Absence from his home or residence for a period of seven years without having in any way been heard from, gives rise to the presumption of death and places the burden of proof on one asserting the contrary.

Wilson, Adm'x v. *Insurance Co.,* 63.

In an action of negligence, the burden of proof is on the plaintiff to show not only that the defendant was negligent, but that he was himself in the exercise of due care.

Cyr v. *Barker et als,* 154.

CARRIERS.

A common carrier in the modern sense includes a carrier of passengers as well as one of goods. Carriers of passengers are not held responsible as insurers of the safety of those whom they transport, as common carriers of goods are. They are, however, bound to exercise care and diligence for the comfort and safety of their passengers.

The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract. Liability, though it arises out of contract, is for negligence. The obligation is wider than any that could be based on mutual assent.

The doctrine of respondeat superior has no application to the relation existing between a common carrier and passengers.

No person is ever absolved from exercising reasonable care for his own safety simply because he is a passenger for hire.

The rule that a passenger shall exercise due care for his own safety applies as between a passenger and a common carrier by automobile.

The control of a taxicab passenger over the driver is restricted to giving directions as to destination.

Chaput v. *Lussier,* 48.

CHARITABLE CORPORATIONS.

Property is not exempt from taxation merely because it is owned by a benevolent and charitable institution. Freedom from assessment extends only to property which the institution occupies or uses for its own purposes.

CHATTEL MORTGAGES.

CHECKS.

CLAMS.

CONDITIONAL SALES.

Maine adopts the Massachusetts rather than the New Jersey rule and holds that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee, unless he is a party to the transaction; and that the question of whether it can or can not be removed without injury to the realty is immaterial.

A lessee's rights of possession are wholly dependent upon his contract with the mortgagor, his lessor. Although the mortgagor is to be regarded as owner of the estate as to all other persons than the mortgagee, he can not create a tenancy after the execution of a mortgage which will be valid against the mortgagee unless the mortgagee chooses to recognize the tenancy as such.

A mortgagor in possession is not competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold.

His lessee's rights are in no way superior to his own as against the mortgagee.

Unless and until the mortgagee recognizes the lessee, there is no privity between the mortgagee and the lessee.

A conditional sales vendor can not be held to have a greater right to retain title to a chattel and to remove the same, which he permits to be attached as a fixture to real estate, when he is dealing with a lessee than when dealing with a mortgagor of the real estate.

In the case at bar, the Court extends the rule declared in *Gaunt* v. *Allen Lane Company*, 128 Me., 41, and holds that a contract between a lessee of a mortgagor and a third person preserving the chattel character of the property added to real estate as an improvement during the life of the mortgage thereon is ineffective as against the mortgagee, unless he is a party to the transaction.

Vorsec v. *Gilkey*, 311.

CONSERVATORS AND RECEIVERS.

See Banks and Banking, 260.

CONSTITUTIONAL LAW.

The service of a writ on a resident defendant in the mode prescribed in the statute by leaving a summons at his last and usual place of abode, gives the Court jurisdiction to enter a judgment against him and is not in violation of the due process clause of the XIVth amendment to the constitution of the United States.

Jordan et al v. *McKay*, 55.

See *State* v. *Strout*, 134.

CONTRACTS.

CONTRIBUTORY NEGLIGENCE.

CORPORATIONS.

COURTS.

CRIMINAL LAW.

An allegation that respondent "did kindle a fire out of doors in the woods on a date during the period proclaimed by the Governor when it became unlawful to kindle fires out of doors in the woods" does not sufficiently set out an offense under the provisions of Secs. 38 and 39, Chap. 11, R. S. 1930, as amended by Chap. 180, P. L. 1931.

State v. *Merrill,* 103.

An indictment describing an offense in the language of the statute is ordinarily sufficient. It, however, depends upon the manner in which the offense is defined in the statute. If the statute does not sufficiently set out the facts which make the crime, so that a person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet, then a more definite statement of the facts than is contained in the statute becomes necessary. It is not enough that the indictment detailed the facts from which an offense may be implied, or only so many of the essential elements as might suggest all the other elements; it must specify everything necessary to criminality.

The sixth amendment to the Constitution of the United States provides that the accused shall enjoy the right to be informed of the nature and cause of the accusation. The Constitution of Maine contains a similar provision.

In order to properly inform the accused of the "nature and cause of the accusation," the commission of the offense must be fully, plainly, substantially and formally set forth.

State v. *Strout,* 134.

When an act is forbidden within a particular territory, the complaint or indictment must allege that it is committed there.

State v. *Parker,* 137.

The rule is well recognized that in the description in the indictment of a statutory offense, every element constituting the crime must be set forth with reasonable precision. The failure to include any necessary allegation can not be cured by implication.

State v. *Faddoul,* 151.

A husband's connivance at the adulterous intercourse of his wife will bar him from maintaining an action against the participant in her improper conduct.

While the question of connivance is primarily of fact for the jury, it is not ordinarily susceptible of proof as an independent fact but it usually established as a conclusion from a line of conduct pursued by the husband in relation to his wife's intercourse with the party from whom he claims damages.

If his conduct as established by undisputed evidence or admitted in his own testimony is such that a rational mind could draw no other conclusion therefrom than that he had consented actively or passively to the conduct of which

DAMAGES.

DEATH.

DEEDS.

DEMURRER.

DESCENT.

The interest of a wife in the real estate of her husband comes to her at his decease, under our statutes, by descent. So long as the husband lives she has a mere inchoate, contingent right in his real estate.

Such right may never ripen into title. If she die before her husband, it is lost.

She may bar her right; or she may release it.

She may release her right, such as it then is, during the lifetime of her husband by a deed with covenants of warranty, but a mere release or quitclaim deed is not sufficient to pass her rights or convey title.

Trust Co. v. *Austin et al*, 45.

DOMICILE.

To retain his home in a town, it is unnecessary that a person should at all times have some house or building, or room, to which he has a right to go.

The home which a person must have, for five successive years, without receiving supplies as a pauper, to acquire a settlement in a town, is equivalent to domicile, which depends upon residence and intention.

Brief absences, without intention to abandon home,—or, more accurately, perhaps, with the formed and determined intention of returning,—do not prevent the acquisition of a settlement.

Madison v. *Fairfield*, 182.

A person non compos, of age and emancipated, can acquire a pauper settlement in his own right.

Friendship v. *Bristol*, 285.

Temporary absences from a home do not prevent the acquirement of a pauper settlement. The test is that of the formed intention of returning.

The settlement of a father, within the State, determines that of his legitimate child.

In order to constitute a settlement, there must be a combination of physical presence with the intention of remaining. The intention must be, not to make the place a home temporarily, but to make it a real home, for an indefinite period. The visible facts may be consistent with either a temporary or a permanent home; each case must depend largely upon its own peculiar facts.

On the issue of one's change of residence, relative to pauper settlement, his declarations unaccompanied by any act material to the issue, would be incompetent. A mere expression of intent, unconnected with any relevant circumstances, would be too remote to be admissible as evidence.

Gouldsboro v. *Sullivan*, 342.

EASEMENTS.

EMBEZZLEMENT.

EQUITY.

EMINENT DOMAIN.

ESTOPPEL.

EVIDENCE.

The failure of a testator to include as a beneficiary a wife, or a son, or a daughter, or even a near relative is a fact of importance in determining his state of mind toward such individual, who would under normal conditions be the natural object of his bounty.

The inclusion by a testator of an outsider as one of the objects of his bounty is evidence of friendship between them. The omission of a close friend is not under ordinary circumstances evidence of any want of friendship.

Ward, Appellant from Decree, 19.

In an action of debt for taxes, evidence of undervaluation of other taxable properties is not admissible.

Bucksport v. *Swazey*, 36.

See *Dyar Sales & Machinery Company* v. *Mininni*, 79.

The competence of an expert witness with respect to his knowledge, his special skill, or experience, that is, whether he possesses the requisite qualifications to enable him to testify as an expert, is a question exclusively for the Court.

State v. *Stuart*, 107.

When an instrument is not ambiguous, it is not permissible to go outside its four corners to determine its meaning.

Machine Makers v. *Patents Co.*, 157.

The parol evidence rule is applicable to insurance policies as well as all other written contracts.

Bryson v. *Fire Insurance Co.*, 172.

When mental condition is the issue to be decided, the evidence of necessity must include a wide field of fact and circumstance, and greater latitude in the admission of testimony must be given than would be permitted in relation to a single fact.

To enable the jury to determine the real state of mind, the action of that mind as shown by conversations, declarations, claims, and acts is the most satisfactory evidence.

Although witnesses other than experts are not allowed in this State to testify directly as to their opinion of the mental condition of another when that question is the issue to be decided, under the directions of the Court, they may be permitted to describe peculiarities, conditions and situations, conduct and changes.

Plummer v. *Life Insurance Co.*, 220.

The weight of authority now is that one's personal appearance may be observed by the jury, in connection with other evidence, or standing alone, for the purpose of determining his or her age.

When the age of a person becomes an issue and the person is present before the triers of fact, they should be at liberty to use their senses and to draw an inference as to the person's age from his physical appearance.

State v. *Dorathy*, 291.

Where the only evidence of the complainant is that respondent begot her with child on the twenty-seventh day of February, 1932, and where the evidence of the respondent is a general denial accompanied with evidence that a normal child was born within seven months, that the complainant had symptoms of pregnancy before the time when the complainant claimed that the child was conceived, with evidence of admission by the complainant that she was herself pregnant before that time, the complainant has failed to sustain the burden of proof that the respondent was responsible for her condition.

Drake v. *Lewis*, 326.

A judicial admission is binding on the one making it. It is not necessarily so on the adverse party. An admission of fact against the interest of a party does not preclude the introduction of evidence by the opposing side to show the details of the picture relied upon to establish liability.

Shea et als v. *Hern*, 361.

See *State* v. *Morang*, 443.

See *Hill* v. *Finnemore*, 459.

EXCEPTIONS.

Exceptions to the acceptance of a report of referees, when permitted by the rule of referees, must be in conformity to Rule XXI of the Rules of the Supreme and Superior Courts, which requires that the objection to the report of the referees must be filed in writing. Non-compliance with this rule renders exceptions invalid.

Bonding and Insurance Co. v. *Pettapiece*, 44.

In cases heard by the Court without a jury, the right of exception is limited to rulings upon questions of law and does not include opinions, directions, or judgments which are the result of evidence or the exercise of judicial discretion.

Sanfacon v. *Gagnon*, 111.

The purpose of a bill of exceptions is to present in clear and specific phrasing the issues of law to be considered by the Court. Each ruling objected to should be clearly and separately set forth. Exceptions are only presented in a

"summary manner" in accordance with the statute when they are "stated separately, pointedly, concisely." It is not permissible to bring before the Court indiscriminately all rulings of the presiding Justice.

Dodge v. *Bardsley et al*, 230.

Rule XXI of the Supreme Judicial and Superior Courts provides that objections to any report "shall set forth specifically the grounds of the objections, and these only shall be considered by the Court."

Throumoulos v. *Bank of Biddeford*, 232.

See *Rioux* v. *Water District*, 307.

Where there is any evidence to support them, findings of fact by a sitting Justice hearing the case are conclusive, and exceptions do not lie.

Langevin v. *Prudential Ins. Co.*, 392.

The abuse of judicial discretion is open to exceptions.

Hill v. *Finnemore*, 459.

Where, on examination of the evidence independent of that admitted over objection, and the full charge, it is apparent that the jury was not misled, or the result influentially affected by the objected evidence, or by any erroneous ruling, or misdirection, exceptions will not be sustained.

Reed et al v. *Power Co.*, 476.

EXECUTORS AND ADMINISTRATORS.

See *Perlin* v. *Rosen*, 187.

Possession and custody of the monies, goods and property, of a deceased person, to an extent and for a time, is vested by statute law in an administrator or executor.

In this State an indictment charging in apt words that a person converted the property of another while in the possession of that person as an administrator or executor is good as against demurrer.

State v. *Snow*, 321.

If an insured during lifetime would have been entitled to sue for a disability benefit under the policy, an administrator of the insured's estate is so entitled.

Langevin v. *Prudential Ins. Co.*, 392.

FEDERAL EMPLOYERS' LIABILITY ACT.

See *Ward* v. *Railroad Co.*, 88.

FELLOW SERVANTS.

See Master and Servant.

FINDINGS OF FACT.

Where there is any evidence to support them, findings of fact by a sitting Justice hearing the case are conclusive, and exceptions do not lie.

Langevin v. *Prudential Ins. Co.*, 392.

Where issues are solely of fact, and there is credible evidence, with nothing in the record to indicate improper motive on the part of the jury, its determination will not be disturbed by the Law Court.

Lamey v. *Mortgage Co.*, 456.

FIRE DEPARTMENTS.

No good reason exists why the rights possessed by a fire department by virtue of R. S. 1930, Chap. 29, Sec. 13, granting a right of way to police, fire department, traffic emergency repair vehicles, and ambulances, when operated in response to calls, and while acting within its home jurisdiction in the performance of its important and necessary service should not obtain as well when reasonably engaged in that kind of service outside its home limits.

The "fire chief's car" is within this statute as a part of the "fire department vehicles."

Such "a right of way," however, does not do away with the requirement that reasonable care shall be exercised at all times.

The speed employed by the driver of such fire apparatus must be exerted with reasonable care and due regard to the lives and limbs of those who may be met upon the way, and the driver is bound to exercise reasonable care, reasonable control, to be on the alert, on the lookout, and to be observant of the rights of others who have the right to be upon the streets.

Section 69, Chapter 29, R. S. 1930, providing for rates of *prima facie* lawful speed of motor vehicles on highways does not apply to fire apparatus when on the way to a fire.

By reason of the necessities of the situation and the public interest, and in the absence of a clear expression of legislative intent to the contrary, fire apparatus vehicles whose function is the saving of life and property are, when in use for such purpose, exempt from traffic regulations, such as those fixing speed limits.

To limit the speed of fire apparatus in accordance with the provisions of said statute would have a very great tendency to slow up the activities and diminish the efficiency of a fire department and destroy in great measure its service necessary for the preservation of property, and, in many instances, life itself.

Carte blanche, however, as to speed in the operation of said fire apparatus is not given by this decision.

The test as to due care in this case is whether or not at that time and place, under all the circumstances as they then and there existed, the defendant was operating his car as the ordinarily careful and prudent driver of such a car, in the performance of such a duty, would have done. If so, he was in the exercise of due care; otherwise, not.

McCarthy v. *Mason*, 347.

FISH AND GAME.

See *State* v. *Parker*, 137.

HIGHWAYS.

One having a private right of way connecting with a public highway acquires no rights superior to the general public in the public highway.

Discontinuance of the public easement does not enlarge the private easement.

Burnham v. *Burnham*, 113.

HUSBAND AND WIFE.

The interest of a wife in the real estate of her husband comes to her at his decease, under our statutes, by descent. So long as the husband lives she has a mere inchoate, contingent right in his real estate.

Such right may never ripen into title. If she die before her husband, it is lost.

She may bar her right; or she may release it.

She may release her right, such as it then is, during the lifetime of her husband by a deed with covenants of warranty, but a mere release or quitclaim deed is not sufficient to pass her rights or convey title.

Trust Co. v. *Austin et al*, 45.

A husband's connivance at the adulterous intercourse of his wife will bar him from maintaining an action against the participant in her improper conduct.

While the question of connivance is primarily of fact for the jury, it is not ordinarily susceptible of proof as an independent fact but is usually established as a conclusion from a line of conduct pursued by the husband in relation to his wife's intercourse with the party from whom he claims damages.

INDICTMENT.

INSURANCE.

INTOXICATING LIQUORS.

See *State* v. *McNaughton*, 8.

INVITED GUESTS.

See Motor Vehicles.

JOINT ADVENTURE.

An equitable action for an accounting is the proper remedy of a party to a joint adventure to recover his share of the profits or fix the liability for losses.

Waldo Lumber Co. v. *Metcalf*, 374.

JUDGMENTS.

A judgment of a court of competent jurisdiction can not be attacked collaterally.

Leavitt v. *Steel Co.*, 76.

Dismissal of a case by order of court is a final judgment.

When a final and valid judgment has been entered and parties are out of court, it does not lie within the power of the presiding Justice at a subsequent term to bring the action forward.

A court may, however, at a subsequent term correct mistakes and rectify false or fraudulent entries, provided that final judgment has not been entered.

Cook v. *Cook*, 119.

No party may be denied a day in court unless a judgment on the merits, in an action for the same cause between the same parties, has been rendered.

The result of a former trial, in which the plaintiff was not a party, neither acts as an estoppel against him nor otherwise acts as a bar to his action.

Christian v. *Pomeroy*, 209.

It is a principle of the common law that when a fact is once finally adjudicated, without fraud or collusion, by a tribunal of competent jurisdiction, the judgment binds the parties and their privies.

Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. The same thing may also be said of those who assume to have the right to do these things.

Privity is a "mutual or successive relationship to the same rights of property."

The strict rule that a judgment operates as res judicata only with reference to the parties and privies, expands on occasion beyond the nominal parties,

—but a single act, such as the employment of an attorney, will not determine status. The mere fact that one not a party to a pending suit employs counsel to assist in the defense thereof, does not make him a party or privy to such proceedings, nor bar him from contesting the issues decided.

Burns v. *Baldwin-Doherty Co.*, 331.

JURISDICTION.

The jurisdiction of the equity judge can not be delegated to others. The provisions of our statutes do not authorize a reference of an equity cause.

Faxon v. *Barney*, 42.

In a criminal cause a motion for a new trial on the ground of newly discovered evidence, filed in the Superior Court after the mandate of the Appellate Court had finally ended the original case, is without avail. In such instance the Superior Court has no jurisdiction.

In Re Hume, 102.

The line of demarcation between cases involving matters concerning patents which may properly be litigated in the State Courts and those in which the Federal Courts have exclusive jurisdiction is clearly drawn.

Summarizing the law as laid down by the authorities generally, it may be said that whenever a contract is made in relation to patent rights which is not provided for and regulated by a Federal statute, the State Court having jurisdiction of the parties is the proper tribunal to hear and decide the case; but where the plaintiff sets up some right, title or interest under the patent laws or at least makes it appear that some such right or privilege will be defeated by one construction or sustained by an opposite construction, the jurisdiction of the Federal Courts is exclusive.

There is a clear distinction between questions arising under the patent laws and cases arising under them. The former arises when plaintiff sets up a right under the patent laws as ground for recovery. Such cases are exclusively for the Federal Courts.

A grant to a patentee of an exclusive right to manufacture and vend an article described therein is a grant of property; and if the validity of the patent is unquestioned, State Courts will protect the owner of such property in the enjoyment thereof, by injunction, to the same extent as they would do were the subject matter of the litigation of any other description. But where as in the case at bar, the validity of the plaintiff's patent is put in question by the pleadings in a State Court, and the defendants present such proofs upon the trial as render it necessary for the Court to examine and pass upon conflicting patents or claims of priority in invention, in order to determine whether the

JURY FINDINGS.

JURY AND JURORS.

belief. One witness may be contradicted by several, and yet his testimony outweigh all of theirs. The question is what is to be believed.

Chenery v. *Russell,* 130.

As a general rule, in the trial of civil cases the assessment of damages is for the jury and the parties are entitled to their judgment upon that issue. When it appears, however, that the jury have disregarded the testimony or acted under some bias, prejudice, or improper influence with the result that the damages awarded are either excessive or inadequate, then it is the duty of the Court to set aside the verdict.

This Court has long held that, when the smallness of a verdict shows that the jury may have made a compromise, a new trial will be granted.

Conroy v. *Reid,* 162.

The nature and extent of cross-examinations of a child of tender years is left to the discretion of the Court.

The credibility to which the child is entitled is for the jury.

The weight of authority now is that one's personal appearance may be observed by the jury, in connection with other evidence, or standing alone, for the purpose of determining his or her age.

When the age of a person becomes an issue and the person is present before the triers of fact, they should be at liberty to use their senses and to draw an inference as to the person's age from his physical appearance.

State v. *Dorathy,* 291.

Harmless conduct on the part of the juror, which has no tendency to impair his impartiality or affect the purity of the verdict, and for which the parties, counsel or friends are in no way responsible, is not a sufficient reason for granting a new trial.

Rioux v. *Water District,* 307.

Where issues are solely of fact, and there is credible evidence, with nothing in the record to indicate improper motive on the part of the jury, its determination will not be disturbed by the Law Court.

Lamey v. *Mortgage Co.,* 456.

The general rule is that the legal limit of information upon which a jury may base their action, is facts truly found, so far as humanly possible, from a fair preponderance of the evidence. Yet, in weighing and applying evidence, jurymen may invoke their everyday experience. They need not lay aside the general information acquired and known to them, as intelligent members of the community. They may examine the case committed to them in the light of

LANDLORD AND TENANT.

LAW COURT.

Every judicial tribunal possesses inherent power within reasonable limitations to correct its obvious errors and should be burdened with the responsibility of so doing.

Should a case arise in which it appeared that justice called for such action, the Law Court would be justified in rectifying an error in a final decision on petition and motion addressed directly to it.

Such a proceeding does not involve a re-hearing and would not lie for the purpose of seeking a revision by the Court of its considered conclusions either of fact or law, nor could mere mistakes in opinion and judgment warrant. It could only be applicable when the Law Court had by mistake assumed to be true that which the record showed not to be true, or had palpably failed to consider facts proved, or had misstated the law so plainly that the point involved was not arguable, and had based its decision thereon.

Summit Thread Co. v. *Corthell*, 336.

Where issues involved are purely of fact, the jurors are the authorized triers of the same and are also judges of credibility of witnesses; but if a result is reached by them which is so out of accord with any reasonable interpretation of the evidence the duty of the Law Court is plain. It will set aside a verdict which finds support only in testimony which on its face is incredible or is obviously untrue.

Turcotte v. *Dunning*, 417.

Where issues are solely of fact, and there is credible evidence, with nothing in the record to indicate improper motive on the part of the jury, its determination will not be disturbed by the Law Court.

Lamey v. *Mortgage Co.*, 456.

LIBEL AND SLANDER.

To determine whether a given publication is libelous the language thereof must be taken in its ordinary significance and must be construed in the light of what might reasonably have been understood therefrom by the persons who read it.

In interpreting the language, it is not a question of the intent of the speaker, or author, but of the understanding of those to whom the words are addressed and of the natural and probable effect of the words upon them. If the language is plain and free from ambiguity, it is solely a question for the Court whether it is actionable.

Chapman v. *Gannett*, 389.

LIENS.

Courts now construe lien statutes liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute.

To a bill in equity seeking to enforce a lien claim, the general contractor is a proper party. If payment is claimed against him, he is a necessary party. But in a bill where no judgment is prayed for against him, and where a final decree can be rendered between the parties to the bill without radically and injuriously affecting the interest of the general contractor, or without leaving the controversy in such situation that its final determination may be inconsistent with equity and good conscience, he is not an indispensable party, and hence need not be joined.

Andrew v. *Bishop et als,* 447.

MALICE.

See Actions.

MASTER AND SERVANT.

Under certain circumstances, it is the duty of the employer to warn the employee of dangers to which he is or may be subjected. This duty is not, however, absolute. Its existence depends upon the age, understanding and experience of the employee and the character of the danger.

In order to create a duty of warning and instruction, the danger must be one that is known to the employer and unknown to the employee, there being no such duty if it is obvious or if the employee possesses knowledge of the risk to which he is subjected.

The rule requiring an employer to instruct his employee and to warn him is only for the purpose of supplying him with information which he is not presumed to have, and if it is shown that the employee did in fact possess the knowledge, the failure to warn can in no sense be said to be the proximate cause of the injury; and if not the proximate cause of the injury, there can not be actionable negligence.

The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand; and if he neglects to observe the perils of his employment, the fault is his own, not that of the employer.

Ward v. *Railroad Co.,* 88.

A master may loan or let his servant to another in such a way that he becomes the servant of the other for the time being.

MISTRIAL.

MORTGAGES.

A conditional sales vendor can not be held to have a greater right to retain title to a chattel and to remove the same, which he permits to be attached as a fixture to real estate, when he is dealing with a lessee than when dealing with a mortgagor of the real estate.

In the case at bar, the Court extends the rule declared in *Gaunt* v. *Allen Lane Company,* 128 Me., 41, and holds that a contract between a lessee of a mortgagor and a third person preserving the chattel character of the property added to real estate as an improvement during the life of the mortgage thereon is ineffective as against the mortgagee, unless he is a party to the transaction.

Vorsec v. *Gilkey,* 311.

MOTOR VEHICLES.

The driver of an automobile turning across a way upon which he is driving to enter a way intersecting from the opposite side, must pass to the right of the intersection of the medial lines of the ways as required by R. S., Chap. 29, Sec. 74.

Failure to obey this rule of the road is *prima facie* proof of negligence.

Such a violation of the law does not absolutely establish liability, but creates a presumption which, nothing else appearing, is sufficient to sustain the burden on the plaintiff of proving the defendant's negligence.

The plaintiff in an action on the case for negligence not only has the burden of establishing the negligence of the defendant, but also his own due care.

Thoughtless inattention in the operation of a motor vehicle on the highway spells negligence.

Rouse v. *Scott,* 22.

Mere skidding of a motor vehicle is not evidence of negligence.

Morin v. *Carney,* 25.

The rule that a passenger shall exercise due care for his own safety applies as between a passenger and a common carrier by automobile.

The control of a taxicab passenger over the driver is restricted to giving directions as to destination.

Chaput v. *Lussier,* 48.

See *Farrell, Pro Ami* v. *Hidish,* 57.

It is for the jury to determine from facts found and inferences logically drawn therefrom, whether the driver of a motor vehicle who lost control of his car while passing another automobile, exercised the degree of care, requisite to the performance of his duty to his invited guests, in the operation of his automobile.

Stewart v. *Jewett,* 71.

Though passing through a fog which obscured vision it was not as a matter of law the duty of the passengers to get out and walk. The question was whether or not they used reasonable precautions under the conditions. This was for the jury.

Richard et als v. *Maine Central Ry.*, 197.

See *Reid et al* v. *Walton et als*, 212.

In an emergency, to escape the charge of negligence, one must act as an ordinarily prudent man might under the same or similar circumstances.

Smith v. *Joe's Market*, 234.

Disobedience of a 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. Negligence and causal connection are ordinarily questions of fact. It is not in every situation an act of negligence for a driver to turn to the left. He must, however, if meeting another automobile, seasonably drive to the right of the middle of the traveled road so that each shall have one-half part thereof, and he must yield for a vehicle in his rear to pass, on suitable and audible signal.

When the operator of a motor vehicle intends to cross a street, he must use reasonable care to ascertain whether cars are attempting to pass from behind.

Attempting to pass vehicles at a street intersection is not permissible.

Field v. *Webber*, 236.

See *Frenyea* v. *Steel Products Co.*, 271.

Negligence is the want of ordinary care, that is, the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situation or under like circumstances.

The care which ordinarily prudent and careful persons take is commensurate with the necessity for care and the dangers of the situation.

No good reason exists why the rights possessed by a fire department by virtue of R. S. 1930, Chap. 29, Sec. 13, granting a right of way to police, fire department, traffic emergency repair vehicles, and ambulances, when operated in response to calls, and while acting within its home jurisdiction in the performance of its important and necessary service should not obtain as well when reasonably engaged in that kind of service outside its home limits.

The "fire chief's car" is within this statute as a part of the "fire department vehicles."

Such "a right of way," however, does not do away with the requirement that reasonable care shall be exercised at all times.

The speed employed by the driver of such fire apparatus must be exerted with reasonable care and due regard to the lives and limbs of those who may be met upon the way, and the driver is bound to exercise reasonable care, reasonable control, to be on the alert, on the lookout, and to be observant of the rights of others who have the right to be upon the streets.

Section 69, Chapter 29, R. S. 1930, providing for rates of *prima facie* lawful speed of motor vehicles on highways does not apply to fire apparatus when on the way to a fire.

By reason of the necessities of the situation and the public interest, and in the absence of a clear expression of legislative intent to the contrary, fire apparatus vehicles whose function is the saving of life and property are, when in use for such purpose, exempt from traffic regulations, such as those fixing speed limits.

To limit the speed of fire apparatus in accordance with the provisions of said statute would have a very great tendency to slow up the activities and diminish the efficiency of a fire department and destroy in great measure its service necessary for the preservation of property, and, in many instances, life itself.

Carte blanche, however, as to speed in the operation of said fire apparatus is not given by this decision.

The test as to due care in this case is whether or not at that time and place, under all the circumstances as they then and there existed, the defendant was operating his car as the ordinarily careful and prudent driver of such a car, in the performance of such a duty, would have done. If so, he was in the exercise of due care; otherwise, not.

The determination of the test is a matter of law. The application of it is for the jury and the jury's verdict must stand, unless, on the whole record, there is no weight of evidence adequate to satisfy the minds of reasonable men, fairly tending to support the jury's finding.

Operators of motor vehicles attempting to cross a right of way of cars coming from behind must act with due care.

Before making such a crossing, they are charged with the duty of so watching and timing the movements of the other car as to reasonably insure themselves of a safe passage, either in front or rear of such car, even to the extent of stopping and waiting if necessary.

McCarthy v. *Mason,* 347.

To rebut the presumption of negligence arising from the fact that an automobile went off the road, the explanation by the defendant driver must be a reasonable one with as much probative force as the inference itself.

It is common knowledge that many automobile casualties occur without apparent reason. Injuries may result from mere inattention on the part of an operator of a car, from his fleeting glance to left or right, which can not 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. When, however, nothing is left to inference the doctrine of *res ipsa loquitur* does not apply.

Excessive speed by the driver of an automobile does not preclude recovery by the passenger. The question is whether, in view of the particular circumstances, there was a duty on the part of the passenger to have warned the driver. They were not obliged to assume control over the management of the car, and their failure to warn is not negligence if such warning would have been futile.

Shea et als v. *Hern,* 361.

See *Abbott et als* v. *Zirpolo,* 368.

See *Hatch* v. *Globe Laundry Co.,* 379.

Thoughtless inattention on the highway spells negligence.

If mere inattention spells negligence, voluntarily diverted attention with a preoccupied mind manifests negligence in an even greater degree.

It is not negligence as a matter of law to attempt to cross the street where there is no cross walk, although there is a cross walk some distance away.

Where a pedestrian steps off from the curb to cross a street, has proceeded only three feet, and has not placed himself in danger of collision, but is hit by the defendant operator of an automobile, who suddenly swerves his car toward the plaintiff, and through lack of due care fails to observe the plaintiff's presence in the street, the proximate cause of the collision is not contributory negligence by the plaintiff but the negligence of the defendant, provided the plaintiff, upon discovery of his predicament, with due care then attempts to step backwards in self-protection.

Hill v. *Finnemore,* 459.

MUNICIPAL CORPORATIONS.

The right to bring a suit to collect taxes in the name of a city may only be conferred by directions in writing from the Mayor and Treasurer as provided in R. S., Chap. 14, Sec. 64.

Moreover, such directions must contain specific authority to institute an action in the name of the municipality and the names of the particular parties to be sued should be stated.

The power conferred by the statute requires an exercise of judgment and discretion which must be exercised by the persons on whom the law has placed the power and authority to act. It can not be delegated.

MUNICIPAL ORDINANCES.

NEGLIGENCE.

Such a violation of the law does not absolutely establish liability, but creates a presumption which, nothing else appearing, is sufficient to sustain the burden on the plaintiff of proving the defendant's negligence.

The plaintiff in an action on the case for negligence not only has the burden of establishing the negligence of the defendant, but also his own due care.

Thoughtless inattention in the operation of a motor vehicle on the highway spells negligence.

Rouse v. *Scott*, 22.

Where, in a civil action, on an issue of negligence, a defendant is shown to have violated a valid statutory regulation, enacted in behalf of and to protect a plaintiff as one of the public, such is evidence from which, if uncontrolled by direct proof or circumstances, the jury may find a defendant negligent.

Mere skidding of a motor vehicle is not evidence of negligence.

Morin v. *Carney*, 25.

A common carrier in the modern sense includes a carrier of passengers as well as one of goods. Carriers of passengers are not held responsible as insurers of the safety of those whom they transport, as common carriers of goods are. They are, however, bound to exercise care and diligence for the comfort and safety of their passengers.

The obligation of a carrier to a passenger for his safe carriage is usually dealt with as an obligation imposed by the law of torts rather than as one assumed by contract. Liability, though it arises out of contract, is for negligence. The obligation is wider than any that could be based on mutual assent.

The doctrine of respondeat superior has no application to the relation existing between a common carrier and passengers.

No person is ever absolved from exercising reasonable care for his own safety simply because he is a passenger for hire.

The rule that a passenger shall exercise due care for his own safety applies as between a passenger and a common carrier by automobile.

The control of a taxicab passenger over the driver is restricted to giving directions as to destination.

Chaput v. *Lussier*, 48.

The mere fact that children of tender years are allowed to walk along a public way is not of itself sufficient proof of negligence on the part of those entrusted with their care.

Small children have a right to light, air and exercise; and the children of the poor can not be constantly watched by their parents.

No hard and fast rules as to the care of children can be laid down, and the financial condition of the family and other cares devolving upon the parents are always to be considered.

A mother engaged in her household duties who permits a child three and a half years old to walk on the street accompanied by her ten year old sister is not guilty of negligence in so doing.

Farrell, Pro Ami v. *Hidish,* 57.

It is for the jury to determine from facts found and inferences logically drawn therefrom, whether the driver of a motor vehicle who lost control of his car while passing another automobile, exercised the degree of care, requisite to the performance of his duty to his invited guests, in the operation of his automobile.

Stewart v. *Jewett,* 71.

The rule requiring an employer to instruct his employee and to warn him is only for the purpose of supplying him with information which he is not presumed to have, and if it is shown that the employee did in fact possess the knowledge, the failure to warn can in no sense be said to be the proximate cause of the injury; and if not the proximate cause of the injury, there can not be actionable negligence.

The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand; and if he neglects to observe the perils of his employment, the fault is his own, not that of the employer.

Ward v. *Railroad Co.,* 88.

In an action of negligence, the burden of proof is on the plaintiff to show not only that the defendant was negligent, but that he was himself in the exercise of due care.

Cyr v. *Barker et als,* 154.

In an action to recover damages sustained by a plaintiff who suffered painful injuries while wringing clothes, as one of her hands was caught and jammed between the rolls of an electrically operated clothes wringer, which had been renewed and repaired by the defendant; and by the husband for expenses incurred in caring for his wife after the injury;

HELD

Defendant can be held to pay damages in either suit only if it is shown to be negligent in performing a duty which it owed to the wife; and if it is shown that in operating the machine on the day of the injury she was guilty of no negligence.

The machine was old, and so worn that renewal of parts was an evident necessity.

Defendant had made one renewal and an attempt to adjust the mechanism after the renewal.

The evidence disclosed that despite repeated experiences of jamming and stopping of the machine, she placed her finger so near to the rolls that her hand was caught between them.

She was clearly negligent, and neither plaintiff is entitled to damages.

Gile v. *Gas and Electric Co.*, 168.

The rights of a railroad and the travelling public to the use of a highway at a grade crossing are reciprocal. The only superior right of the railroad is the right of passage. As an incident to this the railroad may stop its train across a highway temporarily blocking it but, under such circumstances, the use which it makes of the way must be such as is reasonably necessary to enable it to perform its duties as a common carrier.

The leaving of an unlighted obstruction on a highway at night creates a hazard for travelers. Whether such obstruction was the proximate cause of an injury depends upon the circumstances of each individual case, and particularly on whether or not the traveler in the exercise of due care should have seen it and avoided a collision.

Whether the obstruction of a highway by a standing train is negligence depends on whether or not the conduct of the railroad is reasonable. This question and the issue whether or not negligence, if found, was the proximate cause of this accident were for the jury.

Richard et als v. *Maine Central Ry.*, 197.

See *Reid et al* v. *Walton et als*, 212.

In an emergency, to escape the charge of negligence, one must act as an ordinarily prudent man might under the same or similar circumstances.

Smith v. *Joe's Market*, 234.

At common law, in actions of tort for negligence, the plaintiff has to prove, by a fair preponderance of all the evidence, not only that defendant was negligent, and harm without other agency resulting, but also to negative contributory negligence. Absence of proof of any of these elements precludes a recovery. Under the Death-Liability statute if contributory negligence is relied upon as a defense, it must be pleaded and proved by the defendant; otherwise that statute did not undertake to change the substantive law of negligence. If a plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff may not prevail.

Contributory negligence is usually for the jury. Yet, when the evidence is conclusive that conduct was not in harmony with what an ordinarily prudent man would do, and a valid verdict, in any rational view, could not be returned for the plaintiff, the judge should order the verdict the evidence demands.

Disobedience of a 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. Negligence and causal connection are ordinarily questions of fact. It is not in every situation an act of negligence for a driver to turn to the left. He must, however, if meeting another automobile, seasonably drive to the right of the middle of the traveled road so that each shall have one-half part thereof, and he must yield for a vehicle in his rear to pass, on suitable and audible signal.

When the operator of a motor vehicle intends to cross a street, he must use reasonable care to ascertain whether cars are attempting to pass from behind.

Attempting to pass vehicles at a street intersection is not permissible.

Field v. *Webber,* 236.

See *Frenyea* v. *Steel Products Co.,* 271.

Negligence is the want of ordinary care, that is, the want of such care as a reasonably prudent and careful man, mindful of his own conduct and the rights and safety of others, would exercise in a similar situation or under like circumstances.

The care which ordinarily prudent and careful persons take is commensurate with the necessity for care and the dangers of the situation.

No good reason exists why the rights possessed by a fire department by virtue of R. S. 1930, Chap. 29, Sec. 13, granting a right of way to police, fire department, traffic emergency repair vehicles, and ambulances, when operated in response to calls, and while acting within its home jurisdiction in the performance of its important and necessary service should not obtain as well when reasonably engaged in that kind of service outside its home limits.

The "fire chief's car" is within this statute as a part of the "fire department vehicles."

Such "a right of way," however, does not do away with the requirement that reasonable care shall be exercised at all times.

The speed employed by the driver of such fire apparatus must be exerted with reasonable care and due regard to the lives and limbs of those who may be met upon the way, and the driver is bound to exercise reasonable care, reasonable control, to be on the alert, on the lookout, and to be observant of the rights of others who have the right to be upon the streets.

Section 69, Chapter 29, R. S. 1930, providing for rates of *prima facie* lawful speed of motor vehicles on highways does not apply to fire apparatus when on the way to a fire.

By reason of the necessities of the situation and the public interest, and in the absence of a clear expression of legislative intent to the contrary, fire apparatus vehicles whose function is the saving of life and property are, when in use for such purpose, exempt from traffic regulations, such as those fixing speed limits.

To limit the speed of fire apparatus in accordance with the provisions of said statute would have a very great tendency to slow up the activities and diminish the efficiency of a fire department and destroy in great measure its service necessary for the preservation of property, and, in many instances, life itself.

Carte blanche, however, as to speed in the operation of said fire apparatus is not given by this decision.

The test as to due care in this case is whether or not at that time and place, under all the circumstances as they then and there existed, the defendant was operating his car as the ordinarily careful and prudent driver of such a car, in the performance of such a duty, would have done. If so, he was in the exercise of due care; otherwise, not.

The determination of the test is a matter of law. The application of it is for the jury and the jury's verdict must stand, unless, on the whole record, there is no weight of evidence adequate to satisfy the minds of reasonable men, fairly tending to support the jury's finding.

Operators of motor vehicles attempting to cross a right of way of cars coming from behind must act with due care.

Before making such a crossing, they are charged with the duty of so watching and timing the movements of the other car as to reasonably insure themselves of a safe passage, either in front or rear of such car, even to the extent of stopping and waiting if necessary.

McCarthy v. *Mason,* 347.

To rebut the presumption of negligence arising from the fact that an automobile went off the road, the explanation by the defendant driver must be a reasonable one with as much probative force as the inference itself.

It is common knowledge that many automobile casualties occur without apparent reason. Injuries may result from mere inattention on the part of an operator of a car, from his fleeting glance to left or right, which can not 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. When, however, nothing is left to inference the doctrine of *res ipsa loquitur* does not apply.

Excessive speed by the driver of an automobile does not preclude recovery by the passenger. The question is whether, in view of the particular circumstances, there was a duty on the part of the passenger to have warned the driver. They were not obliged to assume control over the management of the car, and their failure to warn is not negligence if such warning would have been futile.

Shea et als v. *Hern,* 361.

See *Abbott et als* v. *Zirpolo,* 368.

If a defendant is to be held answerable in damages to a plaintiff, his negligence must be the proximate cause of the injury. Negligence is ordinarily said to be the proximate cause when the injury is the natural and probable consequence of the negligence. Viewing the occurrence in retrospect it is only essential that the consequences appear to flow in unbroken sequence from the negligence.

The independent act of a third person, intervening between the wrong complained of and the injury, is not sufficient to break the causal connection, if such act should have been foreseen or reasonably anticipated.

One attempting to rescue another is not to be held negligent by exposing himself to imminent danger, unless his conduct is to be regarded as rash or reckless. The law is indulgent to the rescuer, if in the emergency he fails to use the same judgment and adopt the same measures for his protection, that he might if the opportunity were given for calm deliberation.

Hatch v. *Globe Laundry Co.*, 379.

Thoughtless inattention on the highway spells negligence.

If mere inattention spells negligence, voluntarily diverted attention with a preoccupied mind manifests negligence in an even greater degree.

It is not negligence as a matter of law to attempt to cross the street where there is no cross walk, although there is a cross walk some distance away.

Where a pedestrian steps off from the curb to cross a street, has proceeded only three feet, and has not placed himself in danger of collision, but is hit by the defendant operator of an automobile, who suddenly swerves his car toward the plaintiff, and through lack of due care fails to observe the plaintiff's presence in the street, the proximate cause of the collision is not contributory negligence by the plaintiff but the negligence of the defendant, provided the plaintiff, upon discovery of his predicament, with due care then attempts to step backwards in self-protection.

Hill v. *Finnemore*, 459.

NEW TRIAL.

A motion for a new trial on the ground of newly discovered evidence can not be demanded as of right, and can be granted only when certain conditions appear. The evidence supporting such a motion must be material and not merely cumulative or impeaching. It 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. It must be such as will probably change the result, if a new trial is granted.

State v. *Shea*, 16.

If, on review, the jury is found to have returned a verdict against the evidence or the weight thereof, the Court should set the verdict aside and grant a new trial.

Morin v. *Carney*, 25.

NOTICE.

PARENT AND CHILD.

A mother engaged in her household duties who permits a child three and a half years old to walk on the street accompanied by her ten year old sister is not guilty of negligence in so doing.

Farrell, Pro Ami v. *Hidish,* 57.

Although a parent may not with hostile, wicked or malicious intent alienate the affections of her married son, yet she may advise that the marriage relation be broken up if, on reasonable grounds, she believes that a further continuance of it tends to injure the health or destroy the peace of mind of the child so that he would be justified in leaving.

The parent may in such a case persuade the child and may use proper and reasonable arguments to that end.

And though it turn out that the parent acted on mistaken premises or false information, or that her advice and interference may have proved unfortunate, still, if she acts in good faith for the child's good upon reasonable grounds of belief, she is not liable for damages for the separation which results.

Malice is not presumed. It must be proved.

But if in an action by a wife, there is evidence upon which the jury would have a right to find that a parent, or brothers and sisters who stand *"in loco parentis,"* have actively interfered to cause a son and brother to abandon the wife, and have deprived her of his affections and the comfort and solace of his society, and have done this through hatred or malice towards the wife and not for the purpose of affording a proper protection to the husband and furthering his true welfare, the case is for the jury and, if the facts so in evidence are deemed proved, recovery must be granted.

Block v. *Block et als,* 202.

PATENTS.

See *Machine Makers* v. *Patents Co.,* 157.

The line of demarcation between cases involving matters concerning patents which may properly be litigated in the State Courts and those in which the Federal Courts have exclusive jurisdiction is clearly drawn.

Summarizing the law as laid down by the authorities generally, it may be said that whenever a contract is made in relation to patent rights which is not provided for and regulated by a Federal statute, the State Court having jurisdiction of the parties is the proper tribunal to hear and decide the case; but where the plaintiff sets up some right, title or interest under the patent laws or at least makes it appear that some such right or privilege will be defeated by one construction or sustained by an opposite construction, the jurisdiction of the Federal Courts is exclusive.

PAUPERS AND PAUPER SETTLEMENT.

Under R. S., Chapter 33, Section 3, as amended by Chapter 124, P. L. 1931, which was in force when this action accrued, a pauper settlement acquired under existing laws remains until it is defeated by the acquisition of a new one or until it is lost as therein provided.

Under this law, when a pauper settlement is defeated or lost, it is finally ended and can not be revived.

A subsequent settlement in the same town, as in a different one, is a new settlement and entirely distinct from the old. It is not the same in fact or any legal consequence.

The estoppel of R. S., Chapter 33, Section 30, does not apply to a new and independent settlement acquired subsequent to that upon which the recovery has been had.

Friendship v. *Bristol*, 285.

By the provision of R. S. 1930, Chapter 33, Section 39, a town which has incurred expense for the support of a pauper, whether he has a settlement in that town or not, may recover it of him, his executors or administrators, in an action of assumpsit.

It is not every expense incurred that is recoverable under this statute. A purely officious payment of expense which a town is under no legal obligation to make is not so recoverable.

A town furnishing necessary relief to a married woman totally deserted by her husband, it having been applied for and received as pauper supplies, may obtain reimbursement from the husband.

At common law, a husband is bound to provide support for his wife, and is liable to pay for it, if it is furnished by other person, on his refusal or neglect to do so, when he ought.

Inhabitants of Vienna v. *Weymouth*, 302.

Temporary absences from a home do not prevent the acquirement of a pauper settlement. The test is that of the formed intention of returning.

The settlement of a father, within the State, determines that of his legitimate child.

In order to constitute a settlement, there must be a combination of physical presence with the intention of remaining. The intention must be, not to make the place a home temporarily, but to make it a real home, for an indefinite period. The visible facts may be consistent with either a temporary or a permanent home; each case must depend largely upon its own peculiar facts.

On the issue of one's change of residence, relative to pauper settlement, his declarations unaccompanied by any act material to the issue, would be incompetent. A mere expression of intent, unconnected with any relevant circumstances, would be too remote to be admissible as evidence.

Gouldsboro v. *Sullivan*, 342.

PAYMENT.

PEDESTRIANS.

PLEADING AND PRACTICE.

Section 27, Chapter 96, R. S. 1930, provides that "The action of assumpsit shall lie in any case in which either an action of debt or an action of covenant is now mantainable. Under the plea of non assumpsit, the defenses available under the plea of general issue in either of said actions shall be available."

It is unnecessary to offer direct proof of a fact which may be conclusively inferred from all of the evidence submitted.

Investment Co. v. *Rumery Co.*, 176.

The purpose of a bill of exceptions is to present in clear and specific phrasing the issues of law to be considered by the Court. Each ruling objected to should be clearly and separately set forth. Exceptions are only presented in a "summary manner" in accordance with the statute when they are "stated separately, pointedly, concisely." It is not permissible to bring before the Court indiscriminately all rulings of the presiding Justice.

Dodge v. *Bardsley et al*, 230.

Rule XXI of the Supreme Judicial and Superior Courts provides that objections to any report "shall set forth specifically the grounds of the objections, and these only shall be considered by the Court."

Throumoulos v. *Bank of Biddeford*, 232.

See *Rioux* v. *Water District*, 307.

A ruling at *nisi prius* stated to have been made *"pro forma"* has the same force and effect as though no qualifying phrase accompanied the ruling.

A petition for review is addressed to the discretion of the Court by which it is heard and its decision can only be revised on exceptions to erroneous rulings in matters of law.

Statutory review is not an appropriate method to obtain the correction of a mistake upon which final adjudication of a cause was based by a court of last resort.

Every judicial tribunal possesses inherent power within reasonable limitations to correct its obvious errors and should be burdened with the responsibility of so doing.

Should a case arise in which it appeared that justice called for such action, the Law Court would be justified in rectifying an error in a final decision on petition and motion addressed directly to it.

Such a proceeding does not involve a re-hearing and would not lie for the purpose of seeking a revision by the Court of its considered conclusions either of fact or law, nor could mere mistakes in opinion and judgment warrant it. It could only be applicable when the Law Court had by mistake assumed to be true that which the record showed not to be true, or had palpably failed to consider facts proved, or had misstated the law so plainly that the point involved was not arguable, and had based its decision thereon.

Summit Thread Co. v. *Corthell*, 336.

PRESCRIPTION.

Since prescription presupposes a grant which is lost, the proof of the nature of the grant is to be found in use, and the extent of the right acquired is fixed and determined by the user in which it originated.

Burnham v. *Burnham,* 113.

PRESUMPTIONS.

Failure to obey a rule of the road is *prima facie* proof of negligence.

Such a violation of the law does not absolutely establish liability, but creates a presumption which, nothing else appearing, is sufficient to sustain the burden on the plaintiff of proving the defendant's negligence.

Rouse v. *Scott,* 22.

Absence from his home or residence for a period of seven years without having in any way been heard from, gives rise to the presumption of death and places the burden of proof on one asserting the contrary.

The presumption of death is by no means of equal strength at all times and in all situations. It is not to be rigidly observed without regard to the conditions under which departure from home took place. Each case must depend upon its own facts. These may, with reason, account for absence and silence without the hypothesis of death. The rule, which has limitation, is to be applied with caution.

Wilson, Adm'x v. *Insurance Co.,* 63.

Under the Negotiable Instruments Act, the presumption of liability on the part of the maker, whose signature appears on the note is complete, and the proof sufficient, until it is attacked and overthrown by convincing evidence.

Evidence to overthrow a mere presumption need not be more than slight, but it must be evidence of probative weight.

Eiseman v. *Austen, Ex'r,* 214.

PRINCIPAL AND SURETY.

The rule that a binding extension of time given to a principal discharges his surety has no application when the extension complained of consists of a mere continuance of a pending case from term to term.

Leavitt v. *Steel Co.,* 76.

See *State* v. *Parent et als,* 433.

PUBLIC UTILITIES.

R. S., Chap. 66, Sec. 4, which provides that no person, firm or corporation shall operate a motor vehicle carrying passengers for hire over regular routes on any street or highway in any city or town in the State without obtaining from the Public Utilities Commission a certificate permitting such operation, is constitutional and valid.

State v. *Rowe*, 167.

RAILROADS.

See *Ward* v. *Railroad Co.*, 88.

The rights of a railroad and the travelling public to the use of a highway at a grade crossing are reciprocal. The only superior right of the railroad is the right of passage. As an incident to this the railroad may stop its train across a highway temporarily blocking it but, under such circumstances, the use which it makes of the way must be such as is reasonably necessary to enable it to perform its duties as a common carrier.

The leaving of an unlighted obstruction on a highway at night creates a hazard for travelers. Whether such obstruction was the proximate cause of an injury depends upon the circumstances of each individual case, and particularly on whether or not the traveler in the exercise of due care should have seen it and avoided a collision.

Whether the obstruction of a highway by a standing train is negligence depends on whether or not the conduct of the railroad is reasonable. This question and the issue whether or not negligence, if found, was the proximate cause of this accident were for the jury.

Richard et als v. *Maine Central Ry.*, 197.

REAL ACTIONS.

In a real action the plea of the general issue requires that the plaintiff prove that he has such an estate in the land sought to be recovered as he has alleged, and that he had a right of entry therein when he commenced his action.

Stutz v. *Martin*, 126.

REFERENCE AND REFEREES.

In the reference of a case under Rule XLII of the Supreme Judicial and Superior Courts, the decision of the Referee on all questions of fact is final, if there is any evidence to support the finding of fact. When, however, the facts are undisputed and but one possible deduction can be drawn from them, the question is then one of law, and if proper reservation is made in the rule of reference, may be considered by the Law Court.

Hawkins v. *Theatre Company*, 1.

Reference of disputes is governed by the provisions of our statutes and consent alone can not confer jurisdiction. The words of the statute authorizing trial by Referees, where the parties consent, of all cases in the Superior Court apply only to civil cases.

The jurisdiction of the equity judge can not be delegated to others. The provisions of our statutes do not authorize a reference to an equity case.

Faxon v. *Barney*, 42.

Exceptions to the acceptance of a report of Referees, when permitted by the rule of referees, must be in conformity to Rule XXI of the Rules of the Supreme and Superior Courts, which requires that the objection to the report of the Referees must be filed in writing. Non-compliance with this rule renders exceptions invalid.

Bonding and Insurance Co. v. *Pettapiece*, 44.

Reports of Referees are only open to attack on certain definite lines and according to certain definite procedure. When cases are referred without conditions or limitations, Referees are final judges of both fact and law, in the absence of fraud, prejudice or mistake, and objections to their findings based on those grounds must be filed in writing before their report is accepted to entitle the aggrieved party to a hearing before this Court.

When cases are referred with the right of exception reserved as to matters of law, the same procedure is followed as to objections and the excepting party is confined to those specifically set out by him at *nisi prius*.

The contention that there was no evidence before the Referees tending to establish the position of the party in whose favor decision was rendered raises a question of law.

There is no obligation on the part of the Court to study the evidence presented to Referees for the purpose of ascertaining on which side the preponderance lies or what testimony is most entitled to credence. Questions of fact once settled by Referees are finally decided if supported by any evidence. They are the sole judges of the credibility of witnesses and the value of their testimony.

When parties to a controversy submit their cause to a tribunal of their own choosing, they invest it with authority to decide questions of fact. They are bound by its findings, no fraud, prejudice, misconduct or obvious error appearing.

Staples v. *Littlefield*, 91.

In reference of cases by rule of court, decision of fact, honestly made, by the Referee, in the proceedings, is final, provided there is supporting evidence.

Francoeur v. *Smith*, 185.

Where there is credible evidence to support the finding of fact of a Referee, exceptions will not lie. *Throumoulos* v. *Bank of Biddeford*, 232.

RES IPSA LOQUITUR.

RES JUDICATA.

REVIEW.

RULES OF COURT.

SALES.

SCIRE FACIAS.

SET-OFF AND COUNTER CLAIMS.

STATUTES, CONSTRUCTION OF.

In so doing, the Court is not legislating. It is merely following the dictates of common sense and enforcing the true will of the legislature.

State v. *Day*, 38.

The statute prohibiting an expression of opinion by the trial judge must be strictly construed.

The prohibition that the presiding Justice shall not express an opinion upon "issues of fact arising in the case" has reference to issues to be determined by the jury.

State v. *Stuart*, 107.

STOCKHOLDERS.

See Corporations.

SURETYSHIP AND GUARANTY.

Liability can not be founded except upon the reasonable import of all the terms of a bond, otherwise a surety would be held not on the contract as actually made, but on that which the court might determine that he intended to enter into.

An agreement to furnish a thing to be used in a certain work is not an agreement as to how it shall be obtained.

An agreement by a construction company to furnish and deliver all the materials and to do and perform all the work and labor necessary to complete its undertaking, is not the equivalent of a promise to pay subcontractors. Such a promise is necessary before the contracting company's surety company can be held.

Tremblay v. *Soucy and Casualty Co.*, 251.

See *State* v. *Parent et als*, 433.

TAXATION.

In an action of debt for taxes, it is not necessary that the assessment contain a particular description of the property to be taxed, nor that separate valuations be made in case there are several parcels.

Evidence of undervaluation of other taxable properties is not admissible. If such were the fact, it is not a defense to this action.

Bucksport v. *Swazey*, 36.

Property is not exempt from taxation merely because it is owned by a benevolent and charitable institution. Freedom from assessment extends only to property which the institution occupies or uses for its own purposes.

Legislative enunciation exempts certain corporations created and existing with the consent of the State of Maine, from taxation, the exemption being restricted to property which such corporate bodies own and use for their own purposes.

Immunity from assessment depends, not upon simple ownership and possession of property, nor necessarily upon the extent, or length, of the actual occupancy thereof, although this is entitled to consideration, but upon exclusive occupation of such a nature as, within the meaning of the statute, contributes immediately to the promotion of benevolence and charity, and the advancement thereof.

Camp Associates v. *Inhabitants of Lyman*, 67.

The right to bring a suit to collect taxes in the name of a city may only be conferred by directions in writing from the Mayor and Treasurer as provided in R. S., Chap. 14, Sec. 64.

Moreover, such directions must contain specific authority to institute an action in the name of the municipality and the names of the particular parties to be sued should be stated.

The power conferred by the statute requires an exercise of judgment and discretion which must be exercised by the persons on whom the law has placed the power and authority to act. It can not be delegated.

The right of a municipality to bring suit upon the bonds of its tax collectors comes from the general power conferred on cities and towns to sue and be sued as bodies corporate. R. S., Chap. 5, Sec. 1.

Biddeford v. *Cleary*, 116.

Where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally.

Cushing v. *McKay Co.*, 324.

In an action of debt brought to recover an amount due for taxes, it is not necessary that the assessment contain a particular description of the property assessed or that separate valuations should be made in case there are several parcels, as in a case where forfeiture might ensue.

It is no defense to such an action that there was included in the assessment property not in fact owned by the taxpayer.

If he had not been at the time of the assessment an inhabitant of the plaintiff town and therefore not subject to the jurisdiction of its tax assessors, this defense might be tenable.

If land is taxed to a resident which he does not own or is not in possession of, it is merely an over-valuation of his property, and over-valuation is not a defense to an action of debt for taxes.

Georgetown v. *Reid*, 414.

THEATRES.

The obligation which the proprietor of a theatre or amusement enterprise owes to his guests is to guard them not only against dangers of which he has actual knowledge but also against those which he should reasonably anticipate. The

failure to carry out such a duty is negligence, and a recovery may be had, even though the wilful or negligent act of a third person intervenes and contributes to the injury, provided such act should have been foreseen.

Hawkins v. *Theatre Company*, 1.

TITLE.

In the absence of a statute to that effect, it is universally held that mere agreement to "furnish" material does not guarantee title.

Tremblay v. *Soucy and Casualty Co.*, 251.

TOWNS.

The legislature alone has authority to establish and to change the boundaries of towns. The authority of commissioners appointed to ascertain and determine town lines in dispute is limited to fixing the line which the legislature has designated.

The finding of the commissioners is final both as to law and fact. Where, however, it is clear that the commissioners went beyond the authority given them by the statute, and instead of trying to determine the line as called for by the legislature, established one obviously at variance with it, it is the duty of the Court to sustain objections duly made to their action.

Fayette v. *Readfield*, 328.

VERDICTS.

A verdict can not stand upon a finding which results from sympathy or a misconception of the law and the facts of the case.

Rouse v. *Scott*, 22.

If, on review, the jury is found to have returned a verdict against the evidence or the weight thereof, the Court should set the verdict aside and grant a new trial.

Morin v. *Carney*, 25.

A jury verdict in excess of what may be regarded as reasonable remuneration for pain and suffering, will not be sustained.

Stewart v. *Jewett*, 71.

A jury finding not based on the evidence, but upon sympathy, will be set aside.

Burns v. *Haskell*, 74.

WAIVER.

WARRANTY.

A vendor in possession impliedly warrants the title to personal property sold, and is bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action wherein title is the sole issue, and gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. Nor would it make any difference that there were intermediate purchasers. The defect in title will come home to the first one who sold without a proper title.

A warranty of the quality of a chattel does not, however, run with the chattel on its resale, and hence is not available to a subvendee. Warranties of quality of goods and chattels are personal to the warrantee.

Burns v. *Baldwin-Doherty Co.*, 331.

WILLS.

The failure of a testator to include as a beneficiary a wife, or a son, or a daughter, or even a near relative is a fact of importance in determining his state of mind toward such individual, who would under normal conditions be the natural object of his bounty.

The inclusion by a testator of an outsider as one of the objects of his bounty is evidence of friendship between them. The omission of a close friend is not under ordinary circumstances evidence of any want of friendship.

Ward, Appellant from Decree, 19.

The controlling rule to be applied in construing the meaning and force of the provisions of a will is that the intention of the testator as expressed must govern, unless it is inconsistent with legal rules. Such intention may be determined by an examination of the whole instrument, including its general scope, logical implications and necessary inferences. Language may be changed or moulded to give effect to intent; and intent will not be allowed to fail for want of apt phrase or conventional formula.

Green v. *Allen et als*, 256.

WITNESSES.

The competence of an expert witness with respect to his knowledge, his special skill, or experience, that is, whether he possesses the requisite qualifications to enable him to testify as an expert, is a question exclusively for the Court.

State v. *Stuart*, 107.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT.

In a Workmen's Compensation Case, in computing average weekly wage or earnings, tips received by a waitress from patrons of the restaurant, may properly be added to the compensation paid her by the employer.

Gladys Gross' Case, 59.

An employee sustained a right inguinal hernia as result of an accident. While operating to reduce this hernia under a local anaesthetic the doctor suggested to the injured man the advisability of removing his appendix, which had appeared through the abdominal incision. With the employee's consent the appendix was removed, the employee subsequently dying.

The commissioner in his finding stated: "It is impossible to say whether death would have resulted had the appendix not been removed."

HELD

The removal of the appendix was an incident of the hernia operation.

The deceased had the right to rely on the statement of the doctor furnished by his employer that the removal of the appendix was a proper and usual procedure under such circumstances. Even though such practice may have been unwarranted and a contributing cause of death, the accident would still be regarded as the proximate cause of death, and the employer would be liable.

Gauvin's Case, 145.

Under the Workmen's Compensation Act, where the employment requires the employee to drive on the highway, and accident causes injury to the latter when he is using the highway in pursuance of his employment, or in doing some act incidental to his employment, with the knowledge and approval of the employer, such injury is compensable.

Illegality of a plaintiff is no bar to his recovery for an injury, unless his illegality is a cause directly contributing to the injury.

The right of a person to maintain an action for a wrong committed upon him is not taken away because at the time of the injury he was disobeying a statute, provided this disobedience in no way contributed to the injury.

Kimball's Case, 193.

In measuring the compensation of an employee for partial incapacity under the statute, the loss or reduction in wages that he is able to earn after the accident, which is occasioned by general business depression, here referred to as "industrial conditions," must be considered. In so far as the wages of a partially incapacitated employee are reduced by that element, the loss must be borne by him, not the employer. That is not a loss "due to said injury."

An employee's wage loss resulting from partial incapacity is not measured solely by the yardstick of his former employment.

WRITS.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF THE UNITED STATES.

STATUTES OF MASSACHUSETTS.

STATUTES OF NEW YORK.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Page 233, seventh line, insert after 132 Maine the figures 91.

Page 343, fourth line from bottom of page, after citation *Madison* v. *Fairfield* insert figures 132 Me., 182.